A TREATISE

ON

HINDU LAW

BY

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SEVENTH EDITION

BY

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TO

Edward Byles Cowell, Esq., M.A.,

Professor of Sanskrit, Cambridge, Sometime Principal, Sanskrit College and Professor, Presidency College, Calcutta.

THIS BOOK

IS

DEDICATED

AS AN HUMBLE TRIBUTE OF GRATITUDE

for his unfailing kindness and generous encouragement to the students placed under his care in India,

AND

AS A SMALL TOKEN OF THE SINCERE RESPECT

for his memory which is treasured up in the minds of the Indian students with feelings of Affection and Reverence,

By one of them,
Specially benefited
The Author.

उत्सर्गः

—:o:—

परमभट्टारक-श्रीलश्रीयुक्त इ, बि, काउएल—
परमाराध्य गुरुदेव-महोदय—
करकमलेषु

प्रज्ञानिधे प्रकृतिसौम्य महर्षिमूर्त्ते
हे भारतीतनयरत्न गुरो नमस्ते ।
स्थित्वा चिरं वससि यद्यपि नः सुदूरे
त्वं नस्तथापि हृदयानि जहासि नैव ॥

अस्माकमाराध्यतमो गुरुस्त्वं
शिष्या वयं ते सुतनिर्विशेषाः ।
अस्माकमेवं स्पृहणीय आस्तां
सम्बन्धबन्धो जननान्तरेऽपि ॥

विना भवन्तं तव पुत्रकोऽहं
कस्मै मदीयां कृतिमुत्सृजामि ।
स्व-हस्त-संवर्द्धित-पादपस्य
फलं यथा ग्रन्थमिमं गृहाण ॥

कलिकाता ।
१८१९ शकाब्दाः
पौषः ।

प्रणत-भक्त-सेवकस्य
श्रीगोलापचन्द्र शास्त्रिणः

PREFACE TO THE SEVENTH EDITION.

This edition has been thoroughly revised, and for easy and convenient references some important changes have been made and new matters incorporated The original number of Chapters with all the observations of the author have been preserved, but each Chapter is divided into Sections and further sub-divided into Sub sections, where necessary, so as to bring similar topics under a single head Long discourses on subjects which the highest Courts of appeal have decided or Legislatures have enacted contrary to Hindu law and sentiments, long quotations from important judgments and enactments and translations of original texts have been printed in smaller types Prominence has been given to Privy Council and important decisions of the Courts in India, moreover profuse marginal notes have been added

An alphabetical list of various commentaries on Hindu law with short notes indicating chiefly, the biographical sketches of the authors, the schools of law in which they are respected and the observations of the Courts, where there are any, are embodied in this edition Important legistations affecting Hindu law have also been added at the end of this book so as to make it, as far as possible, self-contained.

Lastly, almost all the decisions bearing on Hindu law, wherever reported, have been incorporated with comments where found necessary. An Addendum containing notes of cases decided up to December 1932, during the period the book was in the press, has been annexed. The index has been made more comprehensive and re-cast according to modern method of arrangement.

The aforesaid reasons have caused considerable delay in publishing this edition which is long over-due. I venture to hope however, that this edition also will receive the same treatment from both the Bench and the Bar as also from the students of law, as the previous editions. I shall deem my labours amply rewarded if the present edition satisfies the needs of the readers and the modifications are approved of by them.

I cannot conclude without expressing my best thanks to Mr. Sudhansu Sekhar Mukherjee, Advocate, for revising the case-law, to Mr. Subodh Chandra Dutt, Advocate, for preparing the index and examining the proofs and to Mr. Pramathanath Banerjee, Advocate, since deceased, for preparing the table of cases.

20A, SANKARITOLA EAST,
Calcutta, 29th January 1933.

R. N. SARKAR.

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ABBREVIATIONS

A	Allahabad (Indian Law Reports).
(1922) A.	All India Reporter, Allahabad, 1922.
A. L J.	Allahabad Law Journal.
A. C.	Law Reports, Appeal Cases,
B.	Bombay (Indian Law Reports).
(1922) B.	All India Reporter, Bombay, 1922.
B. C.	Bengal Council
B. H. C. or B. H C. R	Bombay High Court Reports
B. L. R.	Bengal Law Reports.
Bom. L. R.	Bombay Law Reports.
Bur. L. T.	Burma Law Times.
C.	Calcutta (Indian Law Reports).
(1922) C.	All India Reporter, Calcutta, 1922.
Ch.	Chapter.
Ch. D.	Chancery Division
Cl F.	Clerk & Finnelly H R. 1831—46
C. L. J.	Calcutta Law Journal.
C. L. R.	Calcutta Law Reports.
C. W. N.	Calcutta Weekly Notes.
D. B or Daya	Dayabhaga
D T.	Daya-Tattwa.
Ed.	Edition.
F. B.	Full Bench.
H. L.	Hindu Law.
H. L A. C	House of Lords Appeal Cases.
H. W. Act	Hindu Wills Act.
Hyde.	Hyde's Report.
I. A.	Law Reports, Indian Appeals.
I. C.	Indian Cases.
I. D. (O. S.)	Indian Decisions (Old Series).
I. S. Act.	Indian Succession Act.
L.	Lahore (Indian Law Reports).
(1922) L.	All India Reporter, Lahore, 1922.
L. L. J.	Lahore Law Journal.
L. W.	Law Weekly (Madras)
Luc.	Lucknow (Indian Law Reports)
M.	Madras (Indian Law Reports)
(1922) M.	All India Reporter, Madras, 1922
M. C.	Madras Council.
Mer.	Merivale Ch. 1815—17.

Mit.	...	...	... Mitakshara.
M. H. C. R.		...	... Madras High Court Reports.
M. I. A.	...	...	... Moore's Indian Appeals.
M. L. J.	...	...	... Madras Law Journal.
M. L. T.	..	...	... Madras Law Times
Mad.	...	...	... Madras.
M. W. N.	...	...	... Madras Weekly Notes.
Mys L. J.	...	...	... Mysore Law Journal.
(1922) N.	..	...	... All India Reporter, Nagpur, 1922.
Nag.	...	...	... Nagpur.
N. L. J.	...	...	... Nagpur Law Journal.
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O. L. J.	...	..	... Oudh Law Journal.
P.	..	...	... Patna (Indian Law Reports).
(1922) P.	..	...	... All India Reporter, Patna, 1922.
Pat.	...	...	... Patna (Indian Law Reports).
P. C.	...	...	... Privy Council.
(1922) P. C.		...	... All India Reporter, Privy Council.
P. L. R.	...	...	... Punjab Law Reports.
P. R.	...	...	... Punjab Record.
P. W. R.	...	...	... Punjab Weekly Reporter.
Pat. L. J.	...	...	... Patna Law Journal.
P. L. W.	...	...	. Patna Law Weekly.
R.	...	.	... Rangoon (India Law Reports).
(1922) R.		...	... All india Reporter, Rangoyn, 1922
S. or Sec.	..	...	... Section.
S L. R.	. .		... Sindh Law Reports.
Sel. Rep.	.	...	... Select Reports
Spl.	...	...	... Special.
Sub-Sec.	...	...	... Sub-Sec.
Yaj.	...	...	... Yajnavalkya.
Vir.	...	...	... Viramitrodaya.
W. R.	...	...	... Weekly Reporter.
W. & T.	...	...	... White & Tudor's Leading Cases.

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—*co-parcenary* may arise between the two branches of a Sudra, one by his married wife and another by his concubine though living separate, in the absence of any proof of partition: Sakharam *v.* Shamrao, 1932 B. 234.

—*deed of exchange* executed by the father or the manager is liable to be challenged by the other members, if it was not for the benefit of the estate Belzor *v.* Raghunandan, 1932 A. 548.

—*family settlement* to be binding must be to settle either a dispute or at least an apprehension of a dispute . Sashi *v.* Promode, 1932 C 600.

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—*manager* cannot start new business ; Parbhudas *v.* Lallubhai, 1932 B. 117.

—*manager* or Karta can compromise doubtful rights for the benefit of the family so as to bind the members : Shankar *v.* Khem, 1932 B. 3.

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—*minor member* not being a party, the suit is not vitiated if family interest protected : Tribeni *v.* Ramasray, 1932 P. 80.

—*minor partner* of a joint-family-trade is not personally liable for any debt ; but if he does not repudiate on attaining

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—*necessity* is also to defend a member from criminal prosecution although resulting in conviction : Said Ahmad *v.* Narain, 1932 O. 255.

—*property* is that property also which has been acquired by litigation with expenses procured by security of joint family property : Balram *v.* Radhey, 1932 O. 219.

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—*rate* of arrears may be fixed than that for current : Venkataratuamma *v.* Seetaratnam, 1932 M. 408.

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—*consent of guardian* not having been obtained is not void : Ram Harakh *v* Jagar, 1932 A. 5

—*conversion* to Mahomedanism and then remarriage of widow, do not create a title by adverse possession in her favour to the estate of her former husband in which she continued in possession for over 12 years or more without any assertion of such a right Parbati *v.* Ram, 7 Luc. 320

—*daughter inheriting* her father's property can alienate it for her son's marriage, the husband being poor : Mallayya *v.* Bapi, 62 M. L. J. 39.

—*expenses* incurred by the maternal uncle of a girl can be recovered out of her deceased father's estate inherited by her paternal relations who refused to bear the expenses : Khan *v.* Ranshan, 1932 L. 129.

—*forcible*, though duly solemnized whether can be avoided ; Ram Harakh *v.* Jagor, 1932 A. 5.

—*re-marriage* of widow terminates the alienee's interest in the property alienated by the widow for no necessity binding on the estate, and does not enure for the life of the widow : Vijiaraghava *v* Pouvammal, 62 M L J. 131 : 1932 M. 120.

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—*suit,* institution, effects severance of joint tenancy : Krishnamurthy *v.* Sundaramurthy, 1932 M. 381.

—*suit* for partition between two branches is not bad for defect of parties if the heads of the different branches are made parties , the other members may not be impleaded : Bishambar *v.* Kanshi, 10 L. 483, . Parnima *v.* Nand, 1932 P. 105.

—*separate possession for convenience* is not partition *Ibid.*

Pre-Emption—*by co-parcener* is not available if *karta* purchased it for family : Jamna *v* Sadeo, 1932 A. 80.

—*decree satisfied* by alienating family property by manager is binding on the family if it was for the benefit of the family : Amraj *v.* Shambhu, 1932 A. 632.

Religious Endowment—*dedication in the name of a god* is not void for uncertainty : Bankey *v.* Pears, 1932 A. 224.

—*deed not necessary* for dedication of property : Maruti *v.* Gopal 1932 B. 305

—*deed execution of* without proof of divesting himself or the property by the executant is not valid endowment, 1932 C 419.

—delegation temporarily of *yajman vritti* to a relativ when the *yajmans* do not object, is not objectionable Kodulal *v.* Beharilal, 1932 S 60.

—*deity when not represented* in a suit is not bound by the decision Radha *v.* Official, 1932 C. 642.

—*devolu tion of the office* of sebayet directed by the founder is not to be custrued on the same principle as gift of property . Bimalabala *v.* Deb, 1932, P. 267.

—*dharmakartha* is no more than a manager or trutee : Periyanan *v.* Gobinda, 1932 M. 328.

—*endowment* to be valid must be created in perpetuity for religious or charitable purposes which the founder or his heirs cannot revoke Dedication may be made by *Sunkalpa* and *Samarpan* . Chaturbhuj *v.* Sarada, 11 P. 701.

—*jajman vritti* is nibandha and also falls within the difinition of "immoveable property" according to the Registration Act : Kodulal *v.* Beharilal, 1932 S. 60.

—*obligation of the heir* to provide for the upkeep and maintenance of a family deity cannot be enforced where there is no endowment : Bansilal *v* Govindlal, 1932 B. 439.

—*sannyasi* who is not the *mohant* cannot maintain an action in ejectment : Paramarath *v* Ram, 1932 A. 487

—*suit* : the idol must be represented by a sentient being in a suit : Maruti *v.* Gopal, 1932 B. 305

Re-union—*united* son succeeds in preference to divided son to the father's self-acquired property . Narasinha *v* Narasinha, 1932 M. 361.

Succession—*ancestral line* means through the agnates only and not cognates : Gajadhar *v.* Gauri, 1932 A 417 (F B).

—*Bairagi's* right to succeed is not lost : Paras *v.* Chetan, 1932 L. 81.

—*bandhu's* enumeration not exhaustive ; *father's bandhus* and *mother's bandhus* mean person's bandhus through father and mother ;

—*brother's son* through *half blood* excludes brother's grandson, though the latter may be an heir but has got no right of representation : Nilkantha *v.* Narayan, 28 N L.R. 58 : 1932 N. 79 F.B.

—*christian convert's* succession is governed by the Succession Act · Dwaraka *v* Raj Rani, 1952 O. 85.

—*collaterals* succeeding property becomes his separate property · Raj Kishore *v* Madan, 13 L 491.

—*daughter, poor* excludes the rich daughter , Bhagelu *v.* Mutri, 1932 A 326

—*disqualified person* cannot transmit anything to his heirs : Budha *v.* Sahodra, 11 P. 35.

—*Grandfather's grandson* is preferred to brother's great-grandson : Ram Semeran *v* Rodi, 1932 A 117

—In order to succeed two conditions must be fulfilled, viz · (1) that he is the *gotraja* of the common ancestor and (2) that he is the *sapinda* of the deceased : Jadunath *v.* Bisheshar, 1932 P.C. 142

—*paternal grandmother's brother* is a *bandhu* : Dila *v.* Kura, 1932 A. 289.

—*right of representation* does not apply among brother's son and brother's son's son : Nilkanth *v.* Naragan, 28 N. L. R. 58 : 1932 N. 79.

—*sapinda* as used in *achara adhya* is to be same in inheritance : [The author is not the only person who has expressed an opinion that the limitation of *sapinda* relationship for marriage is not for inheritance. Rao Soheb *v.* N Mandlik entertains the same view on the authority of Viramitrodaya and Kamalakera quoted in Nirnayasindhu ; *See* pp. 110-111 of 7th Ed. and pp. 104-105 of 6th Ed. of the treaties The view expressed in this treaties is supported by authorities and the author's view can only be rejected by pointing out his error.]

—*sapinda* relationship ceases beyond the fifth degree from common ancestor and in order to succeed to the inheritance of another, they must be *sapinda* of each other : Ram Parshad *v.* Idu, 1932 L 394.

—*sapindaship* relates to corporal particles and not on offering funeral oblations; but the latter may be important in determining preferential claims : Jadunath *v.* Biseenker, 1932 P.C. 142.

—*sister* under Benares school is not heir : Jang Bir *v.* Jamea, 1932 L. 37.

—*sister's son* and application of Section 2 of Act II of 1929 : Shib Das *v* Nand, 1932 L 361.

—*undivided son* succeeds to father's self acquired to the exclusion of divided son . Narasimham *v.* Narasinhan, 55 M 577 : 62 M. L J. 436.

Widow—*alienation by her with* consent of reversioner, whether obtained before or after alienation is binding on the latter Sheshrao *v* Mansaram, 1932 N 103.

—*alienation* by the widow with the consent of the presumptive reversioner who had derived some benefit out of that transaction is binding on him or persons claiming through him Babu Singh *v* Rameshwar, 7 Luc. 360

—*alienee's bona fide enquiry*, presence of actual pressure and absence of funds in the hands of the widow, protects the alienee . Thiruvengadam *v.* Gnanasambandam, 1932 M. 97.

—*conversion* to Mahomedanism and then remarriage of widow do not create a title by adverse possession in her favour to the estate of her former husband in which she continued in possession for over 12 years or more without any assertion of such a right · Parbati *v.* Ram, 7 Luc 320

—*compromise with widow* has no application with that made between mother and son and the interest the mother gets is to be determined by the terms of the deed : Parshottam *v.* Kashavlal, 1932 B 213.

—*debt* is not necessarily to be paid out of income : Jagannadham *v.* Vighneswarudur, 1932 M 177.

—*family settlement* in order to be binding must be to

settle a dispute or an apprehension of a dispute : Sashi *v.* Promode, 1932 C. 600.

—*gift by widow* is not void but voidable : Shesrao *v.* Mansaram, 28 N. L R. 102.

—*interest* to be paid out of income , but if the debt is binding on the estate, the interest is also payable out of the estate . Subbayya *v.* Bhaskara, 53 M. 216 . 1932 M. 257.

—*interest* on husband's debts is to be paid out of income : Thiruvengadam *v.* Gnanasmbandam, 1932 M 97.

—*nature of her interest* in husband's estate is not life estate but it determines on death, re-marriage or surrender : Vijiaraghava *v.* Ponnammal, 1932 M. 120.

—*property received* by a widow in settlement of disputed rights with her husband's brother wherein the latter and his son agreed that she will have absolute right to it, becomes her stridhana property · Vatsalabai *v.* Vasndev, 1932 B. 13.

—*property* settled to be held by a widow for life in a dispute with her adopted son and then the son's interest devolving on her after the death of son's daughter, vests her with absolute right in Bombay Parshottam *v* Koshavlal, 56 B 164.

—*purchaser from widow* is to prove legal necessity or *bona fide* enquiry . Sashi *v.* Promode, 1932 C. 600.

—*re-marriage* of widow vests the estate in reversioner unaffected by any alienation not binding on the estate. Vijiaraghava *v.* Ponnammal, 62 M. L. J. : 1932 M. 120.

reversioner's decree for possession against alienee may be granted subject to payment to him the amount required for legal necessity : Jagarnath *v.* Demodar, 1932 A. 37.

—*reversioner actual* not affected by ommission of presumptive reversioner to challenge alienation : Wali *v.* Punjab, 1932 L. 39.

—*reversioner* (*remote*) who was a minor at the time of alienation and the nearest reversioner was a minor and the other remote reversioner precluded himself from questioning the alienation, can maintain a suit even after limitation : Khushimram *v.* Nano, 1922 L. 140.

—*reverter doctrine* after widow's death does not arise when after the death of the last full owner, the widow on partition with the illegitimate son of a Sudra got the property : Karuppayee *v.* Ramaswami, 1932 M. 440.

—*surrender* in favour of a third party with the consent of the next reversioner is held valid. Antu *v.* Yeshwant, 1932 B. 430.

—*surrender* by widow means the extinction of widow's estate in the entire estate which would cause the estate to devolve on the next reversioner or reversioners as if the widow is dead ;

—*surrender* of the major portion keeping a small portion for her maintenance and that of the daughter, is not a valid surrender · Gangadhar *v.* Prabhuda, 56 B. 410.

—*surrender* is destroying the widow's estate so as to accelerate the succession of the next heir. But any condition to revert the estate back to the widow is against the idea of surrender . Jages *v.* Prassana, 1932 C. 664.

—*surrendering* she cannot defeat an alienation made by her Vijiaraghava *v.* Ponnammal. 1932 M. 120.

Wills—*bequest* by a Hindu governed by the Mitakshara of his separate ancestral property in the absence of male descendant is not invalid: Sashi *v* Promode, 1932 C. 600.

—*bequest to woman* is not to be presumed against the express terms used in the Will . Pramatha *v.* Suprakash, 1932 C. 337.

—*gift for punyakriya* is void for vagueness: Satkari *v.* Hazarilal, 1932 C. 44.

—*gift for sadavarta* of Shukaltirth is a valid bequest : Kalidas *v.* Rukshamani, 1932 B. 108.

—*vernacular Will* has to be constructed with due allowance to the shades of meaning not susceptible of exact translation: Pramatha *v.* Suprakash, 1332 C. 337.

Word and phrases—

—*Malik dakhalikar*: and *Uttaradhikari* : Basantakumar *v.* Ramshankar, 59 C. 859.

HINDU LAW

CHAPTER I

INTRODUCTORY

Sec. 1—ORIGINAL TEXTS

The words in Italics are not in the original texts, but are explanatory additions

१। अहं प्रजाः सिसृक्षुस्तु तपस्तप्त्वा सुदुश्चरम् ।
पतीन् प्रजानाम् असृजम् महर्षीन् आदितो दश ॥
मरीचिम् अत्र्यङ्गिरसौ पुलस्त्यं पुलहं क्रतुम् ।
प्रचेतसं वसिष्ठञ्च भृगुं नारदम् एव च ॥
इदं शास्त्रन्तु कृत्वासौ माम् एव स्वयम् आदितः ।
विधिवद्-ग्राहयामास मरीच्यादींस्त्वहं मुनीन् ॥
एतद् वोऽयं भृगुः शास्त्रं श्रावयिष्यत्यशेषतः ।
एतद्धि मत्तोऽधिजगे सर्व्वम् एषोऽखिलं मुनिः ॥
मनुः । १ । ३४, ३५, ५८, ५९ ॥

1 Being desirous of creating beings, I *Manu* performed very difficult religious austerities, and at first created ten Lords of beings, who were great Rishis, *or sages eminent in holiness*, namely, Marichi, Atri, Angiras, Pulastya, Pulaha, Kratu, Prachetas, Vasishtha, Bhrigu and Narada. (Manu, 1, 34-35) He *the self-existent* having made this Shastra *i e*, *Code of Manu*, himself taught it regularly to me *Manu* in the beginning afterwards I taught Marichi and the other holy sages. This Bhrigu will repeat to you this Shastra without omission, for this sage learnt from me the whole of it, perfectly well. Manu, 1, 58-59

Creation of sages.

Author of *Code of Manu*.

२। वेदः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः ।
एतच्-चतुर्विधं प्राहुः साक्षाद्-धर्म्मस्य लक्षणम् ॥
मनुः । २ । १२ ॥

Dharma or Law, as stated by Manu,

2 The Veda, the Smriti, the approved usage, and what is agreeable to one's soul *or good conscience, where there is no other guide*, the wise have declared to be the quadruple direct evidence of Dharma *or law and other means of securing good.*—Manu, ii, 12.

१ । श्रुति: स्मृति: सदाचार: स्वस्य च प्रियम् आत्मन: ।
सम्यक् सङ्कल्पज. कामो धर्म्ममूलम् इदं स्मृतम् ॥
याज्ञवल्क्य:—१ । ७ ॥

by Yajnavalkya

3 The Sruti, the Smriti, the approved usage, what is agreeable to one's soul *or good conscience*, and desire sprung from due deliberation, are ordained the foundation *or evidence of* Dharma —Yajnavalkya, i, 7.

४ । पुराण न्याय-मीमांसा धर्म्मशास्त्राङ्गमिश्रिता: ।
वेदा: स्थानानि विद्याना धर्म्मस्य च चतुर्दश ॥
याज्ञवल्क्य:— १ । ३ ॥

Sources of knowledge and *Dharma*

4 The *four* Vedas, together with their *six* Angas *or subsidiary science*, the Dharma shastras *or Codes of Law*, the Mimansa *or disquisition* of the rules of scripture, the Nyâya *or science of reasoning or rules of interpretation*, and the Purânas *or records of antiquity*, are the fourteen sources of knowledge and Dharma —Yâjnavalkya, i, 3

५ । द्वे विद्ये वेदितव्ये, इति ह स्म यद्-ब्रह्मविदो वदन्ति, परा चैवापरा च ।
तत्र अपरा,—ऋग्वेदो यजुर्वेद सामवेदोऽथर्ववेद, शिक्षा कल्पो व्याकरणं निरुक्तं छन्दो ज्योतिषम् इति ॥

अथ परा—यया तद्-अक्षरम् अधिगम्यते । यत् तद् अद्रेश्यम् अग्राह्यम् अगोत्रम् अवर्णम् अचक्षु:श्रोत्रं तद्-अपाणिपादम् । नित्यं विभुं सर्वगतं सुसूक्ष्मं तद्-अव्ययं यद् भूतयोनिं परिपश्यन्ति धीरा: । यथोर्णनाभि सृजते गृह्णते च, यथा पृथिव्याम् ओषधय: संभवन्ति । यथा सत: पुरुषात् केशलोमानि, तथाऽक्षरात् संभवतीह विश्वम् ॥
मुण्डकोपनिषद्, १ । १ । ४ ७ ॥

5 Two sciences should be known—this is what was said by those who knew the Revelations :—the Ultimate and the Non-Ultimate

Non-Ultimate

Of these, the Non-Ultimate consists of the four Vedas, namely the Rik, the Yajus, the Sâman and the Atharvan, and *of the six Angas, namely,* the Sikshâ *or the science of proper articulation and pronunciation Orthography and Orthoepy,* the Kalpa *or the regulation of the manner of performing sacrifices,* Vyakarana or *grammar*, the Nirukta *or thesaurus, with explanation of the etymology of words*, the Chhandas *or prosody* and the Jyotisha *or astronomy*

Ultimate.

And the Ultimate is the science *embodied in the Upanishadas* by which is known the Imperishable, i e, that which is imperceptible *to the organs of sense,*

intangible *by the organs of action*, not sprung from any parent, destitute of any quality *or colour*, having neither eyes nor ears, which has no hands nor feet, which is eternal, omnipresent, all pervading, extremely subtle, undecaying *and* cause of all beings,—that which the wise perceive everywhere as the spider spreads out and draws in *the thread*, as the annuals grow up in the earth, and as the hairs long and short *grow* from *the body of* a living person, so everything here comes into being from the Imperishable.—Manduk-Upanishad, 1,1, 4-7.

६ । चोदनालक्षणः अर्थः धर्मः । २ ॥

तस्य निमित्त परीष्टिः । ३ ॥

सत्संप्रयोगे पुरुषस्य इन्द्रियाणां बुद्धिजन्म, तत् प्रत्यक्षम्, अनिमित्त विद्यमानो-पलम्भनत्वात् । ४ ॥

औत्पत्तिकस्तु शब्दस्य अर्थेन सम्बन्धः तस्य ज्ञानम् उपदेश अव्यतिरेकश्च, अर्थे अनुपलब्धे तत् प्रमाणं, बादरायणस्य, अनपेक्षत्वात् ॥ ५ ॥

जैमिनि.— १ । १ । २ ५

6. Dharma is a *means of securing a desirable* purpose *or end i e, happiness uncontaminated with pain* of which the Vedic injunction *or precept* is the *only* proof *or source of knowledge* —2

End of *Dharma*

An examination *or establishment by reasoning* of the means *of knowledge* of Dharma, *is made in the following aphorisms, that is to say, the proposition that the Vedic precept is the only means of knowing Dharma is established by reasoning in the next two aphorisms* —3

The intellection *or knowledge* that arises on the requisite perfect union of a person's senses with existing objects is *called* perception, that *i e, perception* is not the means *of knowing Dharma*, by means of *its* causing knowledge of existing things *only, and therefore Dharma which is not in existence at the time of knowledge derived from Vedic precepts, cannot be proved by, or known from, perception, hence, Dharma is also beyond the scope of Inference founded, as it is, on the Perception of existing facts* —4.

Means of knowing *Dharma*

But the connection of a word with *its* meaning is eternal *or natural not artificial, i. e, not made by man, the instruction or precept by the Vedic words* is the *only* means of knowledge of that, *i e, Dharma*, and is not *otherwise proved* erroneous; *hence* as regards the meaning *conveyed by the Vedic instruction* which is not known *by means of any other proof save that of the words*, the same *i. e, the instruction* is proof or *the only means of knowing the truth of what is conveyed by the words*, because it is not dependent *on any other proof, i e, the intellection caused by the hearing or perusal of the Vedic words is self-evident, is to say, it does not require any other proof to establish its existence* —This is the opinion of Vyâsa also"—5 —Jaimini, 1, 1, 2—5

७ । मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिराः ।

यमापस्तम्बसंवर्ताः कात्यायनबृहस्पती ॥

पराशर-व्यास शङ्ख लिखिता दक्षगौतमौ ।
शातातपो वशिष्ठश्च धर्मशास्त्रप्रयोजकाः ॥

याज्ञवल्क्यः—१ । ४-५ ।

नेयं परिसंख्या किन्तु प्रदर्शनार्थं, अतो बौधायनादेरपि धर्मशास्त्रत्वम् अविरुद्धम् । इति मिताक्षरा ।

Compilers of *Dharma sastra* or Codes of Law,

7 Manu, Atri, Vishnu, Hârita, Yâjnavalkya, Usanâs, Angiras, Yama, Apastamba, Sambarta, Kâtyâna, Vrihaspati, Parâsara, Vyâsa, Sankha, Likhita, Daksha, Gauthma, Sâtâtapa and Vasistha, are the compilers of the Dharmasâstras or *Codes of Law*.—Yâjnavalkya, 1 4-5

not exhaustive

The Mitâkshârâ on this passage says —This is not an exhaustive enumeration, but illustrative, hence, the compilations of Baudhâyana, ***Narada Devala*** and others being Dharma-sâstras, is not contrary to it

क । धर्मस्य शब्दमूलत्वाद् अशब्दम् अनपेक्षं स्यात् ॥ १ ॥
अपि वा कर्तृसामान्यात् प्रमाणम् अनुमानं स्यात् । २ ॥
विरोधे त्वनपेक्षं स्यात् असति ह्यनुमानं । ३ ॥
हेतुदर्शनाच्च । ४ ॥ जैमिनि, १ । ३ । १-४ ॥

Smriti

8 *It may be contended that* as the words of Revelation form the foundation of Law, therefore that *such as the Smriti* which is not embodied in such words should not be regarded as authority —1

But *the answer is,* the Smritis being compiled by the sages who were also the repositories of the Revelation *from whom it was handed down by tradition until recorded in writing*, there arises an inference that the Smritis are founded on the Sruti or Revelation, and therefore *they should be regarded* as authority —2

when in conflict with Sruti

But if there be conflict *of any precept of the Smriti with one of the Sruti ;* the Smriti must be disregarded *as spurious ;* since the inference arises, *only* when there is no such conflict —3

A Smriti must be disregarded as spurious, also, when there is found a reason *for fabricating it, such as the covetousness of priests, or the like.*—4.—Jaimini's Purva-Mimânsâ, 1, 3, 1-4

The argument in the second of the above aphorisms is explained in the following Sloka cited and commented on by Pârtha-Sârathi in his Shâstra-Dipikâ,

वैदिकैः स्मर्यमाणत्वात् तत्परिग्रहदार्ढ्यतः ।
संभाव्यवेदमूलत्वात् स्मृतीनां वेदमूलता ॥

Sources of Smritis.

Revelation is *inferred to be* the source of the Smritis, because they are remembered *and compiled* by those who admit the Veda alone *and nothing else* to be the source of law, and because they have been adopted and acted upon

as authoritative by such persons, and because their being founded on the Veda is probable.

९ । सरस्वतीदृषद्वत्योर्देवनद्योर्यदन्तरम् ।
तं देवनिर्मितं देशं ब्रह्मावर्त्तं प्रचक्षते ॥
तस्मिन् देशे य आचारः पारम्पर्य-क्रमागतः ॥
वर्णानां सान्तरालानां स सदाचार उच्यते ॥
मनुः—२ । १७-१८ ॥

Approved usage

9. The holy country lying between the holy rivers Sarasvati and Drishadvati is called Brahmavarta the custom in that country, which has come down by immemorial tradition and obtains among the castes pure and mixed, is called approved usage —Manu, ii, 17-1 .

१० । कुरुक्षेत्रञ्च मत्स्याश्च पञ्चालाः शूरसेनकाः ॥
एष ब्रह्मर्षिदेशो वै ब्रह्मावर्त्तादनन्तरः ॥
एतद्देशप्रसूतस्य सकाशादग्रजन्मनः ।
स्वं स्वं चरित्रं शिक्षेरन् पृथिव्यां सर्व्वमानवाः ॥
हिमवद् विन्ध्ययोर्मध्यं यत् प्राग्विनशनादपि ।
प्रत्यगेव प्रयागाच्च मध्यदेशः प्रकीर्तितः ॥
आसमुद्रात्तु वै पूर्व्वात्, आसमुद्रात्तु पश्चिमात् ।
तयोरेवान्तरं गिर्योर्-आर्य्यावर्त्तं विदुर्बुधाः ॥
कृष्णसारस्तु चरति मृगो यत्र स्वभावतः ।
स ज्ञेयो यज्ञियो देशो म्लेच्छदेशस्त्वतः परः ॥
एतान् द्विजातयो देशान् संश्रयेरन् प्रयत्नतः ।
शूद्रस्तु यस्मिन् कस्मिन् वा निवसेद् वृत्तिकर्षितः ॥
मनुः—२ । १९-२४ ॥

Aryavarta

10. Next *in holiness or position* to Brahmavarta is the country called Brahmarshi consisting of Kurukshetra, Matsya, Panchala and Sûrasena. From a Brahmana born in this country all men on earth should learn their respective usages. The country lying between the Himavat and the Vindhya *mountains* and to the east of Vinasana *the place where the Sarasvati disappears* and to the west of Prayaga *i e*, *Allahabad* is called Madhya-desa *or the middle country*. The country *extending* to the eastern, and to the western oceans and *lying* between these very mountains the wise call Aryavarta. Where the black antelope lives naturally, that is known as the sacrificial country; beyond the same is the country of the Mlechchhas. These countries, the twice-born persons should take care to dwell in *if born elsewhere*, but a Sûdra may live anywhere, for the sake of maintenance —Manu, ii, 19-24

according to Manu.

११। दक्षिणेन हिमवत, उत्तरेण विन्ध्यस्य ये धर्म्माः, ये आचाराः, ते सर्वं प्रत्येतव्याः, न त्वन्ये प्रतिलोमकल्पधर्माः। एतद्-आर्य्यावर्त्तम् इत्याचक्षते। गङ्गायमुनयोरन्तरामेके, यावद् वा कृष्णमृगो विचरति तावद् ब्रह्मवर्चसमिति॥ वशिष्ठः। प्रथमाध्याये॥

11 Those laws and those usages that[1] are *observed in the country* on the south of the Himavat and on the north of the the Vindhya, all those ought to be followed but not the laws prevailing among the Mlechchhas, that are different *from these* This country *between Himavat and Vindhya* is called Aryàvarta; some say *this country is limited to that which lies* between the Ganges and the Yamunà, or *extends* so far as the black antelope roams, where spiritual pre-eminence *obtains* —Vasistha, Ch I

and Vasishtha

१२। यस्मिन् देशे य आचारो व्यवहार कुलस्थिति।
तथैव परिपाल्योऽसौ यदा वशम् उपागत.॥
या॰—१। ३४३॥

Custom

12 Whatever customs, practices and family usages prevail in a country, shall be preserved intact, when it comes under subjection by conquest — Yàjnavalkya, I, 343

१३। यस्मिन् देशे य आचारो न्यायदृष्टस्तु कल्पित।
स तस्मिन्नेव कर्त्तव्यो न तु देशान्तरे स्थित.॥
यस्मिन् देशे पुरे ग्रामे त्रैविद्ये नगरेऽपि वा।
यो यत्र विहितो धर्म-स्तं धर्म्मं न विचालयेत्॥
देवलः पराशरमाधव-धृतः॥

when contrary to texts of law

13 But if any usage required by utility is established in a locality *contrary to the written texts of law*, it should be practised therein only, but not in any other district Whatever customary law is prevalent in a district, in a city, in a town, or in a village, or among the learned, the said law ***though contrary to the Smritis*** must not be disturbed —Devala, cited in the Paràsara-Màdhava

१४। सर्व्वेषाम् एवमादीनां प्रतिदेश व्यवस्थया।
आपस्तम्बेन संस्थाप्य दुष्टादुष्टत्वम् आश्रित।
येषां परम्पराप्राप्ता: पूर्व्वजैरप्यनुष्ठिता:।
त एव तैर्न दुष्येयु-राचारैर्नेतरे पुन:॥
कुमारिलस्वामिनेदं परमतमित्युपन्यस्तं तन्त्रवार्त्तिके प्रथमाध्याये तृतीयपादे॥

14. Apastamba has briefly explained the reprehensibility or non reprehensibility of all such usages *as are contrary to the written texts of law* by referring them to different localities By these usages they do not become liable to censure, who have got them by tradition, and whose predecessors used to practice them , others, however, are not so, *but become guilty of violating the written texts of law, if they practise those usages*

This is stated as the opinion of others, by Kumarila Swamin who himself maintains the invalidity of such usages, in his Tantra-Vârtika, first chapter, third Pâda or Section,

१५। अष्टादशपुराणानि पुराणज्ञाः प्रचक्षते ।
ब्राह्मं पाद्मं वैष्णवञ्च शैवं भागवतं तथा ॥
तथान्यं नारदीयञ्च मार्कण्डेयञ्च सप्तमम् ।
आग्नेयमष्टमञ्चैव भविष्यं नवमं तथा ॥
दशमं ब्रह्मवैवर्तं लैङ्गमेकादशं स्मृतम् ।
वाराहं द्वादशञ्चैव स्कान्दञ्चात्र त्रयोदशम् ॥
चतुर्दशं वामनञ्च कौर्म्मं पञ्चदशं स्मृतम् ।
मात्स्यञ्च गारुडञ्चैव ब्रह्माण्डञ्च ततः परम् ॥
सर्गश्च प्रतिसर्गश्च वंशो मन्वन्तराणि च ।
सर्वेष्वेतेषु कथ्यन्ते वंशानुचरितञ्च यत् ॥
विष्णुपुराणं — ३।६।२१-२५ ॥

Eighteen Puranas

15 Eighteen *Puranas* are enumerated by those versed in the *Puranas* — the Brâhma, the Pâdma, and the Vaishnava, the Saiva, Bhâgavata, likewise, another is the Nâradiya, and the Mârkandeya is the seventh, and the A'gneya is the eighth, likewise, the Bhavishya is the ninth, the tenth is the Brahmavaivarta, the Lainga is ordained the eleventh, and the Varaha is the twelfth, and the Skânda is the thirteenth, in this *enumeration* the Vâmana is the fourteenth, the Kaurma is ordained the fifteenth, posterior to these are the Matsya, and the Gâruda and the Brahmânda In all these the subjects dealt with are, the creation, the secondary creation, the dynasties *of gods, sages and kings*, the ages of the world, as well as the career of the dynasties —Vishnu-Purâna, III, VI, 21-25

१६। श्रुतिद्वैधे स्मृतिद्वैधे स्थलभेदः प्रकल्प्यते ।
स्मृतिश्रुतिविरोधे तु श्रुतिरेव गरीयसी ॥

Conflict between Sruti and Smriti,

16. In case there be two contradictory precepts of the Sruti or of the Smriti, they are reconciled thus,—different cases are to be assumed *to which they are respectively applicable* but if there be a conflict between *a text of* the Sruti and *one of* the Smriti, the Sruti alone must prevail

१७। स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।
अर्थशास्त्रात् तु बलवत् धर्मशास्त्रम् इति स्थितिः ॥
याज्ञवल्क्यः—२ । २१ ।

between two Smritis,

17. But in a case of conflict between two passages of the Smriti, reconciliation based on usage must prevail · but the rule is, that the sacred books on law are more weighty than sacred books on politics.—Yàjnavalkya, ii, 21.

१८। श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्वरा—१।४
व्याससंहिता—१।४ ॥

between Sruti Smriti and Purana.

18 When there is a conflict between the Sruti, the Smriti and the Puràna, the Sruti must prevail but in a conflict between the latter two, the Smriti must prevail —The Code of Vyàsa, i, 4

१९। कायेन मनसा वाचा यत्नाद् धर्मं समाचरेत् ।
अस्वर्ग्यं लोकविद्विष्टं धर्म्यम् अप्याचरेन् न तु ॥
याज्ञवल्क्यः—१ । १५६ ॥

What to be practised

19. Practice with care what is lawful, by body, mind and speech, but practice not that which is abhorred by the world, though it is ordained in the Sacred Books , for it secures not spiritual bliss —Yàjnavalkya, i, 156

२०। अस्वर्ग्यं लोकविद्विष्टं धर्म्यम् अप्याचरेन् न तु ।
समुद्र-यात्रा-स्वीकारः कमण्डलु-विधारणम् ॥
द्विजानाम् असवर्णासु कन्यासूपयमस्तथा ।
देवरेण सुतोत्पत्तिर्मधुपर्के पशोर्वधः ॥
मांसदानं तथा श्राद्धे वानप्रस्थाश्रमस्तथा ।
दत्ताक्षतायाः कन्यायाः पुनर्दानं परस्य च ॥
दीर्घकालं ब्रह्मचर्यं नरमेधाश्वमेधकौ ।
महाप्रस्थानगमनं गोमेधश्च तथा मखम् ॥
इमान् धर्मान् कलियुगे वर्ज्यान् आहुर्मनीषिणः ॥
बृहन्नारदीयम्—२२ ।१२-१६ ॥

and what not

20. But practise not what is abhorred by the people, though it is ordained in the sacred books , for, it secures not spiritual bliss Taking sea-voyage , carrying a waterpot *by students* , likewise marriage by regenerate men of damsels not belonging to the same tribe; procreation of son *on a woman* by her husband's younger brother slaughter of cattle for entertaining honoured

guests ; offering of flesh-meat in ancestor-worship , retirement to a forest *or adoption of the third order of life* , gift over again of a daughter once given in marriage though still a virgin to another *bridegroom* , study of the Vedas for a long time , man-sacrifice , horse sacrifice ceaseless walking with intent to die ; and likewise cow-sacrifice ,—these practices though permitted by the sacred books, the wise declare avoidable in the Kali age —Vrihan-Nâradiya-Purana, xxii, 12-16.

२१ । दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः ।
शूद्रेषु दासगोपालकुलमित्रार्द्धसीरिणाम् ।
भोज्यान्नता, गृहस्थस्य तीर्थसेवातिदूरतः ।
ब्राह्मणादिषु शूद्रस्य पक्वतादिक्रियापि च ।
भृग्वग्निमरणञ्चैव वृद्धादिमरणं तथा ।
इमानि लोकगुप्त्यर्थं कलेरादौ महात्मभिः ।
निवर्त्तितानि कर्म्माणि व्यवस्थापूर्व्वकं बुधैः ।
समयश्चापि साधूनां प्रमाणं वेदवद् भवेत् ॥
आदित्यपुराणवचनम् ॥

21. Recognition of sons other than the Aurasa and the Dattaka , participation *by a Brahmana* of food from the following description of Sûdras namely, *his* slave, *his* cowherd, *his* family-friend, and the cultivator *of his land* delivering half the produce , pilgrimage by a householder to a very distant holy place , participation by the Brahmanas and the like, of food prepared by a Sûdra , suicide by falling from a precipice or by cremation , likewise suicide by a person extremely old or the like —In the beginning of the Kali age, these practices have been prohibited after consideration by the learned for protection of the people for, a convention also, made by the virtuous, has as much authority as the Veda —A'ditya Purâna quoted by Raghunandana. *Same*

२२ । तत्रासीनः स्थितो वापि पाणिम् उद्यम्य दक्षिणम् ।
विनीतवेषाभरणः पश्येत् कार्य्याणि कार्य्यिणाम् ॥ २ ।
प्रत्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः ।
अष्टादशसु मार्गेषु निबद्धानि पृथक् पृथक् ॥ ३ ।
तेषाम् आद्यम् ऋणादानं, निक्षेपोऽस्वामिविक्रयः ।
सम्भूय च समुत्थानं दत्तस्यानपकर्म्म च ॥ ४ ।
वेतनस्यैव चादानं संविदश्च व्यतिक्रमः ।
क्रयविक्रयानुशयौ विवादः स्वामिपालयोः ॥ ५ ।
सीमाविवादधर्म्मश्च पारुष्ये दण्डवाचिके ।
स्तेयञ्च साहसञ्चैव स्त्रीसंग्रहणमेव च ॥ ६ ।

स्त्रीपुंधर्मो विभागश्च द्यूतमाह्वय एव च ।
पदान्यष्टादशैतानि व्यवहारस्थिताविह ॥ ७ ॥

मनु:—८ । ७ ॥

Eighteen Forms of Action.

22 In his Court of Justice, either sitting or standing, holding forth his right arm, unostentatious in his dress and ornaments, let the king, every day, decide, one after another, causes of suitors, separately classified under eighteen Forms of Action, by rules founded on Local Usages and Codes of Law. Of these *Forms of Action* the first is the Recovery of Debts, *the others are*,—(2) Deposit and Pledge, (3) Sale without Ownership, (4) Joint Concerns *or Partnership*, (5) Resumption of Gifts, (6) Non-payment of Wages, (7) Breach of Contract, (8) Rescission of Sale and Purchase, (9) Dispute between the Owner *of cattle* and the Shepherd, (10) Dispute relating to Boundaries *or Trespass*, (11) Violence consisting of Assault, (12) and *Violence* consisting of Abuse *or Slander and Defamation*, (13) Theft, (14) Force *consisting of robbery, hurt or violence on women*, (15) Adultery, (16) Duties of Man and Wife, (17) Partition *and Inheritance*, and (18) Gambling and Betting —these are in this world the eighteen foundations upon which litigation rests —Manu, viii, 2-7

Narada adds

Nàrada has added another Form of Action called प्रकीर्णकम् or Miscellaneous, which includes various matters that cannot come under those declared by Manu, and in which the Action arises at the instance of the king The first and the last lines of Nàrada's description of it are as follows —

२३ । प्रकीर्णके पुनर्ज्ञेयो व्यवहारो नृपाश्रयः ।
न दृष्टं यच्च पूर्वेषु सर्वं तत् स्यात् प्रकीर्णके ॥

Miscellaneous Form of Action.

23 In the Miscellaneous Form of Action, the litigation depends upon the king Whatever is not considered in the foregoing *Forms of Action*, all that, would come within the Miscellaneous Form of Action

२४ । स्मृत्याचार-व्यपेतेन मार्गेणाधर्षितः परैः ॥
आवेदयति चेद् राज्ञे व्यवहारपदं हि तत् ॥

याज्ञवल्क्य:—२।५ ॥

How Causes of Action arise.

24 If a person wronged by others in a way contrary to the Smriti or Custom complains to the king, then arises a Cause of Action —Yajnavalkya, ii, 5

Sec. 2 - ORIGIN AND SOURCES OF LAW

ओम् नमो भगवते वासुदेवाय ।

Sub-Sec 1—DHARMA SHASTRAS

Origin of law

Divine origin of laws —The Hindus believe their law to be of divine origin, and they believe this not only of what Austin calls the laws of God, but positive law also is believed by them to have emanated from the Deity. The idea of Sovereign in the modern juridical sense was unknown to them. They had kings, but their function was defined by the divine law contained in the Smritis, and they were bound to obey the selfsame law, equally with their subjects. By this original theory of its origin, the law was independent of the state, or rather the state was dependent on law, as the king was to be guided in all matters connected with government, by the revealed law, though he was not excluded from a control over the administration of justice The king being theoretically the administrator of justice his decrees must have been recognized as binding on suitors from the very earliest times. And this gradually introduced the view recognized by commentators that royal edicts in certain matters have as much binding force as divine law, should the former be not repugnant to the latter.

Those that are not inclined to accept the Hindu idea of a divine origin of laws would have no hesitation to allow that they are based upon immemorial customs and usages, and call them the *unwritten* laws of India, and as being the law of the majority of the population, these may be deemed the Common Law of the country. But the Hindu law is not now the territorial law of Hindusthan In Hindu times the validity of customs was admitted, so the law of inheritance, marriage, &c., under the Smritis, was not purely territorial. The Hindus, however, had a complete Code of laws, both Adjective and Substantive, and the latter was discussed under eighteen heads called *topics of litigation*, which resemble he *actions* of the English Common Law.

The earlier notion of law was gradually modified to a certain extent, as may be gleaned from the remarks of the commentators. And the conception of positive as distinguished from divine law, presented to us by the commentators, nearly approaches the ideas of modern jurisprudence.

Sources of law are

The sources of law.—The term 'source of law' is used in two senses : in one, the Deity according to the Hindus, and the Sovereign according to modern jurisprudence, is the fountain source of law; and in the other sense, the term means that to which one must resort to get at law, in other words, the evidence or records of law which one is to study for the purpose of learning law. In this sense, the sources of Hindu law are the Sruti, the Smriti, and the Immemorial and *approved* Customs, by which the Divine will or law is evidenced.

Sruti, Smriti and Custom

Sruti,

Sruti.—The Sruti is believed to contain the very words of the Deity. The name is derived from the root *sru* to hear, and signifies what was *heard*.

what it contains

The Sruti contains very little of lawyer's law : they consist of hymns, and deal with religious rites, true knowledge and liberation. There are, no doubt, a few passages containing an incidental allusion to a rule of law, or giving an instance from which a rule of law may be inferred. The Sruti comprises the four Vedas, the six Vedangas, and the Upanishads. (*a*)

Vedas :

The earliest sacred books are the Vedas. These were compiled and arranged in the present order by Krishna-Dvaipayana, the son of Parasara, who obtained the surname of Veda-Vyasa, that is, compilor of the Vedas. He distributed the Hindu scriptures into four parts, *viz.*, Rik, Yajur, Saman and Atharvan. The Rik-Veda praises either a God, or a thing or the instrumentality of a thing for pleasing the Gods. The Yajur-Veda relates chiefly to sacrifices. The Sama-Veda consists of prayers composed in metre and intended to be chanted at sacrifices. The Atharva-Veda contains hymns, incantations and forms of imprecations for destroying or

Rik, Yajur, Saman, and Atharvan.

(a) Text No 5

injuring enemies, and prayers for safety from enemies or for averting calamities. As the idea of injuring another, be he even an enemy, is opposed to the spirit of Hinduism, the Atharva-Veda was not much respected and came to be regarded with disapprobation. It is for this reason the Smritis and other sacred books refer to three Vedas only, the Atharvan being suppressed.

Vedangas

The Vedangas or appendages to the Vedas came into existence in the post-Vedic period. These are six in number *viz.*, (i) the Siksha or orthography and orthoepy ; (ii) the Kalpas or treatises dealing with ritual , (iii) the Vyakarana or Grammar ; (iv) the Chhandas or prosody ; (v) the Jyotisha or Astronomy , and (vi) the Nirukta or lexicon. In order to read, pronounce and understand the Vedas properly, and to make use of them for sacrifical purposes, one must study the Vedangas. These, however, cannot be regarded as sources of law.

Upanishadas.

The Upanishads are denominated as the Vedanta or the concluding portion of the Veda and embody the highest principles of Hindu religion, referring to which Schopenhauer says,—"In the whole world there is no study so beneficial and so elevating as that of the Upanishads. It has been the solace of my life, it will be the solace of my death."

Smriti,

Smriti.—The Smriti means what was *remembered*, and is believed to contain the precepts of God, but not in the language they had been delivered. The language is of human origin, but the rules are divine. The authors do not arrogate to themselves the position of legislators, but profess to compile the traditions handed down to them by those to whom divine commands had been communicated.

the principal source of law.

The Smritis are the principal sources of lawyer's law, but they also contain matters other than positive law. The complete Codes of Manu and Yàjnavalkya deal with religious rites, *positive law*, penance, true knowledge and liberation. There are some that deal with positive law alone, such as the Code of Narada, now extant Many others contain nothing of civil law. The Smritis as a whole deal with man as a being of

infinite existence, whose present life is like a point in a straight line infinte in both directions.

Why Smritis be taken as evidence of Dharma or law.

It should be noticed that writers on the Mimansa system of Hindu philosophy discuss the question:—Why should Smritis composed by human beings be taken as evidence of *Dharma* or Law, of which Revelation is admitted by all to be the only source? They maintain that the Smritis must be *inferred* to be founded on lost or forgotten Sruti, inasmuch as they are compiled from memory, and are declared as embodying binding rules of conduct, by the sages who were perfectly familiar with the Vedas, and who admitted the Sruti alone and nothing else, to be the foundation or evidence of law ; and as they have all along been adopted and followed in practice by the sages as well as by other persons learned in the Vedas and entertaining the same view with respect to the origin and source of Law. They also notice an objection that may be raised to this, namely,—Why then have not, the very words of the original revelations that are supposed to be the foundation of the Smritis, been preserved? And they refute it by saying that human memory being frail, there is no wonder that precepts should be remembered while the exact words in which thay had originally been expressed might be forgotten. There is a great distinction between the sacred literature dealing with rules regulating the conduct of men in this world as members of society, and that relating to purely religious matters ; the precepts of the former are observed in practice, while the latter is rather theoretical in character, the wording of which was therefore of greater importance than that of the former. The rise of different Sàkhàs or schools of Vedic literature affords evidence of the loss of the exact wording of portions of the latter kind of Revelation, since parts of the Vedas, found in one Sàkhà are wanting in others, showing that when the Vedic literature used to be handed down by tradition, parts were omitted by different Sàkhàs with a view to lighten the burden on the memory of students : and the practice with the teacher of a particular Sàkhà, who was familiar with the other Sàkhàs also, was not to teach to a pupil of his own Sàkhà, the exact wording of those portions

of other Sâkhâs, that were wanting in his own, but to give their purport in his own language, so that the same might not be mistaken as part of his own Sâkhâ

Authority of Smritis.

It is worthy of notice that the inference set forth above forms the foundation of the authority of the Smritis. When this inference cannot properly be made with respect to a particular precept of Smriti, the same must be disregarded as spurious. Thus, if a Smriti is in conflict with Sruti, it must be rejected as being not founded on Revelation. Similarly, a passage of Smriti, the origin of which may reasonably be attributed to the covetousness of priests, or to the selfishness or the like improper motive of some persons who might introduce any interpolation in it, cannot be regarded as authoritative, but should be discarded as a fabrication and interpolation. (*b*)

Dharma.

Dharma Law & Sources —The word *dharma* is generally rendered into Law and includes all kinds of rules religious, moral, legal, physical, metaphysical or scientific, in the same way as the term Law does, in its widest sense. The word is derived from the root *dhri* to hold, support or maintain, and it means law, or duty, or the essential quality of persons or things. By the term *dharma* is understood the rules whereby not only mankind but all beings are governed , it also imports duty or distinctive feature of beings implying subjection to, or control by the rules The term *Shàstra* is derived from the root *Shas* to teach, enjoin or control and means teacher. The Sruti and the Smriti are comprehended by the term *Dharma-shàstra* in its primary sense, inasmuch as the objects of both are to teach of rules or duties. But the word *Dharma-shàstra* is often used to designate the Smritis alone, with a view to mark their practical importance : thus Manu says,—

श्रुतिस्तु वेदो विज्ञेयो धर्मशास्त्रं तु वै स्मृतिः ।

which means,—" By Sruti is known the Veda, and by Smriti the *Dharma-shàstra*."

Vedas Upanishads.

The Vedas are rather theoretical than practical The Upanishads deal with theology and the means, implying

(*b*) See Text No 8

esoteric Hinduism, whereby a person may attain *moksha* or liberation of the soul from the necessity of repeatedbirths and deaths, and its restoration to its original state of (सच्चिदानन्द or) Existence, Knowledge and Beatitude--the *Summum Bonum* of the Hindus. While the Smriti lays down rules relating to sacramental and other religious rites, and positive law, and pollution, penance and theology intended to be practically observed by men in the course of their lives; and in doing so, it embodies, in modern Sanskrit, many of the rules of the Sruti; and accordingly the term Dharma-Shastra is applied to it with a view to thrust into prominence its importance in a practical point of view.

Smriti.

Dharma,

Dharma is defined by Jaimini the founder of the School of Hindu philosophy, called*Purva* (prior) *Mimânsâ* to be the means of attaining the desirable ends of man, knowable from the Vedic precepts alone. (*c*) Theends of man or पुरुषार्थाः are, four, namely,—धर्मार्थकाममोक्षाः or Religious merit securing heavenly happiness after death Wealth, Desirable objects other than these, and *Moksha* or liberation from metempsychosis or Restoration of the soul to its own real state of (सच्चिदानन्द; or) Existence, Knowledge and Beatitude, the realization of which is prevented by Mâyâ or illusion. It should be noticed that the term "Desirable objects" includes the other three of the group of four, but they are separately mentioned to indicate the importance attached to them by different persons.

what it includes.

The term *Dharma*, therefore, includes not only what are conveyed by the term Law in its widest sense, but also persons and things that may be the means of attaining any of the desirable ends. And positive law which is conducive to the welfare and well-being of people, is comprehended by the term "Desirable objects."

English equivalent of Dharma.

In the English translation of the original texts, the word Law is generally used as equivalent to *Dharma*, leaving out of consideration any thing else comprised by it according to Jaimini. And that appears to be the sense in which the word is generally used.

(*c*) Text No 6.

It is in this wide sense, that the sources of *Dharma* or law are · (1) the Sruti, (2) the Smriti, and (3) the Immemorial Customs. The first, though of the highest authority, is of very little importance to lawyers The last again are of very great importance, as being the rules by which the people are actually guided in practice, and their value has come to be specially recognized under the British rule, and authorized records of customs of various localities have been compiled. They override the Smritis and their accepted interpretation given by an authoritative commentator, should these be inconsistent with them They prove that the written texts of law are either speculative and never followed in practice, or obsolete. The Hindu commentators have not, except in a few instances, devoted much attention to these unrecorded customs and usages, though they recognize their authority as a source of law. They have confined their attention to the Smritis alone, which constitute the primary *written* sources of law. The customary law will be discussed later on.

Widest sense of Dharma : Sruti, Smriti and Custom.

The exact number of the Smritis cannot be stated, as many of them are not extant, being either lost or unprocurable. From the quotations in the various commentaries one can make a list of the Codes. Most of them are written in metre, and a few in both prose and metre They do not appear to have been written at the same time, nor do they lay down the self-same law; and a process of development may be perceived in them. Thus there is conflict of law as laid down in the different Codes on various matters.

Smritis cannot be exactly enumerated

Conflict of law and Commentaries – Conflict of law, however, is opposed to the theory of its divine origin, from which perfect harmony between the different Codes must necessarily be xpected. The conflict between the Smritis, seeming or real, has given rise to the commentaries or digests that are called Nibandhas. Conflict between the Shâstras, however, is admitted and the mode of reconciling them is pointed out thus :—" When there is a conflict between two texts of the Sruti or of the Smriti, they are to be presumed to relate to different cases; but where a text of the Sruti is

Commentaries and Nibandhas

opposed to one of the Smriti, the former must prevail.' (*d*).

Scope of Shastras:

Scope of Shastras.—This admission of the existence of conflict of law, opposed to the theory of its origin, has landed the commentators upon a difficulty, which they attempt to get over in the following way —The proper object of the Shàstras, say they, is to teach of things that lie beyond the scope of human reason, what men would do or refrain from doing of their own accord from purely human motives, need not be laid down in the Shàstras ; accordingly they classify the precepts laid down in the Shàstras thus. where a precept forbids men to do what they may do under the natural impulses, it is called a *Nishedha* or prohibition ; but where a precept enjoins men to do a certain thing, when no reason could be suggested for doing it, it is called an *Utpatti-vidhi* or an injunction creating a duty, and a precept regarding what men may do, of their own accord, may come within the purview of the Shàstras, if it enjoins that act at a particular time or place: such a precept is called a *Niyama-vidhi* or restrictive injunction, there is a third kind of *vidhi* or injunction called *Parisankhyà* which is an injunction in form, but a prohibition in purport, as for instance,— " Man shall eat the flesh of the five five-clawed animals,"—which means, that man shall not eat the flesh of five-clawed animals excepting that of the five specified ones, but precepts that do not fall under any one of the above descriptions are called *Anuvàda*, superfluous rules that need not have been laid down in the Shàstras.

Classification of percepts

Nishedha,

Utpatti-vidhi,

Niyama-vidhi,

Parisankhyà,

Anuvada.

Shastras that deal with positive law are *Anuvada*

Positive law and Shastras—The Commentators do, either expressly or by necessary implication, hold that the Shàstras in so far as they deal with positive law, are generally *Anuvàda* or superfluous, inasmuch as the rules of positive law are deducible from reason, in other words, from a consideration of what best conduces to the welfare of the society and suits the feelings of the people. This is proved by the systems of law obtaining among non-Hindu peoples who are utterly ignorant of the Shàstras. They do, in fact, draw a distinction between positive law on the one hand, and the

(*d*) Texts Nos. 16—18.

rules of religious or moral obligation on the other,

Thus the author of the Mitàksharà (*e*) cites and follows a text which runs thus :—"Practise not that which is legal, but is abhorred by the world, for it secures not spiritual bliss." This text does virtually suggest the maxim *Vox populi est vox Dei* and maintain that popular feelings override an express text of law contained in the Shàstras, taking of course, the term law in the limited sense of lawyers.

Factum valet

Factum valet.—On the very same principle does rest the so-called doctrine of *factum valet quod fieri non debuit* (what should not be done, yet being done, shall be valid), usually though not correctly, thought to be peculiar to the Bengal School, and enunciated for the first time by the author of the Dàyabhàga, the founder of that School. For, it has been held, and correctly held by the Privy Council in the case of *Wooma Daee*, (*f*) that the doctrine is recognized by the Mitàksharà School also. There appear to be considerable misconception and difference of opinion as to what was intended to be laid down by the author of the Dàyabhàga in the passage—वचनशतेनापि वस्तुनोऽन्यथाकरणाशक्तेः :—which means, " A thing (or the nature of a thing) cannot be altered by a hundred texts." The rule intended to be laid down may be thus formulated :—An act or transaction done by a man in the exercise of a right or power, natural or recognized by law, cannot be undone or invalidated by reason of there being texts in the Shastras prohibiting such act or transaction.

recognized by Mitakshara School

The above passage of the Dàyabhàga, was rendered by Colebrooke into,—"For a *fact* cannot be altered by a hundred texts." The founder of the Bengal School holds that an alienation by a father or a co-heir, of his self-acquired immovable property or of his undivided share in joint-family property, respectvely, is perfectly valid, even when made without the consent of his sons in the one case, or of his co-sharers in the other, notwithstanding texts of law requiring such consent. And in support of this position he sets forth the above reason. His argument is this :—Ownership consists in the power of

( ) Mit I. 3, 4,

(*f*) 3 C, 587 5 I A. 40, 53, see also Ganga *v.* Lekhraj 9 A. 253, 292-296

dealing with property according to pleasure ; it cannot but be admitted that the father and the co-heir have ownership respectively, in the self-acquired immovable and in the undivided share, and consequently power of alienation · hence, the *nature of the thing, i e*, ownership, or its incidents such as sale or other alienation, cannot be affected by a hundred texts prohibiting alienation without consent , such texts therefore, are to be taken as admonitory but not imperative. Of the same effect are texts prohibiting gift or other alienation of the whole of his property by a man having wife and children to support Parallel to them are passages forbidding the gift in adoption, of an only son by a person in the exercise of *patria potestas* or parental property in a child This is one of the many principles upon which commentators differentiate between rules of legal and religious or moral obligation, which are blended together in the Codes of Hindu law.

Difference between two schools and *Factum valet.*

There is no real difference between the two Schools, as regards the tests for distinguishing the rules of legal obligation from those that are merely preceptive. The Mitâksharâ rule that a co-heir cannot alienate his undivided coparcenary interest in joint property without the consent of his coparceners, is a necessary logical consequence of the doctrine that co-heirs are *joint tenants*, and not *tenants in common* as in the Bengal School. Hence the distinction in this respect does not support the opinion that the doctrine of *factum valet* is not recognized by the Mitâksharâ School to the same extent as in Bengal

Application of the maxim.

This scope of this maxim has been discussed by the Bombay and Allahabad High Courts. The Bombay High Court has said "In cases in which the Shâstra is merely directory and not mandatory, or only indicates particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the precept or recommended preference be disregarded " (*g*) In an elaborate judgment Mahmood, J , of the Allahabad High Court has said : "In the case of adoption there are of course, questions of formalities, ceremonies, preference in the matter of selection,

(*g*) Laksmâppâ *v* Ramava, 12 Bom H C R 364, 398 See also Gopal *v*, Hanmant, 3 B 273, 293 , Dharma *v* Ramkrishna, 10 B 80, 86,

and other points which amount to moral and religious suggestions. Such matters, speaking generally, are dealt with in the texts in a directory manner, relating to what I may perhaps call the *Modus operandi* of adoption To such matters, which do not affect the essence of the adoption, the doctrine of *factum valet* would undoubtedly apply upon general grounds of justice, equity nd good conscience and irrespective of the authority of any text in the Hindu law itself." (h)

Privy Council on the same

The following learned observations of the Judicial Committee on this maxim are instructive and should be carefully read :—"their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet* That unhappily expressed maxim clearly causes trouble in Indian courts. Sir M Westroop is quite right in pointing out that if the *factum*, external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law." (i) But the doctrine of *factum valet*, however, does not ever excuse the violation of a legal rule (j)

Prohibition in *Kali* age

Practices to be eschewed in Kali age—So also Raghunandana in his treatise on Marriage (Udvâha-Tattva) prohibits, contrary to the Smritis and the earlier commentaries, the intermarriage between different tribes, and in support of this position cites a passage from the A'ditya-Purâna, which after laying down that certain practices including intermarrige, though authorized by the Shâstras, are not to be followed in this Kali age, concludes thus —"In the beginning of the Kali

(h) Ganga v Lekhraj, 9 A 253, 296-297

(i) Sri Balusu v Sri Balusu, 22 M 398, 423 26 I A 113, 144, see also Bhagwant v Murari, 15 C W N 524, 535 15 C L J 97, 108 7 I C 427

(j) Budansa v Fatma, 26 M L J 260, 266. 15 M L T 107, 22 I. C. 697.

age these practices have been prohibited after consideration by the learned for the protection of the people : *and a convention come to by the virtuous has as much legal force as a text of the Veda*" (*k*)

Shastras flexible according to exigencies of society

Thus we see that the rules of the Shàstras in so far as they relate to secular as distinguished from purely spiritual matters, are not inflexible, but may be modified or replaced if repugnant to popular feelings, or if in the opinion of the learned the exigencies of Hindu society require a change. The Shàstras therefore, do not present any insurmountable difficulty in the way of social progress, and Hindus may re-constitute their society in any way they like withont renouncing their religion.

Puranas also source of law.

Puranas.—The above quotation from the A'ditya-Puràna shows that the Puràuas also are considered by the later commentators as a source of law. Jurisprudence, however, does not come within the scope of the subjects that are, according to the Puránas themselves, dealt with in them. (*l*) They are voluminous mythological poems professing to give an account of the creation, to narrate the genealogy of Gods, of ancient dynasties and of sacerdotal families, to describe the different ages of the world, and to delineate stories of Gods, ancient kings and sages; and in doing so they also relate religious rites and duties. These works are said to have been composed by the celebrated Veda-Vyàsa or compiler of the four Vedas, and are enumerated in some of the Pnràuas to be eighteen in number. But there are many other works of the same kind, the authorship of which is not attributed to Vyasa, which appear to have been written subsequently, and which are on that account styled Upà Puràuas, and are respectively deemed supplementary to one or other of the eighteen Puràuas. The Puràuas are not considered authoritative so as to override the

Authority of Puràuas

Smritis, but are deemed to illustrate the law by the instances of its application, that are related by them and are looked upon as precedents. (*m*) With respect to their authority in matters of positive law, Professor Wilson rightly observes that

(*k*) Text No 19. (*l*) Text No 12. (*m*) Text No 18

"the Puràṇas are not authorities in law, they may be received in explanation or illustration, but not in proof." It should be observed that the doctrine of prohibition in the Kali age, of certain practices which are authorized by the Smritis, is enunciated by some of the Upa-Puràṇas, and cannot, therefore, be entertained by our courts, if the Puràṇas are not authorities in law.

Sub-Sec ii—CUSTOMS

Customs,

What are Customs:—Divine will is evidenced also by immemorial customs, indicating rules of conduct, in other words, such customs are presumed to be based on unrecorded revelation. Manu and Yajnavalkya declare सदाचार: : *approved* custom or usage, to be evidence of law Some of the other sages use the term शिष्टाचार meaning *usage of the learned* instead of, and as equivalent to, the said expression सदाचार: meaning *approved usage* or *usage* of the virtuous. By that term are to be understood the traditional usages prevailing in a particular locality, which, according to Manu, is Brahmàvarta or the country between the two rivers *Sarasvati* and *Drishadvati*, but which, according to other sages, is extended so as to include according to some the whole of Northern India between the Himàlaya and the Vindhya mountains excluding the Punjab and probably the Eastern part of Bengal. Although from the explanation of these terms, as given by some of the sages, they seem to be limited to the usages of those that are virtuous and versed in the sacred literature, yet as the usages prevailing among tradesmen, artisans and the like are maintained by the sages themselves to be binding on them, they are not to be taken as limited or qualified in that manner. The limitations or qualifications, however, may be taken to be intended to exclude *immoral* customs.

Immoral customs,

The subject of *immoral* customs and usages is not free from difficulty. There are certain communities in India, whose existence itself may be attributed to vice and want of morals, as for instance the dancing girls and the women of the town. The Hindu law recognizes the prostitutes as forming

a separatecommunity and existing from immemorial times, and lays down rules relating to disputes between them and their paramours The existence of such a class is deemed by the Hindus to be conducive to the welfare of their society, and necessary for the preservation of the chastity of women so highly valued and jealously guarded by them There are usages among these unfortunate women, that appear immoral to us, although they may be conducive to their happiness, for instance the practice of the adoption of daughters. These outcasted women, most of whom have none to call their own, have recourse to adoption to secure a relation who would look after them in old age, although the minor girls so adopted may have to lead vicious lives thus this practice looked at from their point of view, appears to be unobjectionable, but from the other, it appears *immoral* There is a conflict of rulings with respect to the recognition by the Courts of Justice, of this usage as well as a few caste-customs such as that authorizing a woman to abandon her husband and re-marry without his consent, and the usage permitting divorce and re-marriage by mutual consent of the husband and the wife (*n*)

Hardship in not recognising them

But it should be observed that when the question comes before the courts for their decision, the mischief has already been done, and the refusal to recognize the usage serves no useful purpose, but in most cases involves great hardship by defeating expectations and disturbing settled arrangements of their property, intended by deceased persons to take effect after their death

Conflict between Custom and text of law

Customs and Smritis or Law —There is a difference of opinion among commentators on the Mimânsâ with respect to the evidentiary force of customs and usages, some commentators are of opinion that usages give rise to an inference of being based on unrecorded or forgotten Sruti or Revelation, in the same way as Smritis do. While others maintain that as the learned of modern times cannot be taken to have been so familiar with the Vedas as Manu and other sages were, the

(*n*) See Mayne § 55.

usages observed by the learned of comparatively recent times cannot give rise to an inference of being founded on Sruti, but can only give rise to an inference of being based on some now lost or forgotten *Smriti* with which they may be presumed to have been familiar. Accordingly they hold that usages are inferior to Smritis, and must not be followed when in conflict with them. But agreeably to the former view usages and Smritis are of equal authority as evidence of law, and in case of conflict between them, the former must be taken to be of greater force as being actually observed in practice

be followed,

This view appears to accord with reason more than the other, and has been adopted by the highest tribunal which observes,—"The duty therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.*" (*o*) And similar reference to usage is made by Legislature in Acts which provide for the administration of law, unless the usage is contrary to justice, equity and good conscience, or has been declared to be void. (*p*) The Privy Council has held in the case of ***Neelkristo* v *Beerchandra*** (*q*) that where custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. This principle has been approved of by the same Board in the case of *Tara Kumari* v. *Chaturbhuj*. (*r*)

held by Privy Council

and Legislature.

According to Hindu law and the decisions of the highest tribunal, the Indian courts are bound to decide cases agreeably to such customs when proved to exist, although they

How Hindu law cases to be decided by courts.

(*o*) Collector of Madura *v* Mootoo, 12 M I A 397, 436 10 W R P C 17, *see* Muthusami *v* Masilamani, 33 M 342 20 M L J 49 5 I C 42

(*p*) Bombay:—Bom Reg IV of 1827, § 26, Act II of 1864, § 15, Burma —Act XVII of 1875, § 5, Central Provinces —Act XX of 1875, § 5, Madras —Act III of 1873 § 16, Oudh —Act XVIII of 1876, § 3, Punjab —Act XII of 1878, § 1, Bengal —Act VIII of 1885, § 183 (*q*) 12 M I A 523 12 W R P C 21

(*r*) 42 C 1179, 1191 42 I A 192 22 C L J 498 19 C W N 1119 29 M L J 731 : 30 I C 833 17 Bom. L R 1012.

may be at variance with the School of Hindu law, prevalent in the locality. This appears to be a most salutary rule, regard being had to the facts that many precepts in the Shàstras are recommendatory in character, and that many innovations have been introduced by Pandits of the Mahomedan period, who were neither judges nor lawyers, in their commentaries on Hindu law.

Austin's theory compared

This resembles the view taken by German jurists, of customary law, and is opposed to that of Austin who maintains that the rules of customary law become positive law *when* they are adopted as such by the courts of justice or promulgated in the statutes of the State. The great jurist seems to have been thinking of the state of things in England, and not in a country like India where there was no statute law, but where the entire body of laws was based upon immemorial customs and usages.

Definition of Custom

The Definition of Custom.—Custom is a rule which in a particular family or in a particular class of persons or in a particular locality, has from long usage, obtained the force of law. The Judicial Committee explained Custom thus: "Custom is a rule which in a particular family or in a particular district has from long usages obtained the force of law. It must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly."(*s*) But one must not suppose that customs as a rule are always in derogation of the general rules of law, for there may be many rules which custom only supplements.

Division of customs:

Division of customs—Customs may be divided under three heads, namely.—(1) Local customs, (2) Class customs, and (3) Family customs

(1) Local,

1 Local customs are binding on all the inhabitants of a particular locality which may be the whole country, or a province, or a district, or a town, or even a village.

(2) Class,

2. Class customs are customs of a caste, or of a sect, or of the followers of a particular profession or occupation such as agriculture, trade, mechanical art and the like.

( ) Hurpurshad v Sheo, 3 I A. 259, 285 : 26 W. R P C 55.

3. Family customs are confined to a particular family, such as those governing succession to an impartible Raj. Similar to them are the usages of succession to *maths* or religious foundations

(3) Family.

Essentials of customs.—*Antiquity, certainty, reasonableness* and *continuity* are essential to the validity of a custom.(*t*) On this subject the Judicial Committee observes as follows: "Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." (*u*)

Essentials of customs

Antiquity, Certainty, Reasonableness and *Continuity*

A custom, in order to have the force of law, must be *ancient* or *immemorial*. It is therefore important to consider what is to be deemed *time immemorial*. In England the expression "time immemorial," or "time out of mind," or "time whereof the memory of man runneth not to the contrary," is considered to denote legally the time commencing from the reign of King Richard the First, *i. e.*, A D. 1189.

What is ancient or immemorial;

it is from 1189 A D in England,

An opinion has been expressed that in this country the time of the Permanent Settlement should be taken as the limit, and it is asserted that there is no rule of Hindu law on the point.

in India some say from Permanent Settlement

This assertion, however, is not correct. The Hindu lawyers have laid down a reasonable rule on this question. One hundred years is the limit propounded by them What-

Hindu sages say one hundred years.

(*t*) Mahamaya *v* Haridas, 20 C L J 183 19 C W N 208 42 C. 455 27 I C 400, Sib Narain *v* Bhut, 28 C L J 148 (reasonableness explained)

(*u*) Ramalakshmi *v* Sivanantha, 14 M I A 570, 585-586 17 W R 553 I A Sup 1, this was followed in Vannia *v* Vannichi, 51 M 1, 11 F B See also Hazarimal *v* Abani, 17 C L J 38, 41 17 C W N. 280 18 I C 625; Durga *v* Raghunath, 18 C L J 559, 561 18 C W. N 55 20 I C 810, Ambalika *v*. Aparna, 45 C 835, 857 23 C. W N. 160. 29 C L. J 264.

ever is beyond a century is *immemorial* or out of mind of man whose span of life according to the Sruti extends to one hundred years only : accordingly everything previous to it must be beyond human memory and as such *immemorial.*(v)

Family custom.

Family and Local Customs—The foregoing observations apply both to family and local customs · a family usage also must be ancient and invariable, and being in derogation of ordinary law must be satisfactorily and strictly proved. (w)

Difference between local and family customs.

But a family usage differs from a local custom in this that it may be given up and discontinued, and the discontinuance whether accidental or intentional will have the effect of destroying it On this subject the Privy Council remarks —

"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails It is of the essence of family usages that they should be certain, invariable and continuous, and well-established discontinuance must be held to destroy them This would be so when the discontinuance has arisen from accidental causes, and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family" (x)

Custom in unimportant family.

For the validity of a family custom it is not necessary that the family should possess an estate which is technically known as a Raj in the north of India or a Polliem in the south of India.(y) Great difficulty may arise to prove special custom of a single family and specially a family of no great importance, but none the less if the custom is proved it is valid (z)

Creation of Custom—"No reason, even the highest whatso-

(v) Mit, on Yajnavalkya, ii, 27

(w) Nugender v Rughunath, W R (1864) 20, Chandika v Muna, 24 A 273 29 I A 70 6 C W N 425, Ambalika v Aparna, 45 C 835, 857 23 C W N 160 29 C L J 254

(x) Rajah Rajkishen v Ramjoy, 19 W R 8, 12 1 C 186, 195 See also Rao Kishore v Mst Gahenabai, 24 C W N 601, 610, 612 37 M L J 562

(y) Chintamun v Nowlukho, 1 C 153 2 I A 263, 269 24 W R 255, Shyamanand v Ramakanta, 32 C 6, Parbati v Chandarpal, 31 A 457 36 I A 125, 136 10 C L J 216 13 C W N 1073, Ambalika v Aparna, *supra* In this connection see, Sahdeo v Kusum, 27 C W N 901, 908 2 P 230 50 I A 58 37 C L J 359 44 M L J 475 25 Bom L R 550, family custom recognized in India, Durga Devi v Sambhu, 29 C W N 105 P C

(z) Bhan v Sundraibai, 11 Bom H C, 249, 269-270, Muhammad v. Fidayat un-nissa, 3 A 723, 729.

ever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom." (*a*) Customs may be similar or contradictory, probable or improbable (*b*)

Extinction of Custom.—But the non-existence of the circumstances which gave rise to a particular custom does not destroy the custom, (*c*) and this has been clearly explained in the case of *Narendra Narayan Chowdhury* (*d*) Similarly the "mere cessation of services to which *watan* lands are attached, which are by custom impartible, does not ordinarily destory that custom." (*e*)

When a custom is based on the nature of a particular tenure and the nature of that tenure is subsequently altered the rule is also altered and the custom ceases to exist. (*f*) But from this rule it cannot be said that renewal of settlement by the Government wipes out a family custom of primogeniture (*g*) In the absence of evidence to the contrary, in case of a re-grant by Government of an estate which existed before, the existing incidents of custom before the re-grant, must be presumed to continue. (*h*)

Custom and usage distinguished

Customs and Usages—Although the terms Custom and Usage are often used as convertible terms, still sometimes a distinction is drawn between them, and the former is applied to those rules of which *antiquity* is an essential incident, and the latter is used to designate those that may be of recent origin, such as those relating to trade or agriculture.

Mercantile usage

With respect to the nature and character of mercantile usage, the Judicial Committee observes —

(*a*) Arthur *v* Bokenham, (1708) 11 Mod 148, 161 88 E R 957, quoted in Pradyot Kumar Tagore *v* Gopikrishna, 37 C 322, 326 11 C L J 209 14 C W N 487, 5 I C 243

(*b*) Palaniappa *v* Chockalinga, 1930 M 109

(*c*) Rao Kishore *v* Gohenabai, 24 C W N 601, 610, 612 37 M L J 562

(*d*) 50 C L J 267, 274

(*e*) Rana Mahatab *v* Badan, 26 C W N 226 P. C

(*f*) Rajkishen *v* Ramjoy, 19 W R 8 1 C 186 followed in Narendra *v* Nogendra, 50 C L J 267, 274

(*g*) Rao Kishore *v* Gahenabai, 24 C W N 601 37 M L J 562, Narendra *v* Nagindra, *supra*, see Martand, *v* Malhar, 55 C 403 P. C.

(*h*) Martand *v*. Malnar, *supra*

"There needs not either the *antiquity*, the *uniformity* or the *notoriety* of custom which in respect of all these becomes a local law The usage may be still in course of growth ; it may require evidence for its support in each case ; but in the result it is enough, if it appear to be so well-known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract " (*hi*)

Agricultural usage

The same principles apply to an agricultural usage which may be of recent origin, lapse of a long period of time being not necessary for its growth , for instance, the usage of transferability of occupancy holdings may be established by evidence of transfers by the tenantry without the landlord's consent under the Bengal Tenancy Act , (*i*) and this power of the tenant has considerably been enlarged by the new Amendment of 1928.

Evidence Relating to Custom —The evidence of custom must be clear and unambiguous, (*j*) and such as would prove antiquity, uniformity and continuity, (*k*) as well as publicity and also the conviction of those following it, that they were acting in accordance with law The evidence of custom must be strictly construed (*l*)

The testimony of experienced and competent persons that certain acts done in accordance with a particular usage are held by them to be legal and valid, is admissible in evidence, provided that their statements are supported by examples of other acts done in accordance with the usage in question. (*m*) But evidence oral or documentary, as to statement of a deceased person, regarding the existence of a family custom is inadmissible, if such statement was made after the alleged custom was challenged (*n*)

(*hi*) Juggomohun v. Manichand, 7 M I A 269, 282 4 W R P C 8 1 Suth P C 357

(*i*) Dalglish v Guzuffer, 23 C 427 3 C W N 21 , Sec 183, Act VIII of 1885

(*j*) Martand v Malhar, 55 C 403 P C , Rajani v Nitai, 48 C 643, 718 F B 32 C L J 333 25 C W N 433 63 I C 50 , Hazarimal v Abani, 17 C L J 38, 41 17 C W N 280 18 I C 625 , Bhikabai v Manilal, 54 B 780, Hirabharti v Jamnabharti B u Javar, 1929 B 35

(*k*) Durga v Raghunath, 18 C L J 559 18 C W N 55 , Lachmi v Sangram, 14 I C 322 10 A L J 135 , Punni v Chat, 1 O L J 319 2 I C 640, Bhikabai v Manilal, *supra*

(*l*) Hurpurshad v Seo Dyal, 3 I A 259, 285 26 W R P C 55 , Durga v Raghunath, *supra*

(*m*) Gopal v Raghupati, 7 M H C R 250

(*n*) Ekradeshwar v Janeshwari, 41 I A 275 42 C 582,601 18 C W N 1249, 1256 21 C L J 9 27 M L J 373 12 A.L J 1217 17 Bom L R. 18 . 25 I C. 417.

In cases of the custom of a class, the history of the class is to be considered, in order to establish the custom (*o*) The Privy Council in a case, in which the parties were not Hindus, lays down the rule that it "may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy." (*p*)

Mercantile and agricultural usages need not be ancient, and they may be proved by the testimony of persons, who are in a position to know of their existence in their locality. (*q*)

Instances of custom or usage, judicially recognised, afford evidence of their existence (*r*) A few instances of transactions of recent date are not sufficient to establish a custom. (*s*)

Onus—The burden of proof, as to the existence of a custom, rests on the person who sets up a custom contrary to law. (*t*)

Customs not enforceable—Though a custom may be clearly established, it cannot be enforced if it is against public policy, (*u*) or is contrary to the express provision of legislative

(*o*) Shadeo *v* Kusum, 5 P L J 164, *see* P C Appeal in 50 I A 58 2 P. 230 27 C W N 901 37 C L J 369 44 M L J 476 25 Bom L R 560

(*p*) Ahmad *v* Channi Bibi, 30 C.W N 506, 510

(*q*) Sarimatulla *v* Pran Nath, 26 C 184, Bottomley *v* Forbes, (1838) 5 Bing. (N C.) 121 : 132 E R 1051 A case of usage at Bombay *Re* Mathews, *Ex parte* Powell (1875) 1 Ch D 501 C A

(*r*) Harnab *v* Mandal, 27 C 379, Radhiram *v* Dayal, 33 C L J 141, Rajah Rama *v* Rajah of Pittapur, 45 I A 148 41 M 778, 785 28 C L J 428 35 M L J 392 23 C W N 173 16 A L J 833 20 Bom L R 1056 47 I C 354, Veluthakkal *v* Veluthakkal, 31 M L J 875

(*s*) Luchman *v* Mohun, 16 W R 179, Kakarla *v* Raja Venkata, 29 M 24 16 M L J 8, Durga *v* Raghunath, 18 C W N 55 18 C L J 559 20 I C. 810.

(*t*) Durga *v* Raghunath, 18 C W N 55 18 C L J 559 : 20 I C 810, Syamanand *v* Ramkanta, 32 C, 6, 11, Venni *v* Vannichi, 51 M L F B 1928 M. 299; Raman *v* Muther, 40 M L J 301, Dahyabhai *v* Chunilal, 38 B 183 15 Bom L.R. 1035. 22 I C 289, Dharani *v* Sisu, 39 C L J 100, Paras Ram *v* Hukman, 73 I C 239; Bhagwandas *v* Rajmal, 10 B H C R 241, Lachmi *v*. Sangram, 10 A.L.J. 136 : 14 I C. 322.

(*u*) Vurmah *v* Ravi, 4 I A 76 : 1 M. 235, Pancha *v* Bindeswari, 19 C.W.N. 580 : 28 I C. 675; Panchu *v*. Bindeswari, 37 I C 960 (Pat.)

enactment, (*v*) or is immoral. (*w*)

Records of Custom.—There are various records of customs and usages prepared under the direction of the Government The Wajib-ul-arz (a written representation or petition) and Riwaj-i-am (*x*) (record of custom) are records of customs, prepared under the authority of public officers.

WAJIB UL-ARZ —The evidentiary value of *Wajib-ul-arz* varies according to circumstances ; (*y*) but in the absence of ambiguity in the record, or proof of neglect of duty on the part of the officers preparing it, the record of a custom in it is reliable, (*z*) and where possible, constructions compatible with rules of Hindu law should be placed upon it. (*a*) The Privy Council following the above-mentioned case of *Balgobind* (*b*) has laid down that these *Wajib-ul-arz* when properly used, afford most valuable evidence of custom and are much more reliable than oral evidence given after the event (*c*)

RIWAJ-I-AM —The *Riwaj-i-am* was held to be not of much value, if it was not supported by instances (*d*) It is referred to in many cases. (*e*) The Privy Council has held that it is admissible as evidence to prove facts entered in it, subject to rebuttal, and it may be accepted, even if unsupported by instances (*f*)

(*v*) Srinivas v Annasami, 15 M 323 , Empress v Ramanna, 12 M 273 , Ex parte Padmabati, 5 M H C 415 , Reg v Jaite, 6 B H Cr C 60 , Sections 372, 373 of I P Code

(*w*) Marubppa v Vaithilinga, 18 I C 979 1913 M.W N 247

(*x*) Vaishno v Rameshri, 10 L 86 49 C L J 38, 47

(*y*) Muhammad v Hussain, 25 I A 161, 169 26 C 81, 92 , Parbati v. Chandrapal, 36 I A 125, 135 31 A 457 , Chandi v Gur, 1930 O 339

(*z*) Balgobind v Badri Prasad, 45 A 413 50 I A 413 29 C W N 465; 38 C L J 302

(*a*) Durga v Lal, 1928 O 509, 512

(*b*) Balgobind v Badri, *supra*

(*c*) Sheik Rostan v Chaudri, 52 C L J 183, 193 P C

(*d*) Rukman v Kripa, 22 I C 134 338 P L R 1913 209 P W R 1913.

(*e*) Chawa v Ahmed, 8 I 144 , Khuda v Muhammad, 8 L 127 , Labh Singh v Mango, 8 L 281 , Maimun v Jowan, 8 I 139 , Zakar v Ghulam, 8 L 149 , Kahan v Gopal, 8 L 527 , Nizam-ud Din v Muhammad, 8 L 536 , Labha v Raman, 9 L 1 , Malik v Waryam, 9 L 471 , Sultan v Sharfen 10 L. 249

(*f*) Vaishno v Rameshri, 10 L 86 49 C L J 38, 47.

PUNJAB CUSTOMS.—The Punjab is generally governed by customary law. The Punjab School, in addition to the Mitakshara and Viramitrodaya, recognises the authority of the customs prevailing in the Punjab. Notes on customary law, as administered in the Courts of the Punjab, by Charles Bulnois and W. H. Rattigan, (1876) and the Punjab Customary Law, edited by Tupper, (1881) are always relied on as evidence of customs recorded in them.

OTHER RECORDS.—There are books, in which records of customs are to be found, such as Mr Steele's Collection of customs in force in the Deccan, the Thesawalame or description of the customs of the Tamil inhabitants of Jaffna in the Island of Ceylon, the Madura Manual by Mr Nelson, the Malabar Manual by Mr Logan, the North Arcot Manual by Mr Cox, the South Canara Manual by Mr Surrock, the Manual of Administration of the Madras Presidency by Dr Maclean, the Statistical Accounts of Bengal by Sir William W. Hunter, the Castes and Creeds of Bengal by Sir Herbert Risley, the District Gazetteers, the Castes and Tribes in Southern India by Mr Thurston, the Imperial Gazetteer of India, published under the authority of the Secretary of State for India in Council, and other similar books

Sub-Sec. iii—COMMENTARIES

Sources of positive law.

Sources of positive law.—It has already been indicated that the Smritis and Customs are the sources of the positive or lawyer's law. The definition given by Yàjnavalkya, of Cause of Action, implies the same view. (g) For, it is declared, that a Cause of Action arises when a person, wronged in a manner *contrary* to the *Smriti or a Custom*, complains to the King. Manu also appears to support the same view, for, he ordains that the King should decide causes of suitors according to rules founded on *local customs and the codes of law*. (h)

Puranas and Upa-Puranas

But it has already been observed that certain innovations have been introduced by the later commentators of the Mahomedan period, and are contained in the Upa-Purànas or minor

(g) Text No 22 (h) Text No 20

subsidiary Puràṇas which are modern compositions by Bràhmanical writers. It is on the authority of these spurious works, that some recent commentators maintain that certain practices sanctioned or ordained by the Smritis must not be followed in this Kali age Some of these practices were condemned by the Smritis themselves, some are declared by the Mitàksharà and other principal commentaries to have ceased to be binding at present on the ground of the same being abhorred by the people, while the rest appear to have been opposed to the Bràhmanical interests.

Brahmanical influence

The caste superiority of Bràhmanas depended according to the Smritis entirely on the study of the sacred literature and on possession of superior merit, in the absence of which they could not claim to be better than Sùdras The object which these writers seem to have had in view was, to secure by these innovations their hereditary superiority and exclusiveness by preventing mixture with lower castes. But Puràṇas cannot override the Smritis which are admittedly superior to the Puràṇas in authority In order to obviate this difficulty, these comparatively recent commentators cite by the name of Smriti, those passages of these secondary Puràṇas which are विधायक वाक्यानि, that is, which declare rules of conduct, or in other words, which enjoin men to do or abstain from doing anything

Misrepresentation of Pandits

Accordingly, the Pandits who were appointed to advise the judges of the British Indian Courts, on points of Hindu law and usage, misled them by incorrectly representing these innovations to be as authoritative as the Smritis Sir William Jones was misled into giving prominence to certain passages of an Upa-Puràṇa on these innovations, by inserting their English version at the end of his translation of Manu's Code, which passages were palmed off on him, as Smritis or passages of law.

Authority of Puranas

But it should be observed that the names of *Smriti* and *Puràṇa* are given to different works, and while dealing with the relative authority of these *works*, the *Smritis* have been pronounced to be superior to the *Puràṇas*. Hence it is difficult to understand how some passages of the *Puràṇas*

can be called *Smriti*.

What passages of Smritis to be rejected.

It has already been observed that even passages of the Smriti, the origin of which may reasonably be traced to covetousness of the priests, or selfishness of any persons, are to be rejected as spurious and fraudulent interpolations.

Hence these innovations, in so far as they appear to be dictated by improper motives of the writers, cannot be regarded to be of any weight, far less can they be treated as authority.

Relative authority of Smritis and Customs

As regards the relative authority of Smritis and Customs when they are in conflict, it has already been shown that it is now settled law that the latter override the former.

But Kumàrila Swàmin and other commentators of the Mìmàmsà school of philosophy, who were opponents of the Buddhists and supporters of Bràhmanism, and took upon themselves the task of refuting the peculiar doctrines of Buddhism, felt themselves bound to maintain the superiority of the Sàstras over human institutions, and were therefore unwilling to accept the authority of customs and usages that are contrary to the Sàstras. Accordingly, those who reluctantly admitted the binding character of such customs and usages did however, maintain that their authority should be confined only to the locality, or to the caste or the class of persons, where or among whom, they are found to prevail, that is to say, the authority of the Sàstras should be curtailed only to that extent and no further.

Commentaries or *Nibandhas*,

Commentaries.—The Sruti and the Smriti are, theoretically speaking, the sources of law. But all these are now practically replaced by the Nibandhas or digests or commentaries that are accepted as authoritative expositions of Hindu law in the different provinces. The commentators profess to interpret the law enunciated by the Smritis or Codes of Hindu law. A critical reader of the different commentaries on Hindu law will be impressed with the idea, that the positions maintained by them respectively, which are at variance with each other, cannot all be supported by the texts of the Smritis, which they profess to interpret, but which appear to have been made subservient to their views, by bringing changes

effect change in law, upon the language of the texts, rather than correctly interpreting them. This fiction of interpretation is found in every system of law. A rule of law is sometimes enlarged in its operation so as to include a case not covered by its language, or curtailed so as to exclude a case that falls within its terms: and this is designated rational interpretation based upon intention. Whenever there is a rule that is rigid in theory and one wishes to get out of its terms, he must have recourse to the fiction mentioned above This mode of changing law is not peculiar to Hindu law, but is common to many systems of jurisprudence The commentaries, however, have replaced the Smritis, and it is not open to any one to examine whether a particular position maintained by an authoritative commentary accepted as such in a locality, is really supported by the Sàstras.

their authority

Clear texts and the principles of interpretation

Clear texts and principles—But it must not be supposed that the commentators have no respect for the Smritis, and have always disregarded or discarded them for the sake of any principle introduced by them On the contrary, when there is a clear and unambiguous text laying down a particular rule, effect is given by them to it, although the same is inconsistent with any principle referred to by them. In fact, they refer to common feature while dealing with individual cases, from which a general principle may be deduced The courts, however, have gone further. They have deduced such general principles from the particular cases, and applied them to other cases to which they were not intended to apply. The generality of the expressions that may be found in some instances were not intended to be expositions of the whole law, and cannot be taken to establish a proposition that may seem to follow logically from them, since the law is not always logical at all. (*i*) For instance, a text of Yama provides in clear and unambiguous language that the whole and the half brothers of a member of a joint family succeed equally to his share in the joint *immoveable* property, if succession opens to brothers. Effect is given to this text in the Dàyabhàga,

(*i*) Quinn *v* Leathem, H L, (1901) A C 495, 506 See also O W Holmes' Lectures on Common Law, Lec 1, page 1

but the Calcutta High Court refused to follow it. Another instance is the curtailing of women's rights in inherited Strìdhan property, by the deduction by our courts, of a general principle from the curtailment of the heritable right which Jìmùtavàhana for the first time conferred on women in the property of males even when members of joint families, which (curtailment) he effected on the authority of a particular text relating only to the widow's right to the husband's estate, but extended by him to the estate of all *males*, with respect to which only the law was changed by him, and not intended by him to be extended to Strìdhan property, succession to which he had dealt with in a separate earlier chapter, where equal heritable right of sons and daughters in their mother's estate is clearly declared by him, so that it would not be reasonable to say that the daughters take a lesser interest than the sons, in the shares respectively allotted to them

Commentators of Hindu and Mahomedan periods

Of Hindu and Mahomedan periods.—The commentaries of the Hindu period appear to have been composed by practical lawyers, while those that came into existence during the Mahomedan rule, were written by "Sanskritists without law" who seem to be narrow-minded Bràhmans having no concern with the administration of justice, and whose works are more religious and speculative than secular and practical, and contain many innovations of a retrograde character. The Mitàksharà and the Dàyabhàga, the two commentaries of paramount authority giving rise to the two principal schools of Hindu law, are works of the former description, compiled by persons of advanced views, who have developed and improved the Hindu law in many respects. There are many works of the latter description, including the treatises on adoption, which properly speaking, are not entitled to any authority as regards the novel rules sought to be introduced by them, upon the authority of the Upa-Purànas fabricated by Bràhmanical writers for the benefit of their own class.

The following is a list of the various commentaries, and other works on law, with short notes on each indicating the school or schools in which they are respected .—

Ashtavinsati Tattva—by *Raghunandana Bhattacharya*

of Nabadwipa is so called, by reason of its being divided into twenty-eight books It is also known as Smriti-Tattva and deals mainly with ritual The author appears to have flourished in the sixteenth century, (j) but the Calcutta High Court without assigning any reason has held that he flourished in the fifteenth century (k) He is universally respected in Bengal as a jurist whose authority is surpassed only by Jimutavahana.(l) One of the books called *Dayatattva*, (m) however, deals with the substantive law of inheritance The book is an abridgment of the doctrines of Jimutavahana and is an excellent compendium of his treatise, although on a few points Raghunandana has differed from his master.

Bhagavad-Bhaskara—See *Vyavahara Mayukha*, below.

Chaturvarga-Chintamani—See *Hemadri*, below.

Colebrooke's Digest—See *Vivada Bhangarnava*, below.

Dattaka-Chandrika.—See Ch IV, Sec 2, Sub-Sec ii.

Dattaka-Mimansa—See Ch IV, Sec. 2, Sub-Sec ii

Dayabhaga its age,

its author Jimutavahana,

flourished in 942 A D.

Dayabhaga.—Jìmùtavàhana, the author of the Dayabhága appears to have flourished in the last quarter of the eleventh and the first of the twelfth century of the Christian era. The evidence of his age, almost conclusive, is afforded by some passages of the Kála-Viveka another work of the same author, in which he states the occurrence of certain astronomical positions of the sun and the moon in the years 1013 and 1014 of the Saka era, in such a manner that the same appear to have been observed by himself, or to have occurred at his time and were well-known This agrees with the account of Jimùta, given by Eru Misra in his Kula-Kàrikà or Social History of the Bengal Bráhmanas, in which he is stated to be the seventh descendant of Bhatta-Nàràyana, one of the five learned and virtuous Bráhmanas who together with the five learned Káyasthas were sent by the King of Kányakubja, the modern Kanauj at the request of A'disùra, the King of Bengal, and who reached Gaur the then capital of Bengal, in the month of Magh of the year 999 of the Sambat era which is

(j) Colebrooke's preface to Dayabhaga and Mitakshara
(k) Tailakhya v Radha, 23 C W N 970, 971
(l) *Ibid*, Ramnath v Durga, 4 C 550, 554
(m) See author's Translation.

57 years in advance of the Christian era (=942 A.D.) which again is 78 years in advance of the Saka era. (*m1*)

Jimutavahana was Minister of King of Bengal

As was anticipated above, it now appears from the account given by Eru Misra that Jimutavahana was the Minister of Viswaksena, a King of Bengal, and also Administrator of Justice, and was celebrated for his great learning. (*m2*)

The Dayabhaga is not a commentary on any particular code, but professes to be a digest of all the codes, while it maintains that the first place ought to be given to the Code of Manu. This commentary, or that portion of it, which is now extant, is confined to the subject of partition or inheritance alone.

The Dayabhaga is deemed as an enactment amending the Mitakshara law in Bengal This view follows from what is stated in the case of *Collector of Madura* (*n*) and that of *Bhugwandeen Doobey* (*o*) And in the well-known case of *Kerry Kolitanee* (*p*) after reference to a passage of the Mitakshara in a Bengal case, the same view has been explained thus :—

"It is true that there is no special discussion on this point in Dayabhaga, but the reason of this omission is obvious The authority of the Mitakshara, it should be remembered, was at one time supreme even in *Bengal*, and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them It is for this reason that the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in that school, as may be seen from the remarks made by the Privy Council in the case already referred to "

There are six well-known commentators of this work, namely, Srinathacharya Churamani, Rambhadra Nyayalankara, Achyutananda Chakrabatty, Maheswara Bhattacharya, Raghunandana Bhattacharya and Srikrishna Tarkalankara Pandit Bharat Chandra Siromani has published the original Dayabhaga with the six commentaries

(*m1*) In this connection *see* Rajani *v* Nitai, 48 C 643 25 C W N 433 32 C L J 233 63 I C 50

(*m2*) See Preface to the 2nd Ed , of the translation of Dayatattva by the author

(*n*) 12 M I A 397 10 W R P C 17

(*o*) 11 M I A 487, 507 9 W R P C 23

(*p*) 19 W R 367, 372 affirmed by P C , 5 C 776 7 I A 115, 126 , *See* Akshoy *v* Hari, 35 C 721 12 C W N 511

Daya-Krama-Sangraha—by *Sri Krishna Tarkalankara* is an original treatise and contains a good compendium of the law of inheritance according to the texts of Dayabhaga of Jimutavahana. The author lived in the first part of the eighteenth century and is ranked, in general estimation in Bengal, after Jimutavahana and Raghunandana. The work was translated by Mr P M. Wynch in 1818.

Daya-Nirnaya—of *Srikara Bhattacharya* is a treatise on inheritance according to the doctrines received in Bengal. It is practically a summary of the work of Jimutavahana or of Raghunandana.

Daya-Rahasya or **Smriti-Ratnavali**—by *Ramanath Vidyavachaspati* was considered as an authority in some of the districts of Bengal. "It is a work not devoid of merit , but, as it differs in some material points from both Jimutavahana and Raghunandana, it tends too much to unhinge the certainty of the law on some important questions of very frequent recurrence." (*q*)

Daya-Vibhaga—is a treatise of some authority in Southern India. It is a commentary on inheritance by *Madhavacharya* who was prime-minister of several kings of Vijayanagara dynasty and flourished during the latter half of the fourteenth century (*r*) It was translated by Dr. A C Burnell, Ph D , of Madras Civil Service in 1868

Dayatattva —See *Ashtavinsati Tattva*, above.

Dipakalika—is a commentary on the Institutes of Yajnavalkya by *Sulapani*, a native of Mithila but who resided at Sahuria in Bengal. It is held in high esteem in the Bengal School.

Gentoo Code.—See *Vivadarnava Setu*, below.

Hemadri—is the author of Chaturvarga-Chintamani and is believed to have written it in the beginning of the fourteenth century. The work is a collection of Smritis and deals with all subjects and is generally respected in many schools of Hindu law. It is a mine of interesting quotations from the Smritis

(*q*) *See* Preface by Colebrooke to his edition of the Dayabhaga Mitakshara (1810)

(*r*) *See* Mayne's Hindu Law, 9th Edition, page 28.

and Purànas. The author was known by the name of *Hemadri Bhatta Kashitaran.*

Jagannath's Digest.—See *Vivada-Bhangarnava*, below.

Kalpataru—by *Lakshmidhara* is a Smriti compilation on the duties, feasts and observances meant for house-holders. It was composed by the command of Gobinda Chandra, a king of Kasi or Benares (s) Chandeswara in his Vivada-Ratnakara often quotes the opinions of Lakshmidhara and cites passages from Kalpataru to support his views. (t) The author lived in the twelfth century

Kesava-Vaijayanti or **Vaijayanti**—by *Nanda Pandita* also the author of Dattaka-Mimansa, is a commentary on the Code of Vishnu. According to his own account it was composed in Sambat 1679 corresponding to 1623 A D. It appears to be exceedingly strange that the author does not in this commentary make any allusion whatever to those somewhat novel rules that he professes to deduce from certain minor codes of law, in his treatise on adoption, *viz*, Dattaka-Mimansa The author was a distinguished Pandit of Benares who composed the commentary under the patronage of Kesava *alias* Thammasa Nayaka, a king of Karnata (modern Canara) in the Deccan.

Madana-Parijata—of *Bisvesvara Bhatta* was composed by the command of Madanapala, a ruler of Kashtha on the banks of the Jamuna. It was composed at the end of the twelfth century (*u*) and deals chiefly with religious law but also comprises a chapter on inheritance. There are passages in this work which show that Smriti Chandrika has been consulted by Bisvesvara Bhatta (*v*) Chandesvara, the author of Vivada-Ratnakara often quotes from *Parijata* as also from *Kalpataru.*

Madhabi—is a commentary on the Institutes of Manu by *Sayanacharyya* and is an authority in the Carnatic (*w*)

Madhaviya —See *Parasara-Madhava* and *Vyavahara-Madhava*, below

(*s*) Sanskrit Manuscripts of Maharaja of Bikaner, p 406, Colebrooke's Essays, Vol II, p 253

(*t*) Sarvadikari's Tagore Law Lectures on Inheritance, 2nd Ed, p 298

(*u*) Colebrooke's Preface to Mitakshara and Dayabhaga

(*v*) Sarvadikari's Tagore Law Lectures on Inheritance, 2nd Edition, pp 296-297

(*w*) Intro to Dharma Shastras by Shastri M N Dutt, p xi.

Madhhavyam.—See Parasara Madhava and Vayavahara-Madhava, below.

Mayukha.—See *Vyavahara-Mayukha*, below.

Mitakshara.—The Mitakshara which is undoubtedly anterior to Dayabhaga is a running commentary on the Institutes of Yajnavalkya, by *Vijnaneswara* called Vijnana-Yogin, an ascetic of the order of *Sannyasis* founded by Sankaracharya, who cites texts of other sages, and reconciles them where they seem to be inconsistent with the Institutes of Yajnavalkya. This concise commentary is universally respected throughout the length and breadth of India, except in Bengal where it yields to the Dayabhaga, on those points only in which they differ ; but it may be consulted as an authority even in Bengal, regarding matters on which the Dayabhaga is silent It is a commentary on all branches of law in its widest sense, professing as it does to elucidate the Institutes of Yajnavalkya. The approximate date of the work must be before 942 A.D., which is the probable date of the Dayabhaga.

There are several commentators again on this commentary of Yajnavalkya, of whom, Bisvesvara Bhatta, Balambhatta (or Lakshmi Debi who assumed that fictitious name) are renowned and their commentaries are available (x) Of these *Subodhini* by Bivesvara Bhatta "is a collection of notes elucidating the obscure passages of the Mitakshara, concisely, but perspicuously It leaves few difficulties unexplained and dwells on them no further than is necessary to their elucidation" (*y*) "Balam Bhatta's work is in the usual form of a perpetual comment It proceeds, sentence by sentence, expounding every phrase and every term, in the original text. Always copious on what is obscure and often so on what is clear." (*z*)

In Schools of Hindu law other than Bengal, the authority of the Mitakshara has been to some extent modified by still modern commentators respected in different Schools.

(x) See author's Tagore Law Lectures on Adoption, p 104, Rajkumar Sarvadikari's Tagore Law Lectures on Inheritance, p 310, 2nd Ed, but Dr Julius Jolly in the Foreword to the Translation of his work on Hindu law and custom says that she is not Balambhatta

(*y*) Colebrooke's Preface to Mitakshara and Dayabhaga

(*z*) Colebrooke's Preface to Mitakshara and Dayabhaga.

Mitakshara.—There is another work of the name of Mitakshara, but it is a gloss on Gautama Smriti by Haradatta (*a*) It is also called "Gautamiya Mitaksharas." (*b*)

Nanda rajkrit—is a commentary on the Code of Manu by Nandaraja and is known amongst the Maharattas (*c*)

Nirnaya-Sindhu—by *Kamalakara* is a book on ritual and Vivada-Tandava by the same author is a work on jurisprudence. The author is considered as an authority by the Benares and the Southern Schools as also in the Western School (*d*) not so much in legal matters as in questions of ceremonial In these Schools he occupies the same position as Raghunandana does in Bengal This book was finished in 1612 A.D. The author was a follower of Vijnaneswara.

Parasara-Madhava or **Parasara-Bhashya**—is the celebrated commentary on the Institutes of Parasara It deals with Achara and Prayaschitta or ritual and penance Its author *Madhavacharya* in the Introduction to his commentary has given a glimpse of his personal history. He was the minister of the third and other kings of Vijayanagara and flourished in the fourteenth century. The author was a versatile writer relating to Vedic, Philosophical, Legal and Grammatical works His commentary was written between 1361 and 1375. Quotations are found in Madhava's work from Mitakshara and Smriti-Chandrika The chapter on Inheritance is reckoned as one of the standard authorities in the Benares, Madras and Bombay Schools and is also held in high respect in the Bengal and Mithila Schools (*e*) It has been held that in the Madras School this commentary and Smriti-Chandrika are the special authorities next to the Mitakshara. (*f*) Works of Madhavacharya are usually referred to as *Madhavyam* or *Madhaviya.*

Samskara-Kaustava.—It is a work by *Anantadeva* and belongs to the same period as Nirnaya Sindhu It is respected in the Bombay School (*g*)

(*a*) *See* Colebrooke's Preface to Mitakshara and Dayabhaga.
(*b*) Sacred Books of the East, Vol II, Intro to Gautama, p vxii.
(*c*) Introduction to Dharma Shastras by Shastri M N Dutt, p xi
(*d*) Dwarka *v* Sarat, 39 C 319, 336.
(*e*) Sarvadikari's Inheritance, 2nd Ed, pp 278 and 281
(*f*) Bhagwandeen *v* Myna, 11 M I A, 487, 508, Collector of Madura *v*. Mootoo, 12 M I A 397, 437, Chinsami *v* Kunja, 35 M 152, 155
(*g*) Collector of Madura *v* Mootoo, 12 M I A 397, 438.

Saraswati-Vilasa—is a work of paramount authority in the territories under the Government of Madras and Orissa (*h*) In the absence of other authority it is applicable to the Benares School (*i*) The work is attributed to *Pratapa Rudra Deva,* one of the princes of the Kakateya dynasty of Warangal (or Gajapati dynasty who ruled at Kataki-nagara or modern cuttack) The reputed author Pratapa Rudra Deva was a contemporary of Chandesvara, the author of Vivada-Ratnakara But the latter was a native of Mithila and the former was a king in the extreme south of the Peninsula (*j*) The Dayabhaga portion of it has been translated by Rev Mr Foulkes

Smriti-Chandrika—of *Devananda Bhatta,* is the earliest and foremost authority in the Dravida or the Madras School in the countries occupied by the Hindu nations of Dravida, Tailangana and Karnata inhabiting the greatest part of the Peninsula or the Deccan (*k*) Very little of the life of the author is known but it seems that he flourished between the twelfth and the thirteenth century. The doctrines of Smriti Chandrika are not recognised in Northern India, and cannot, except by way of analogy, be applied to explain the dubious or indeterminate phrase or term in the Mitakshara (*l*) Bisvesvara Bhatta, author of *Madana-Parijata* consulted this work The Dayabhaga portion of it has been translated by Mr Krishnaswamy Iyer

Smriti-Ratnavali.—See *Dayarahasya*, above.

Smriti-Sara or Smrityartha-Sara—by *Sridharacharyya* is a commentary on the Smritis There is another commentary of the same name of Smriti-Sara or Smriti-Samuchchaya by Harinathopadhyaya. Both these are respected in Mithila. (*m*)

Smriti-Tattva —See *Ashtavinsati Tattva*, above.

Subodhini—is a commentary on the Mitakshara by *Bisvesvara Bhatta* It leaves few difficulties unexplained Mr Colebrooke looked to this when he translated the portion of the

(*h*) Birbhadra *v* Kalpataru, 1 C L J 388, 403, Basanta *v* Jogendra, 33 C 371, 375, Jotindra *v* Nagendra 35 C W N 1153, 1156 P C

(*i*) Jotindra *v* Nogendra, *supra*

(*j*) Sarvadikari's Tagore Law Lectures on Inheritance, 2nd Ed, p 299

(*k*) Colebrooke's Preface to Mitakshara, Bhagwandeen *v* Myna, 11 M I A 487, 508, Collector of Madura *v* Mootoo, 12 M I A 397, 437

(*l*) Budda Singh *v* Laltu, 42 I A 20 37 A 604, 619 20 C W N 1,11

(*m*) Vyavastha-Darpana, p x

Mitakshara on inheritance as it became available to him.

Vaijayanti.—See *Keshava-Vaijayanti*, above.

Varada Rajya—is a general digest and is mainly a commentary on the Institute of Narada by *Varada-raja.* It is respected in Southern India as an authority

Viramitrodaya—of *Mitra Misra(n)* generally follows and maintains the doctrines of the Mitakshara It refutes the contrary doctrine of the Bengal School, meeting the arguments put forward by the founder of that School and by his follower Raghunandana the author of the Dayatattva, to support the positions that are opposed to the Mitakshara School. In the unchastity case (*o*) the Judicial Committee has held that the Viramitrodaya "may also like the Mitakshara, be referred to in Bengal in cases when the Dayabhaga is silent" Like Raghunandana the author is respected in the Benares School and "is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School" (*p*) The Viramitrodaya is also relied on in all the Schools except the Bengal The author flourished towards the end of the sixteenth or the beginning of the seventeenth century

Vivada-Bhangarnava or **Jagannath's** or **Colebrooke's Digest**—was compiled by *Jagannath Tarkapunchanana* at the instance of Sir Willam Jones and at the direction of the Government It has been translated by Mr Colebrooke "With the exception of the three leading writers of the Bengal School, namely, the author of the *Dayabhaga*, the author of the *Dayatattva* and the author of the *Daya-Karama-Sangraha*, the authority of Jagannath Tarkapunchanana is, so far as that School is concerned, higher than that of any other writer on Hindu law, living or dead, not even excluding Mr Colebrooke himself" (*q*)

Vivada-Chandra—is a work much respected in the Mithila School. (*r*) It was composed by Lakshmi or *Lakshmi Devi*,

(*n*) See author's Translation
(*o*) Moniram *v* Keri, 5 C 776 7 I A 115 affirming 19 W R 367
(*p*) Giridhari *v* Bengal Govt, 12 M I A 448, 466, see 47 A 127, 131
(*q*) Keri Kolitany *v* Moneeram, 13 B L R 50 19 W R, 394
(*r*) Rutcheputty *v* Rajinder, 2 M I A 132, 155.

queen of Chandra Simha, in the name of her nephew, Mitra Misra It was composed towards the end of the fourteenth century and named after the reigning prince The authoress of this work must be distinguished from another noteworthy lady author of the same name who assumed the name of Balam Bhatta, the famous commentator of the Mitakshara

Vivada-Chintamani and **Vyavahara Chintamani**—of *Vacha spati Misra* are also authorities in the Mithila School They were composed in the middle of the fifteenth century These works are held in high esteem even higher than Vivada-Ratnakara and Vivada-Chandra (s) The Vivada-Chintamani has been translated by Prosonno Coomor Tagore, the founder of the Tagore Professor of law

Vivada-Ratnakara—of *Chandesvara (t)* is one of the principal works on law and respected on the Mithala School The author was a minister of Harasimha Deva, a king of Mithila He flourished in the fourteenth century In the peroration of the work he mentioned the year in which he performed the ceremony of Tula Parusha or the distribution of his own weight of gold amongst Brahmanas It is not a commentary of any particular code but is a regular digest of the law

Vivada Tandava—of *Kamalakara* is a work on jurisprudence He is also the author of another work, Nirnaya-Sindhu He is an authority in the Benares and the Madras School and also in the Bombay School (u) See *Nirnaya-Sindhu*, above

Vivadarnava-Setu or **Code of Gentu (Gentoo) Laws**—is a digest compiled at the request of Warren Hastings It is commonly known as Halhed's Gentoo Code, from the name of its translator. This was translated not from the original Sanskrit, but from a Persian version supplied to him by Halhed's interpretor. Sir William Jones descibes this translation as "a loose, injudicious, epitome of the original Sanskrit, in which abstract, many essential passages are omitted, though

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(s) Rutchepatty v Rajunder, 2 M I.A 132, 146, Colebroke's Preface to his Digest, 19

(t) See author's Translation *with* Mr (subsequently Mr. Justice) Digambar Chatterjee

(u) Dwarka v Sarat, 39 C 319, 330

several notes of little consequence are interpolated from a vain idea of elucidating or improving, the text." (*v*)

Vyavahara-Madhava—is another work respected in the Madras School. It is a treatise on jurisprudence by *Madhava-charya* who flourished in the fourteenth century and was the prime minister of several kings of Vijaynagara dynasty. This work supplements his commentary, *Parasara-Madhava* or *Parasara-Bhashya* popularly called *Madhavyam* or *Madhaviya* mentioned above, which deals with ritual and penance

Vyavahara-Chintamani.—See *Vivada-Chintamani*, above.

Vyavahara-Mayukha—is a work of *Nilakantha* He flourished in the seventeenth century (*w*) and was known as *Bhatta Nilkantha* and belonged to the learned Bhatta family, the founder of which came from the Deccan and settled at Benares He was the first cousin of Kamalakara, the author of Nirnaya-Sindhu By the command of Bhagabanta Deva, a chief of Bundelkhund, Nilkantha composed a work called *Bhagavad-Bhaskara* after the name of his patron, consisting of twelve books named Mayukha of which eleven are devoted to religious and ceremonial subjects and one denominated Vyavahara-Mayukha which deals with litigation or jurisprudence. (*x*) He, like Raghunandana and Kamalakara, was regarded as an authority not so much for the book on law as for the books on religious matters However, his Vyavahara-Mayukha, came to be regarded as an authority concurrently with the Mitakshara by the Maharastra Brahmanas of the Bombay Presidency. (*y*) "Questions on the Hindu Law of inheritance to property in the island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha, where the latter differs from it" (*z*) In Guzrat and the Island of Bombay (*a*) as also in North

(*v*) Preface to Colebrooke's Digest, 11

(*w*) *See* Narain *v* Notisa, 1927 N 121

(*x*) V N Mandlik's Hindu Law, Introduction, p lxxiv *et seq*

(*y*) Collector of Madura *v* Mootoo, 12 M I A 397, 438

(*z*) Kesserbai *v* Hunsraj, 30 B 431, 442 33 I A 176, 186, *see* also Gojabai *v* Shrimat, 17 B 114, 118

(*a*) Krishnaji *v* Pandurang, 12 Bom H C 65, Lallubhai *v* Mankuvarbai, 2 B 418, Balkrishna *v* Lakshman, 14 B 605, Janaki Bai *v* Sundra, 14 B 612, 623

Konkan (*b*) the Mayukha is paramount to even the Mitakshara. In Ahmednagar, Poona and the Khandesh, the Mayukha is an authority though not capable of over-ruling the Mitakshara. (*c*) But the Mitakshara ranks first and paramount in the Maratha country and in Northern Canara (*d*) as also in Berar. (*e*) It has been translated (except the Chapter on Ordeals) by Mr Borradaile and the whole of it by Rai Shaheb V. N. Mandlik

Vyavahara-Nirnaya—was written by *Varadaraja* who was probably a native of Tamil country and lived at the end of the sixteenth or the beginning of the seventeenth century (*f*) The law of Partition and Succession was also translated by Dr. A. C. Burnell in 1872. It is respected in the Madras School.

Sub-Sec iv—CASE-LAW

Judicial decision as source of law

Case-Law—The most important source of the present Hindu law, is the case-law consisting of the decisions of the Judicial Committee of His Majesty's Privy Council, and of the Highest Courts of Justice in this country. These have practically superseded the Nibandhas or Commentaries. These decisions immediately affect the parties to the suits, but as precedents they are binding on the entire community In applying the law to particular cases, the Judges expressly or by necessary implication enunciate what the law is, and the view of the law expressed and acted upon by them serves as a guide in similar cases arising subsequently, and is taken to have a binding force. An expression of opinion on a point of law, not necessary to be determined for the purpose of deciding the case, though respected, is not considered to be binding and is called an *obiter dictum*.

Decision on Hindu law by English Judges

European authorities and Judges.—The Hindu law as contained in the Commentaries is silent on many points of detail, and the Judges of the superior courts have had to supply this deficiency by laying down rules on such points as

(*b*) Sakharam *v* Sitabai, 3 B 353, Janakibai *v* Sundra, *supra*
(*c*) Bhagirathi *v* Katrunjiran, 11 B 285, 294
(*d*) *See* Mayne's Hindu Law, 9th Ed, p 29
(*e*) Narain *v* Tulsiram, 22 N L R 183
(*f*) Mayne's Hindu Law, 9th Ed, p 28

they were called upon to decide The administration of Hindu law by the English Judges shows forth in clear light the administrative capacity, the indomitable energy, the scrupulous care and the strong common sense of the English lawyers. They commenced to administer justice with the aid of Pandits appointed to advise them on Hindu law. Within a short time the leading treatises and a few others were gradually rendered into English by Sir W Jones, Mr Colebrooke and Mr Sutherland Systematic and concise treatises on Hindu law were also composed by Sir F Macnaghten, Sir T Strange and Sir William Macnaghten The opinion of these learned text-writers is respected as being based upon considerable research, and consultation with learned Pandits. It cannot but be admitted by an impartial and competent critic on perusing the reports of cases, that in the majority of instances the conclusions arrived at by the English Judges are perfectly consistent with the law and feelings of the Hindus But there were difficulties almost insurmountable by foreigners in the way of a correct understanding and appreciation of the argumentative works on a system of ancient law suited to the condition and the feelings of a people, opposed to their own , especially when they had no access to the original books, and the principles of the system of reasoning, followed by the Hindu writers The rules of Hindu law on many points *seemed* to the English lawyers to be vague and capable of diverse interpretations Where therefore arguments *pro* and *con* seemed to them to be equally balanced on any particular point of law they would naturally be disposed to adopt a view that accorded with their own feelings, associations and *præsumptiones hominis,* but which might be altogether opposed to the Hindu view So instances of decisions of highest tribunals contrary to Hindu law, customs and feelings of the Hindus are not wanting

In this connection should be read the following observations made by the Judicial Committee in the case of *Runguma* v. *Atchama* (g) —"At the same time it is quite im-

(g) 4 M I A 1, 97

possible for us to feel any confidence in our opinion upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reason by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindus, with which we cannot be familiar."

Alteration of Hindu law by judicial decisions

Important changes in Hindu law by judicial decisions—The principal points in which there seems to be a divergence between the Commentaries and the judicial decisions are as follows

1. There is no distinction in Bengal between the grandparental or ancestral and the father's self-acquired property as regards his power of alienation when he has male issue (*h*)

2. The Hindus governed by the Dayabhaga School, and others in respect of their separate property, have the power of testamentary disposition.

3. In Bengal a son has not even the right of maintenance as against his father possessed of property.

4. According to the Mitakshara School the son's interest in the ancestral property is liable for the payment of the father's debts if not contracted for an illegal or immoral purpose. (*i*)

5. Alteration is made in the order of succession according to the Dayabhaga and its well-understood traditional interpretation (*j*)

6 The Sapinda relationship ceases—not merely for purposes of marriage, but generally, and therefore for purposes of inheritance—after the seventh degree from the propositus on

(*h*) Tagore *v* Tagore, 18 W R 359 I A Sup 47

(*i*) Hunooman *v* Mt Babooee, 6 M I A 393, 421 ; 18 W R 81, Girdharee *v* Kantoo 1 I A 321, 330-333 22 W R P C 56, Suraj Bunsi *v* Sheo, 6 I A 88, 100, 108 5 C 148, Mahesvar *v* Kishen, 34 C 184 11 C W N 294 5 C L J 441, Lachmi *v* Basant, 16 C L. J. 85 16 I C. 970.

(*j*) Guru Gobind *v* Anund, 13 W R F B 49 5 B L R 15, Digumber *v* Moti, 9 C 563 F B, Sarolah *v* Bhoobun, 15 C 292, Braja *v* Jiban, 26 C 285, Toolsee *v* Luckhymoney, 4 C W N 743, Dino *v* Chundi, 16 C L J 14 16 I C 349, Kedar *v* Amrit, 16 C L J 342 17 C W N 492 17 I C 283, Kailash *v* Karuna, 18 C W N 477 19 I C 677, Kedar *v* Hari, 43 C 1 19 C W N 1181.

the father's side and fifth on the mother's side. (k)

7. Rights of women have baen curtailed under both the Schools of law, and especially of those under the Mitakshara law by extending the Dayabhaga principles to them. (l)

8. An adopted son is entitled to all the rights and privileges of a real legitimate son, save and except those that have been expressly withheld from him. (m)

Father's power over ancestral immovabe property and woman's estate compared

It will be observed that the second and the third propositions depend upon the first, which again seems to have been arrived at by a misapplication of the doctrine of *factum valet.* A careful perusal of the second chapter of the Dayabhaga will convince the reader that the father's estate in ancestral immovable property resembles the Hindu widow's estate, with this difference that the restrictions on the father's right of alienation except for legal necessity, are imposed upon his estate for the benefit of his male issue, whereas the limitations on the widow's estate form the very substance of its nature, and are imposed upon her not merely for the benefit of reversioners. If the intention of the founder of the Bengal School had been to imply that a father is, as against his male issue, absolute master of the ancestral real property, he would not have entered into a long discussion in order to maintain that, on partition of such property, the father is entitled to a share twice as much as is allotted to each of his sons To argue out at great length that the father on partition of ancestral property is entitled to a double share, and at the same time to declare him the absolute owner of the ancestral estate, would be like the ravings of a madman, to use a favourite expression of the Hindu commentators The misapprehension appears to have arisen from the extension to ancestral property, of the doctrine of *factum valet* which relates to the property acquired by the father himself.

Extension of *factum valet* to ancestral property

(k) Ramchandra v Vinayak, 41 I. A 290 · 42 C 384 · 20 C L J 573 8 C W N 1154 10 N L R 112 25 I C 290 27 M L J 333. 16 Bom L R 863 12 A L J 1281

(l) ... -law on Stridhana and property inherited from male" Ch XII, S 7

(m) See Dattaka his status and rights , Status and inheritance in the adoptive family, Ch IV

The acute English lawyers that were connected with the Supreme Courts, either as judges or as advocates, or solicitors are responsible for some of the changes noted above. The Calcutta Supreme Court had to deal mostly with the Bengal School, and its decisions were respected by the Sudder Court that had to administer three schools of Hindu law, prevalent in the territories within its jurisdiction, in the greater portion of which the Dayabhaga is followed. The judges and the pleaders of the latter Court were more familiar with the Bengal law, and unconsciously extended the Dayabhaga rules to the Mitakshara cases And when this had been done in some cases, and the correctness of the decision was then called into question, it was held to be too late to re-open the point for, *Communis error facit jus*, (=Common error sometimes passes current as law.) (*n*)

Points decided held too late to be re-opened

In early times women laboured under great disabilities, the Mitakshara confers on them rights and privileges so as to place them almost on a par with men In some respects women are placed by the founder of the Bengal School in a more favourable position than what they occupy under the Mitakshara, but it is fenced in by limitations. The Mitakshara women have been subjected to Bengal limitations, while the advantageous position enjoyed by the Bengal women could not be given them. Under both the Schools, however, the law relating to women appears to have been construed rather against them. It may be that the Anglo-Hindu lawyers could not conceive the idea that in India which is so backward in material civilization, women could enjoy privileges that were denied to them in England.

Position of women how changed

The order of succession according to the Bengal School has also been changed upon the erroneous assumption that it is based entirely upon the *pinda* theory introduced by the founder of the School And the theory has been so explained as to render the order of succession expressly laid down by Jimûtavahana, inconsistent with the theory attributed to that acute logical writer. According to the present view,

Dayabhaga succession is also erroneously changed

(*n*) In this connection see Jagdish v Sheo, 3 Bom L R 301, Kedar v Hari, 43 C 1, 10-11 19 C W. N 1181

a fraternal nephew's daughter's son is to be preferred to the nephew's son's son, a cognate taking in preference to an agnate of the same degree, although they would succeed in the reverse order to the estate of the brother and the nephew, through whom they are related to the *propositus* a somewhat unique development of law, opposed to the very spirit of Hindu law, and unknown to any other system of Jurisprudence. It is a doctrine to which no Hindu Pandit versed in Hindu law, can be found to give his assent

Principle of *stare decisis* and its application to Hindus.

Stare decisis & Communis error facit jus—Whilst considering the above observations, it must be specially noted that the law as laid down in the decided cases must be accepted for the present as settled law, and justice will be administered in the courts in accordance therewith, so long as they are not upset by authority When a particular view of law has been taken in a series of cases, the judges though convinced of its erroneousness, think themselves bound to follow it, for otherwise they might disturb innumerable titles. But having regard to the facts that the people of this country are extremely conservative and tenaciously adhere to their customary law, that they do oftener consult the Pandits than lawyers on matters of Hindu law, that justice is administered by the highest tribunals in a language strange to the people, and that the case-law is not made accessible to the people by translating the reports of cases into their languages, it is doubtful whether the strictest adherence to the maxim *stare decisis* (= to stand by matters decided) is justifiable in all matters

P C, on *stare decisis* in Bhagwan v Bhagwan.

In the case of *Bhagwan Sing* v *Bhagwan Sing*, the Lords of the Judicial Committee are reported to have observed —" For 80 or 90 years there has been a steady current of authority one way, in all parts of India It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a

Court of Justice to treat the question now as an open one." (o)

In another case their Lordships have declared that *Communis error facit jus* is a sound maxim. (p)

Stare decisis should not be strictly followed in India

It is submitted with the greatest deference that the principles upon which the rule embodied in this maxim is founded, seem to be inapplicable to India. In England "the courts are reluctant to upset former decisions which although anomalous, have been *accepted by the public as the basis of their transactions* for a length of time." There the Judges are the repositories of the law, and are perfectly familiar with the actual usages of the public, of which they are the leading and eminent members. But the English Judges administering Hindu law have no access to its original sources locked up in a dead though classical language with which they are not acquainted nor are they familiar with the actual usages, ideas and sentiments of the Hindu community so different from theirs. On the other hand, the people of this country have no access to the decisions of the superior courts of which the proceedings are conducted and recorded in a language not their own, so that the public here, far from accepting the decisions as the basis of their transactions, continue to adhere to their own law, notwithstanding the erroneous view of the same taken in the precedents unknown to them as well as to their advisers, the Pandits. Thus the public here are no parties to the *communis error* which is confined to the courts alone, and so the law of the courts in these respects has become different from the law of the people, and the reluctance of the courts to upset the decisions has the effect of disturbing settled and cherished arrangements and transactions made by the public on the basis of their customary law. It is difficult to understand why this aspect of the question has escaped the attention of the sages of law adorning the Judicial Committee. It seems that either the grounds for distinction in this respect between the two countries are not noticed by the English lawyers practising in the Privy Council, or they feel so great a veneration for the traditions of the British courts that they do not think it possible to call into question before English Judges the propriety of applying to Indian cases the traditional rule embodied in the maxims, and therefore the attention of their Lordships is not invited to this question. Accordingly their Lordships think that the long acceptance by the courts of a particular doctrine or view of Hindu law, though incorrect, has the same effect here as in England, upon social customs, and that the acceptance of a different though correct view would probably disturb recognized law and settled arrangements, whereas the contrary is found to be the actual case in this country. And although their Lordships go so far as to say that the acceptance of a doctrine for 80 or 90 years by all the courts would "make it incompetent to a court of justice to treat the question as an open

Reason for the same,

P C's attention not drawn

(o) 26 I A 153, 166 21 A 412 3 C W N 454 1 Bom L R. 311, *see also* Kedar v Hari, 43 C 1, 10 19 C W N 1181

(p) Jagdish v. Sheo, 28 I A 100, 109 5 C W N 602 23 A 369.

one," still this fact ought to be submitted to their Lordships that the people here, ignorant of what passes in the courts, follow their customary law and usage which are contrary to that doctrine but which are agreeable to their feelings, as is proved by the facts of the very case in which that observation was made, and if they happen to be informed of the view entertained by the courts, they endeavour by means of deeds and wills to guard against their arrangements being upset by the courts, in consequence of the same being contrary to the precedents For instance, the adoptions that are held in the above case to be wholly void are believed by the regenerate Hindus to be perfectly valid according to their Shastras, and accordingly they are found to adopt a daughter's or sister's son or the like and to devise by wills their estate to the son so adopted, for the purpose of preventing litigation that might otherwise arise for impugning the validity of the adpotion

It is, therefore, to be regretted that their Lordships did not consider the question whether these maxims should be followed in all cases governed by Hindu law, specially in cases where the acceptance of the right view is not likely to disturb many titles, as where restrictions have been erroneously imposed on the nature of heritable right, or where the liberty of action and choice has been wrongly curtailed in matters which ought to be, as they really are under Hindu law, left to the discretion of men

How it should be applied

Application of *stare decisis* —The view of law taken by the courts in previous decisions, which was justified by the particular facts of those cases, is sometimes erroneously applied to other cases in which there are certain different facts which were not considered on the previous occasions, and to which that view is inapplicable and was not intended to apply The following two observations of the Lord Chancellor with respect to the use and application of precedents are important and instructive —"One is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." (q)

(q) Quinn v Leathem, L R Appeal Cases (1901), p. 495, 506, *see also* Kedar v. Hari, 43 C. 1, 10; 19 C.W.N 1181.

Sec 3—SCHOOLS OF HINDU LAW

Two Schools—The different commentaries have given rise to the several schools of Hindu law, which are ordinarily said to be five in number But properly speaking there are only two principal schools, namely the Mitàksharà and the Dàyabhàga schools

The Mitakshara School—may be sub-divided into four or five minor or subordinate schools that differ in some minor matters of detail, and are severally accepted in the different Provinces, where the Mitàksharà is, concurrently with some other treatises or with local customs, accepted as authority, the former yielding to the latter, where they differ. (r)

Different Schools and Commentaries—The following is the list of different schools of Hindu law containing a short description of the places in which each of them prevails with a list of authoritative treatises respected in each school —

Bengal or Dayabhaga or Gauria School

The Presidency of Bengal and Assam and some of the adjoining places are governed by this school The following commentaries are the chief exponents of this school —

1. Dayabhaga
2. Mitakshara
3. Dayatattva
4. Daya-Krama-Sangraha
5. Viramitrodaya
6. Daya-Nirnaya
7. Daya-Rahasya or Smriti Ratnavali
8. Dipakalika
9. Dattaka-Chandrika.

Benares or Northern School

Excepting in Mithila and the Punjab, this school prevails in the whole of Northern India including Orissa. (s) The commentaries respected in this school are the following —

1. Mitakshara

(r) In this connection *see* Sourendra *v* Hari, 5 P 135, 155 52 I A 418 42 C L J 592 50 M L J 1 24 A L J 33 91 I C 1033 1925 P C 280

(s) Orissa governed by the Mitakshara School as administered in Bengal Parbati *v* Jagadish, 29 I A 82, 88 29 C, 440, 447, *see* 1 C L J 388, 403 and 33 C. 371, 375, authorities respected are Saraswati-Vilasa and works of Sambhu Kara Bajpai and Udai Kara Bajpai,

2. Viramitrodaya
3. Dattaka-Mimansa
4. Kalpataru
5. Madana-Parijata
6. Nirnaya-Sindhu
7. Vivada-Tandava.

Mithila or North Behar School

The districts of Tirhoot and parts of the districts of Purnea, Bhagalpur, Monghyr, Saran and Muckwane may be identified with Mithila. It is a tract of country bounded by the three rivers namely, Gandaka on the west, Kosi on the east and the Ganges on the south. In this part of the country the Mithila school prevails, which is the law of Mitakshara except in a few matters in respect of which the law of this school has departed from that of the Mitakshara. (*t*) The following are the commentaries respected in this school :—

1. Mitakshara
2. Vivada-Ratnakara
3. Vivada-Chintamani
4. Smriti-Sara or Smrityartha-Sara.

Bombay or Maharastra or Western School

The Bombay school of Hindu law prevails in almost the whole of the Presidency of Bombay, Sindh and Berar. (*u*) The authorities respected in this school are the following :—

1. Mitakshara
2. Vyavahara Mayukha
3. Viramitrodaya
4. Nirnaya-Sindhu
5. Parasara-Madhava or Parasara-Bhashya
6. Vivada-Tandava.

Madras or Dravida or Southern School

The whole of the Madras Presidency is governed by the Madras school of Hindu law. The authorities respected in this school are the following —

1. Mitakshara

(*t*) Sourendra *v* Hari, 5 P 135, 155 52 I A 418 42 C L J 592 50 M L J 1 24 A L J 33 91 I C 1033 1925 P C 280, Chandieshwar *v* Bisheshwar, 1927 P 61

(*u*) Bajirao *v* Atmaram, 1930 N 265

2. Smriti-Chandrika
3. Parasara-Madhava or Madhaviya
4. Saraswati-Vilasa
5. Viramitrodaya
6. Vyavahara-Nirnaya
7. Dattaka-Chandrika
8. Daya-Vibhaga
9. Kesava-Vaijayanti or Vaijayanti
10. Madhabi
11. Nirnaya-Sindhu
12. Varada-Rajya
13. Vivada-Tandava.

Punjab School

To the above named schools this may be added as one of the schools. It prevails in the part of the country called the Punjab, and is generally guided by customs The following are the authorities in this school —

1. Mitakshara
2. Viramitrodaya
3. The Punjab customs. (v)

The schools of Hindu law are recognised by the later commentators, and cite opinions of the founders of other schools thus. (इति प्राच्याः or इति दाक्षिणात्याः, and so forth) so say the eastern lawyers or the southern lawyers.

Origin of Schools of Law—The Privy Council in the case of *Collector of Madura* v. *Mootoo*, (w) throws considerable light on the growth of the different schools

P.C, on sources of different schools,

"The remoter sources of the Hindu law are common to all the different schools The process by which those schools have been developed seems to have been of this kind Works universally or very generally received became the subject of subsequent commentaries The commentator puts his own gloss on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose (x)

(v) The customs are compiled in the *Riwaz-i-am* For the evidentiary value of this compilation, see p 32 above *See* Acts I and II of 1920 (Punjab Council) *See* Punjab Customs, p 33 above.

(w) 12 M I A 397, 435 10 W R P C 17

(x) Same view has been expressed in Balwant v. Baji, 16 N I R 187 47 I A. 213 48 C 30 25 C W N 243, 247 39 M. L. J 166 22 Bom L. R 1070 18 A L. J 1049 57 I C 545

Thus the Mitakshara, which is universally accepted by all the schools except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the *Dayabhaga* in those points where they differ, was a commentary on the Institutes of Yajnavalkya, and the Dayabhaga which, wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnavalkya In like manner there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that Treatise, but are not received by all"

on Daya. and Mit

Sec 4—HINDU LAW AND ITS APPLICATION

Sub-Sec 1—PERSONS GOVERNED BY IT

Who are Hindus?—The derivative meaning of the word "Hindu" is one who condemns the degraded people (हीन दूषयति *i. e., one who* condemns the low *people or* bad *acts*). The word has not been used in any ancient Sanskrit text It has been used in *Merutantra* (*y*) which treatise must, comparatively, be a modern writing, inasmuch as the author in those stanzas wherein the word has been used, makes reference to the English people and the city of London. The reference clearly shows that the author wrote these stanzas after the English people came to this country.

Derivative meaning of Hindu

But it seems more probable that the name has been derived from that of the river *Sindhu* which is the modern Indus The country round the river *Sindhu* is the place where the Hindu Aryans first settled, and this part of the country was called *Sindhustan.* The Persians and the people of the neighbouring countries, who naturally pronounced the alphabet स (*Sa*) as ह (*Ha*), called *Sindhustan* as Hindustan. Gradually the name has been applied to the whole of India, and during the Mahomedan rule the orginal Aryan settlers were called Hindus. The Mahomedan writers of the Mahomedan period did not deal the Jains and the Buddhists separately, hence they were also called Hindus In the course of time many of the non-Aryans described themselves as Hindus, and practically all the non-Aryan aborigines are now included among the Hindus.

Probable origin of word Hindu

The Hindus are those who profess any form of the religion of the *Vedas* or as explained in the *Puranas* called

Followers of Brahmanism are Hindus

(*y*) *See* Vachaspattam and Sabdakalpadruma

Brahmanism (z) These are not a homogeneous system of belief but in a large measure, have been derived from prior Brahmanical faiths. But no non-Hindu who embraces the Brahmanic religion can be a Hindu, because the Hindu *Shastras* do not approve of conversion into Brahmanism. But he can do so now (z1)

Gentoos.—The Hindus were formerly called as Gentus or Gentoos The word "Gentoo" has been used in 21 Geo III C 70 as also in Vivadarnava-Setu otherwise called the Code of Gentu Law by Mr Nathaniel Brassey Halhed His meaning of the word deserves as much respect as this very work received at the hands of Sir William Jones (a) The Portuguese, as is well-known to students of history, were the first of the Europeans who established their factory in India and it is most natural that the word was used by them first to denote a certain section of the Indian population It was probably derived from the Portuguese *gentio* meaning a gentile or a heathen to import the native of India who is a Hindu as distinguished from the Mahomedans (b)

Hindu by birth governed by Hindu law—The Hindu law applies to Hindus by birth, that have not openly renounced Hindusim by adopting any other religious persuasion So it is not sufficient to bring a man within the definition of Hindu to prove his Hindu birth or origin, but it is essential that he should be a Hindu at the time when the question in issue arises. (c)

Other Communities governed by Hindu law—The following is an alphabetical list of various communities partially or wholly governed by Hindu law —

Agarwallas See "*Jains*", below

Aroras of the Punjab are governed by Hindu law (d)

(z) Nepen Bala v Sitikantha, 12 C L J 459, 461 15 C W N 158 8 I C 41, Dagree v Pacotti, 19 B 783, Maung Chit v Ma Yait, 37 I C 780

(z1) See Sub-Sec ii of this Section under the heading "Conversion and Reconversion to Hinduism", *post*, p 67

(a) For Sir W Jones's remark *see* "Vivadarnava-Setu" in Sub Section vii "Comentaries" in *Sec* 2, *p* 46 above

(b) In this connection *see* Ardaseer v Perozeboye, 6 M I A 348, 383

(c) Rani Bhagwan v J C Bose, 30 I A 249 31 C 11 7 C W N 895 5 Bom L R 845 13 M L J 381 84 P R 1903 195 P L R 1903

(d) Chandan v Waandi, 92 P R 1915 168 P W R 1915 31 I C 541

Arya Samajists are Hindus and hence the *Dayanandis*, a sect of the Arya Samajists are likewise governed by Hindu law. (*e*)

Banias of Ambala District are also governed by Hindu law. (*f*)

Bhatias of Kangarh in the district of Muzaffargarh are governed by Hindu law in matters of succession. (*g*)

Brahmans :

Kashmiri Brahmans settled in the Punjab are governed by the customary law in matters of adoption (*h*)

The *Nambutri Brahmans* of Malabar are held in great esteem(*i*) and do not belong to a despised class as said by Sir W. W. Hunter. (*j*) They are governed by Hindu law (*k*)

Brahmos who under the old Special Marriage Act had to declare before their marriages under that Act that they are not Hindus, are governed by Hindu law in matters of succession. (*l*)

Buddhists who had been Hindus notwithstanding their renunciation of Hindu religion and usage continued to be governed by Hindu law.

Bunjahi Khatris. See "*Khatris*", below

Chourasi Guddidars were originally non-Hindus and still retain some of its relics, but they have adopted Hinduism with its social usages including the law of succession. (*m*)

Cutchi or *Kutchi Memons.* See "*Memons*", below.

Dayanandis. See "*Aryasamajists*", above.

Gonds are not Hindus (*n*) and cannot claim to be governed by Hindu law unless it is pleaded and proved that they

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(*e*) Suraj *v* Attar, 3 P L T 551.

(*f*) Halima *v* Asibai, 8 I C 214 4 S L R 77; Siddick *v* Mohammed, 37 I C 728.

(*g*) Aya *v* Thari, 19 I C 87 34 P W R 1913 74 P L R 1913 78 P R 1913

(*h*) Durga *v* Sambhu, 29 C W N 106 P C

(*i*) Castes and Tribes in Southern India, by Thurston, Vol 15, (Ed 1909)

(*j*) Orissa Annals of Rural Bengal

(*k*) Vishnu *v* Akkamma, 34 M 496, 501 20 M L J 938 6 I C 583

(*l*) Rani Bhagwan *v* J C Bose, 31 C 11 P C, Kusum *v* Satya, 30 C 999 7 C W N 784, *In re* Jnanendra Nath Ray, 49 C 1069 26 C W N 799

(*m*) Sahdeo *v* Kusum, 50 I A 58 2 P 230 27 C WN 901 37 C L J 369 44 M L J 476 25 Bom L R 560

(*n*) Miran *v* Hanslal, 1930 N 57

have adopted Hindu law and custom. (*o*)

Gujars of Nimar District in the Central Provinces, are governed by the Benares school of Hindu law. (*p*)

Halai Memons. See "*Memons*", below.

Jains appear to be a sect of the Buddhists and "may not unfairly be described as a compromise between Hinduism and Buddhism." (*q*) They as well as the Agarwalla Jains, are governed by Hindu law, (*r*) and it is for him to prove that any custom other than the Hindu law of the country where the property is situate and the parties reside, exists (*s*)

Jats in the absence of special custom are governed by Hindu law (*t*)

Kacharies of Assam are governed by Hindu law in matters of succession (*u*)

Kamathis of Bombay are governed by Hindu law in matters of succession (*v*)

Kashmiri Brahmans See "*Brahmans*", above

Khatiks of the Punjab are governed by Hindu law (*w*)

Khatris —*Sarin Khatris* of Lahore city,(*x*) *Segal Khatris* of the Punjab towns,(*y*) *Sodhi Khatris* of Amritsar District (*z*) and *Khatris of Kaunttila* in Gujar Khan Tahsil of Rawalpindi, are governed by Hindu law in matters of succession and inheritance (*a*)*Bunjahi Khatris* of Nara in Tahsil Kahuta of the Rawalpindi District are governed by Hindu law in matters

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(*o*) Sarjabai *v* Gangaram, 1930 N 35

(*p*) Ram *v* Tota, 6 N L R 39

(*q*) Tagore Law Lectures, (1888) on Adoption, 2nd Edn , p 452 ; Sheokuarbai *v* Jeoraj, 25 C W N 273 P C (1920) M W N 627 16 N L R 170 U P L R (P C) 161 61 I C 481 , Elphinstone's History of India, p 116, 5th Edn

(*r*) Rupchand *v* Jambu, 37 I A 93 14 C W N 545 6 I C 272 20 M L J 439 , Sheo Singh *v* Dakho, 5 I A 87 1 A 688 2 C L R 193 , Chotay Lall *v* Chunno, 6 I A 15 4 C 744 22 W R 496 3 C L R 465 , Bhikabai *v* Manilal, 54 B 780 , Kalgavda *v* Soma, 33 B 669 11 Bom L R 797 , Sano *v*. Puran, 78 I C 461 1925 N 174 , Prem Sagar *v* Ram, 1929 L 814

(*s*) Chotay *v* Chunnoo, 4 C 744 6 I A 15 3 C L R 465 , Gatepha *v* Eramma, 1927 M 228

(*t*) Bhagwani *v* Khusi, 24 I C 982 (A) , *See* Nauli *v* Khere, 15 I C 607

(*u*) Neiram *v* Ardaram, 35 C L J 34 64 I C 145

(*v*) Jagannath *v* Narayan, 34 B 553 12 Bom L R 545 7 I C 459

(*w*) Bholar *v* Emperor, 181 P L R 1914 24 I C 947

(*x*) Karori *v* Jawala, 17 I C 510 258 P W R 1912

(*y*) Mehr *v* Devi, 13 I C 50 32 P W R 1912 19 P L R 1912

(*z*) Lalchand *v* Manohri, 78 I C 717 1925 L 108

(*a*) Labh *v* Gurcharan, 19 I C 730 62 P W R 1913 131 P L.R 1913 54 P R 1913

of alienation of ancestral property. (*b*)

Khojas of Bombay are governed by Hindu law in matters of succession. (*c*)

Koches of Assam are governed by Hindu law in matters of succession. (*d*)

Kumhars of the Punjab are not governed by strict Hindu law but by custom. (*e*)

Kutchi Memons. See "*Memons*", below.

Labbais or the Tamil-speaking Mahomedan converts of Coimbatore District adhere to Hindu law of succession, partition and succession of women (*f*)

Lingayat Community of North (Canara) Karnara were originally Hindus but subsequently they became the followers of the religion founded by one Basova who was born in 1100 A.D. Their only God is Siva and the name of the community has, perhaps, derived its name from their God represented by "Lingam". They acknowledge the authority of the Vedas. They are governed by Hindu law. (*g*)

Makathayan Thiyyas in the absence of any proof of a particular custom are to be presumed to be governed by Hindu law. (*h*) See also "*Thattans*", below.

Memons.—The *Cutchi* or *Kutchi Memons* of Bombay (*i*) and of Sindh (*j*) are governed by Hindu law of succession and inheritance The *Halai Memons* domiciled in Porebunder follow Hindu law in matters of succession of women. (*k*) But by a declaration made under Cutchi Memons Act (*l*) any person belonging to that sect may adopt Mahomedan law

(*b*) Dhera *v* Tara, 7 I C 527 85 P W R 1910 88 O R 1910
(*c*) Jan *v* Datu, 38 B 449 15 Bom L R 1044 22 I C 195
(*d*) Aiti *v* Aidew, 24 C W N 173, Dino *v* Chundi, 16 C L J 14 (1889) 16 I C 349
(*e*) Ballia *v* Emperor, 24 P W R 1914 161 P L R 1914 25 I C 839
(*f*) Ibrahim *v* Muhammad, 39 M 664 29 M L J 763 30 I C 806
(*g*) Somasekhera *v* Mahadeva, 53 M 297 1930 M 496
(*h*) Pattukkayal *v* Kothembra, 1927 M 877, 879
(*i*) Abdurahim *v* Halimabai, 43 I A 35 18 Bom L R 635 20 C W N 362 30 M L J 227 32 I C 413, Abdulsakur *v* Abubakkar, 54 B 358 1930 B 1921, Advocate General *v* Jimbabai, 41 B 181 17 Bom L R 799 31 I C 106
(*j*) Sardul *v* Karam, 5 I C 990 30 P R. 1910 27 P W R 1910, Yusif *v* Abu, 78 I C 871
(*k*) Khatubai *v* Mahmed, 50 I C 108 47 B 196 25 Bom L R 127 27 C W N 774 37 C L J 131 44 M L J 35 32 M L T '45
(*l*) Act XLVI of 1920

in matters of succession and inheritance. But the succession of the person who has not signed such a declaration is to be governed by Hindu law (*m*)

Nambutiri Brahmins. See "*Brahmans*", above.

Navayats of South Carnara are Mahomedans but they have adopted many incidents of the joint family law of the Hindus. (*n*)

Nirmalas. See "*Sikhs*", below.

Rajbansis of Bengal were originally non-Hindus but are governed by the Dayabhaga school of Hindu law. (*o*)

Sarin Khatris. See "*Khatris*", above.

Seghal Khatris. See "*Khatris*", above.

Sikhs were originally Hindus and they continued to be governed by Hindu law excepting the law relating to marriage (*p*) The *Nirmalas* were a sect of the Sikhs but they have lost their importance and have merged to a very large extent amongst the Hindus. (*q*)

Sodhi Khatris. See "*Khatris*", above.

Thattans (goldsmiths) of North Malabar are governed by Makathayan law which corresponds mainly to Hindu law. (*r*) See '*Makathayan Thiyyas*", above.

Trakhans of Amritsar city are governed by Hindu law in matters of succession. (*s*)

Yadhavas—The Madura Ramayana Chavadi thousand Yadhavas are governed by Hindu law. (*t*)

Evidence of adoption of Hindu law.—The Privy Council has laid down that a family that was not Hindu by descent and origin, but had gradually adopted Hindu customs was not,

(*m*) Abdulsakur *v* Abubakkar, 54 B 358 1930 B 191

(*n*) Hussain *v* Hassan, 5 L W 825 41 I C 184

(*o*) Narendra *v* Nagendra, 50 C L J 267, 271, Santala *v* Badaswari, 50 C 727 27 C W N 669

(*p*) Rani Bhagwan *v* J C Bose, 31 C 11 P C, Dalip *v* Fati, 18 I C 930 41 P W R 1913 100 P L R 1913 The History of the Sikhs is traced in—Satgur *v* Har, 1930 O 44

(*q*) Kirpa Singh *v* Ajaipal, 1930 L 1

(*r*) Kunhi *v* Raman, 46 M 597 44 M L J 274 18 L W 525

(*s*) Gangu *v* Kanshi, 9 I C 649 28 P R 1911 80 P L R 1911 72 P W R 1911

(*t*) Vanma Kone *v* Vannichi, 51 M 1, 6-7 1928 M 299

on that account, to be governed by Hindu law in all matters unless proved to have been introduced into it as its custom. (*u*)

Where a family was originally aboriginal, it is a question of fact whether they have adopted Hindu law in matters of succession (*v*)

Onus —The *onus* of proving that a particular family which was not originally Hindu, is governed by Hindu law, is on the person who asserts it (*w*)

Sub-Sec ii—RELIGION AND CONVERSION

Effect

Renunciation of Hinduism —A Hindu as soon as he embraces another religious faith, such as Christianity, (*x*) ceases to be a member of a Hindu joint family. But the particular member will continue to hold the family property, as joint owner (*y*) His right to survivorship, however, extinguishes(*z*) from the moment of his conversion to another religious faith as the disruption of the coparcenary is thereby effected (*a*)

Jt family ceases, also survivorship

Effect on succession.

A mere conversion to another religion would not by itself involve the adoption of the laws as to inheritance and succession prevalent among the adherents of that religion (*b*)

Right to adopt by Mahomedan convert ceases

The Mahomedan law of inheritance is a part of their divine law and hence a Hindu convert to Islamism is to be governed by Mahomedan law Such a convert does not, for that reason, carry with him the Hindu law of adoption though adoption is not necessarily inheritance or succession, but it leads to inheritance and succession. (*c*)

Succession of Christian convert

By the Indian Succession Act a Hindu apostate to Christianity cannot choose to be governed by Hindu law in

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(*u*) Fanindra Deb Raikat *v* Rajeswar, 12 I A 72 11 C 463

(*v*) Narendra *v* Nagendra, 50 C L J 267, 271

(*w*) Ujiyara *v* Tilochan, 44 I C 435 (N)

(*x*) Abraham *v* Abraham, 9 M I A 159 1 W R P C 1, Kulada *v* Haripada, 40 C 407 16 C L J 311 17 C W N 102, Subbayya *v* Rangayya, 1927 M 883

(*y*) Kulada *v* Haripada, *supra* In this connection see Ganga *v* Begam, 57 P R 1916 159 P W R 1916 35 I C 549, Kunhichekkan *v* Lydia 11 M L T 232, in this connection see also Jogi Reddi *v* Chinnabbi, 52 M 83 P C

(*z*) Kulada *v* Haripada, *supra*

(*a*) Bhagwan *v* Shib, 1930 A 341, Jamna *v* Gonda, 6 L L J 84 80 I.C 519 1924 L 479

(*b*) Vannia Kone *v* Vannichi, 51 M 1, 22 F B 1928 M 299

(*c*) Bai Macbubai *v* Bai Hira, 35 B 264 13 Bom L R 251 10 I C 816

matters of succession (*d*) But previous to the passing of the original Indian Succession Act of 1865 which has now been repealed by Act XXXIX of 1925, Hindu law was applied to those who followed the customs and usages in other respects (*e*)

Hindu law applies even orthodox habits given up

But still one may have the curiosity to learn how a Hindu by birth who gives up the orthodox habits in matters of diet and ceremonial observances, is to be governed, relating to succession, inheritance and other personal law. The following observation of the Judicial Committee will elucidate the problem :

"The learned Judges of the Chief Court examined the literature bearing upon the Brahmo Society , they had before them much important evidence with reference to the Brahmos and the relation of their principles and their organization to the Hindu system , and they came to the conclusion that a Sikh or a Hindu by becoming a Brahmo did not necessarily cease to belong to the community in which he was born They also found on the evidence that the testator never became a professed Brahmo at all In both these conclusions their Lordships agree

"Their Lordships agree with the learned Judges of the Chief Court in thinking that such lapses *from orthodox practice (in matters of diet &c)* could not have the effect of excluding from the category of Hindu in the Act (V of 1881) one who was born within it, and who never became otherwise separated from the religious communion in which he was born " (*f*)

Right to property not lost by conversion

Legislation protecting Hindu apostates.—The Legislature has prevented a Hindu being penalized by depriving him of his right to property for renunciating the Hindu religious faith (*g*) The Privy Council has explained the effect of these two enactments thus

"The intention in both enactments is perfectly clear , by declaring that the Hindu or Mohamedan law shall not be permitted to deprive any party not belonging to either of these persuasions of a right to property or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the Legislature

(*d*) Kamawati *v* Digbijai, 48 I A 381 43 A 525 64 I C 559 15 M L T 47

(*e*) *See* Abraham *v* Abraham, 9 M I A 195, 237-238

(*f*) Rani Bhagwan *v* J C Bose 30 I A. 249, 257 31 C 11 7 C W N 895 5 Bom L R 845 13 M L J 381 84 P R 1903 135 L R 1903

(*g*) Reg VII of 1832 and Act XXI of 1850

virtually set aside provisions of Hindu law which penalizes renunciation of religion or exclusion from caste " (*h*)

Re-conversion to Hinduism allowed

Conversion* and Re-conversion to Hinduism.—A Hindu converted to any other religious persuation may revert back to Hinduism on performing the religious rite of expiation (प्रायश्चित्तम्) His infant son may, likewise, with his consent and approval, revert back to Hinduism (*i*)

Non-Hindu can embrace Hinduism

But the question still remains whether a non-Hindu can be converted to Hinduism There was a certain orthodox section of Hindus who emphatically asserted that their religious faith is of a higher order and no non-Hindu can have any access to it Some of them even entertained a still limited view of the question and asserted that even a Hindu cannot revert back to Hinduism having embraced any other religious persuasion But these are now of mere academic interest As has been noted above a Hindu can re-embrace Hinduism after having performed the expiatory ceremony The other question whether a non-Hindu by birth can embrace Hinduism has been settled by judicial decisions holding that he can do so (*j*)

Sub-Sec iii—MIGRATION AND SCHOOLS OF LAW

Law of domicile applies

The schools of Hindu law applying as they do to Hindus of particular localities, may be called *quasi*-territorial Hence it is the *prima facie* presumption that a Hindu is governed by the school of law in force in the locality where he is domiciled, (*k*) and that prevailing among his caste-fellows in the locality (*l*) But this presumption may be rebutted by proof that the family to which he belongs had migrated from another province in which a different school prevails , for, in

(*h*) Khunni *v* Gobind, 33 A 356, 365 15 C W N 545 38 I A 87 13 C L J 575 8 A L J 552 13 Bom L R 427 21 M L J 645 10 I C 477

* For conversion of a member of a family, *see* Ch V, Sec 1, Sub-sec ii, *topic*, "Conversion to another religion "

(*i*) *See* Kusum *v* Satya, 30 C 999 7 C W N 784

(*j*) Gopal, Maharaja Kumar *v* Sita Devi, 36 C W N 392 P C, Sahdeo *v* Kusum, 50 I A 58 2 P 230 1923 P C 21 , Fanindra *v* Rajeswar, 12 I A 72 11 C 463 , Palaniappa *v* Alagan, 48 I A 539 44 M 740 : 1922 P C 228 , Ratansi *v* Administrator 1928 M 1279

(*k*) Thaikandhi *v* Illivatukal, 39 M L J 427 13 L W 101 60 I C 209.

(*l*) Tula Ram *v* Shyam, 49 A 848.

but on migration, law of school whence migrated presumed

such a case, the presumption of law is in favour of the retention by the family of the law and usage of the country of its origin (*m*) But this presumption again may be rebutted by proving that the family has adopted the law and customs of the place of its present domicile, and then it will be subject to the school prevailing in that place (*n*)

P C on migration and application of law

The law in this subject is very clearly explained by Viscount Haldane in an appeal from East Africa to His Majesty in Council (*o*)

"Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mohamedans, settle among Mohamedans, the presumption that they have adopted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India"

Test: religious ceremonies,

Evidence of migration.—The mode in which the religious ceremonies are performed is relied on as the test for determining whether a family proved to have migrated from one province to another, adheres to the law of the former place or has adopted the doctrines prevalent in the place of its new domicile (*p*) Evidence of migration of witnesses who heard

(*m*) Mahomed Haji *v* Khatu, 43 B 647 21 Bom L R 85 51 I C 513, Sukbir *v* Mangeisar, 1927 A 252

(*n*) Ram *v* Chundra, 20 C 409, Soorendra *v* M Heeroomone, 10 W R P C 35, Lukkea *v* Gunga, W R (Gap) 56, Kulada *v* Haripada, 40 C 407 16 C L J 311 17 C W N 102 17 I C 257, Bhagbati *v* Sailendra, 16 C W N 834, 839, Gobind *v* Radha, 31 A 477 6 A L J 591 3 I C 56, Pitambar *v* Nishi, 24 C W N 215 31 C L J 52, Balwant *v* Baji, 16 N L R 187, 47 I A 213 25 C W N 243 48 C 30 39 M L J 166 23 Bom L R 1070 18 A L J 1049 57 I C 545, *see* Somasekhara *v* Mahadeva, 51 C L J 237 P C 1910 P C 496 on appeal from 53 M 297, Trimbakdas *v* Mathabai, 1930 N 225

(*o*) Abdurahim *v* Halimabai, 43 I A 35, 41 20 C W N 362, 364 30 M L J 227 18 Bom L R 635 32 I C 413

(*p*) Rutcheputty *v* Rajunder, 2 M I A 132 2 Suth P C 1, R Padma *v* B Dooler, 9 M I A 259 7 W R P C 41, R Srimuty *v* R Koond 4 M I A 292 7 W R P C 44, Ram *v* Kaminee, 6 W R 295, Balwant *v* Baji, 16 N L R 187 47 I A 213 48 C 30 25 C W N 243 18 A L J 1049 39 M L J 166 22 Bom L R 1070 57 I C 515, Kulada *v* Haripada, 41 C 407 17 C W N 102 16 C L J 311 17 I C 257, Bhagabati *v* Sohodra, 16 C W N 834 13 I C 691, Vasudeva *v* Secretary of States, 11 M 157, 161, Gobind *v* Radha, 31 A 477, 479 6 A L J 591 3 I C 563, Balkisan *v* Kunjalal, 51 C L J 237, 1930 P C 133

it from the deceased members of the family, is inadmissible. (q)

It should be observed that it is of the first importance to enquire into the origin of the family The origin, if ascertained to have been in a different place, gives rise to the presumption that the family preserves the customs of its place of origin. Of evidence which go to prove or rebut this presumption, the most direct are instances of succession in the family, and next, ceremonies at marriages, births and Shradhs (r)

place of origin,

succession etc

Wife s domicile—By marriage the wife acquires the domicile of the husband, and the domicile continues during the widowhood unless she adopts a new domicile. (s)

Wife's domicile

Schools which govern certain sects—The following sects have been judicially determined to be governed by particular schools of law

Powars of the Central Provinces are not governed by the Bombay school, but are governed by the Benares school of law. (t)

Raghuvamshis of Nandurbar, who migrated from the province of Oudh and settled in Khandesh, are governed by the Benares school of law (u)

Rao Rathor Telis who settled in the Central Provinces are governed by the Benares school of Hindu law (v)

Sub Sec iv—HINDU LAW, NOW IN FORCE

Under the British rule the Hindus have been suffered to be governed by their own law as regards Succession, Inheritance, Marriage, Religious Institutions and Caste. (w) Hindu law has therefore become the personal law of the Hindus.

The following enactments have modified, supplemented and superseded Hindu law or custom —

Acts —

Act V of 1843 of Governor-General's Council (Abolition of Slavery Act) has abolished slavery which was formerly

Abolition o Slavery.

(q) Ramchandra v Ramabai, 1930 N 267
(r) Parbati v Jagdish, 29 I A 82 29 C 433 6 C W N 490 4 Bom L R 365, in this connection see foot note (p) above, Sarada v Uma, 50 C 370 37 C L J 233
(s) Kashiba v Shripat, 19 B 697
(t) Rukhamabai v Jaipal, 23 N L R 108 1929 N 122
(u) Babu Motising v Durgabai, 53 B 242 1929 B 57.
(v) Narayan v Motisa, 1927 N 121
(w) Reg IV of 1793, Sec. 15, Meenakshi v P Rama, 37 M 396.

practised by almost all the ancient nations

Freedom of Religion, Act XXI of 1850 of Governor-General's Council (Freedom of Religion or *lex loci* Act) repeals those provisions of the Hindu and the Mahomedan laws, that exclude from inheritance persons professing a religion different from that of the person, succession to whose estate is in dispute (x) Where once a person has changed his religion and changed his personal law, the religion and law adopted will govern the rights of succession of his children (*y*)

Widow Re-marriage, Act XV of 1856 of Governor-General's Council (Hindu Widow Re-marriage Act) legalizes the re-marriage of Hindu widows in certain cases, and declares their rights and disabilities on re-marriage. The Act applies to all cases of re-marriage ( )

Indian Penal Code, Act XLV of 1860 (Indian Penal Code) has completely superseded the whole of the Hindu criminal law

Religious Endowments Act XX of 1863 (Religious Endowments Act) repeals the Bengal Regulation XIX of 1810 and Madras Regulation VII of 1817 so far as the religious endowments are concerned, but they still apply to charitable endowments, except in some provinces where it is not made applicable By section 4 of the Act all the landed or other properties which were, at the time of passing of this Act, under the superintendence or in the possession of the Board of Revenue or any local agent, have been transferred to the trustee, manager or superintendent of the religious trust The Act applies to all public religious endowments (*a*) and not to any private trusts or endowments. (*b*)

Marriage Dissolution, Act XXI of 1866 of Governor-General's Council (Native Converts' Marriage Dissolution Act) enables a Hindu convert to Christianity to obtain a dissolution of marriage under special circumstances

(*x*) In this connection see Khunni *v* Gobind, 33 A 356, 365 15 C W N 545 38 I A 87 10 I C 477 21 M I J 645 13 C L J 575 13 Bom L R 427

(*y*) Mitar Sen *v* Maqbul, 35 C W N 89 P C

(*z*) Raman *v* Chinto, 12 I C 623

(*a*) Mahomed Athar *v* Ramjan, 34 C 587, Sheoratan *v* Ram, 18 A. 227; Jan Ali *v* Ram, 8 C 32 9 C L R 433

(*b*) Protap *v* Brojonath, 19 C 275, Ashgar *v* Delroos, 3 C 324.

Act VII of 1866 of Bombay Council (Hindu's Liability and Ancestor's Debts Act) limits son's liability to pay father's debts to the extent of assets received by him.

Ancestor's Debts,

Act IV of 1869 of Governor-General's Council (Indian Divorce Act) applies to a Hindu marriage contracted before the conversion to Christianity of the parties

Divorce,

Act XXI of 1870 of Governor-General's Council (Hindu Wills Act) and Act V of 1881 (Probate and Administration Act) extend to Hindu Wills certain provisions of the Succession Act (Act X of 1865) with some additions and alterations But all these are incorporated in Act XXXIX of 1925

Wills,

Act IX of 1872 (Indian Contract Act) has superseded the Hindu law of contract, (c) though the latter is sometimes referred to in matters of contract or dealing The Hindu law of gift is to some extent applied to gifts made by Hindus, so also the law of *Damdupat*, according to which interest exceeding the amount of the principal cannot be recovered at any one time (d) It has been held that the rule of law is applicable to the Presidency towns of Calcutta (e) and Bombay.(f) It does not apply to the Presidency of Bengal outside Calcutta (g) But it is also applicable to cases outside the city of Bombay (h) This rule of Hindu law is not followed in Madras (i) But it is only applied to cases where the debtors are Hindus (j)

Contract,

Whether affects law of *Damdupat*,

Act III of 1874 (Married Women's Property Act) does not

Married Women's Property,

(c) Madhab v Rajkumar, 22 W R 370 14 B L R 76

(d) Manu, Ch VIII, 8, 151, Mitakshara II, 39, 50, Colebrooke's Digest, Book I, Ch II, Secs 3, 59, 61

(e) Nobin v Romesh, 14 C 781, Ramcoomary v Johur, 5 C 867 7 C.L R 204, Ramkanai v Calli, 21 C 840, Fall v Thakomoni, 23 C 899

(f) Ganpat v Adarji, 3 B 312 Nussurbanji v Lakman, 30 B 452 9 Bom L R 82, Jiwan v Memardas, 35 B 109 12 Bom L R 992

(g) Hetnarain v Ram, 9 C 871 12 C L R 590, Sarjga v Sudhiri, 9 C 825 12 C L R 400, Pran v Jadu, 2 C W N 603

(h) Sundora v Jayawant, 24 B 114 1 Bom L R 551, Sukalal v Bapu, 24 B 305, Ali Shaheb v Shabji, 21 B 85, Dagdusa v Ram, 20 B 611, Ganesh v Keshav Rao, 15 B 625, Balkrishna v Hari Govind, 15 B 84, Hari v Balambhat, 9 B 233, Narain v Satvaji, 9 B H C R 83

(i) Y Annaji v Raghubai, 6 M H C R 400, Subramania v Subramania, 31 M. 250

(j) Ramkumary v Jahor, 5 C 867, Ram Kanai v Calli, 21 C 840, Daud v Ballavdas, 18 B 227, See Chapter (v) Debts, *Damdupat*, *post*,

apply to Hindus. (*k*) But see Act XIII of 1923 and the decision of the Madras Full Bench (*l*)

Majority,

Act IX of 1875 (Indian Majority Act) applies to Hindus, except in matters of marriage and adoption It fixes the age of majority on the completion of the eighteenth year. But every minor of whose person or property a guardian has been or shall be appointed by any court of justice and every minor under any Court of Wards, shall be deemed to have attained his majority when he shall have completed his age of twenty-one years

Transfer of Property

Act IV of 1882 of Governor-General's Council (Transfer of Property Act) supersedes the Hindu law of transfer of property excepting certain limitations mentioned in sections 2 and 129 of the Act, but repealed by Acts XX, 1929, V, 1930.

Guardian and Wards,

Act VIII of 1890 of Governor-General's Council (Guardian and Wards Act) applies to Hindus in cases where the question regarding the guardian appointed or to be appointed by the court arises.

Oudh Settled Estates,

Act II of 1900 of U. P. Council (Oudh Settled Estates Act) validates the mode of devolution contrary to Hindu law in some cases governed by the Act with respect to certain estates and other immovable property in Oudh.

Bengal Settled Estates,

Act III of 1904 of Bengal Council (Settled Estates Act) which has been enacted to facilitate the making of family settlements of estates by landholders in Bengal, applies to Hirdus also.

Disposition of property,

Act XV of 1916 of Governor-General's Council (Hindu Disposition of Property Act) validates the disposition of property to an unborn person

Charitable and Religious Trusts,

Act XIV of 1920 of Governor-General's Council (Charitable and Religious Trusts Act) provides for obtaining information regarding trusts created for public purposes of a charitable and religious nature and to enable the trustees of

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(*k*) Ishani Dasi *v* Gopal Chandra De, 18 C W N 1335 20 C I J 44 25 I C 236, Shankar *v* Umabai, 37B 471

(*l*) Balamba *v* Krishnayya, 37 M 483, 504, over-ruling Oriental *v*, Vantaddu, 35M 162.

such trusts to obtain the directions of a court on certain matters.

Cutchi Memons,

Act XLVI of 1921 of Governor-General's Council (Cutchi Memons Act) to enable those Cutchi Memons who so desire to be governed in matters of succession and inheritance by Mahomedan law [See Act XXXIV of 1923]

The Punjab Customs,

Act I of 1920 of the Punjab Council [The Punjab Limitation (Custom) Act] is to amend and consolidate the law governing the limitation of suits relating to alienations of ancestral immovable property and appointments of heirs by persons who follow custom in the Punjab.

Same,

Act II of 1920 of the Punjab Council is to enact certain restrictions on the power of descendants or collaterals to contest an alienation of immovable property or the appointment of an heir on the ground that such alienation or appointment is contrary to custom.

Bequests in Madras City,

Act VIII of 1921 of Governor-General's Council [Hindu Transfers and Bequests (City of Madras Act)] declares the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

Special Marriage,

Act XXX of 1923 (I C.) [Special Marriage (Amendment) Act of 1923 amending Act III of 1892]. This Act provides a form of marriage of Hindus otherwise than by Hindu rites and customs.

Board for religious endowments,

Act I of 1925 (Madras Council) This is an Act for better governance and administration of certain religious endowments, by a Board consisting of not less than two nor more than four Commissioners who must profess Hindu religion and a President The President according to this Act may not be a Hindu by religion. [See, Acts II of 1927, I of 1928 and V of 1929]

Succession,

Act XXXIX of 1925 (I C) (Indian Succession Act) is an Act which amends twelve different enactments including Indian Succession Act (Act X of 1865), Hindu Wills Act (Act XXI of 1870) and Probate and Administration Act (Act V of 1881).

Removal of Disabilities

Act XII of 1928 is to amend the Hindu law relating to exclusion from inheritance of certain class of heirs on account of physical defects excepting those governed by the Dayabhaga

school.

Inheritance Amendment,

Act II of 1929 is to alter the order of succession of the Mitakshara school regarding son's daughter, daughter's daughter, sister and sister's son.

Child Marriage Restraint,

Act XIX of 1929 is to restrain the solemnisation of child marriages.

Gains of learning,

Act XXX of 1930 is to remove doubt as to the rights of a member of undivided family in property acquired by his learning (gains of learning).

Whole Hindu adjective law replaced

The whole of the adjective law, as laid down by Manu (*m*) and Yajnavalkya (*n*) has been replaced by various legislative enactments.

Sub-Sec v—OBSERVATION ON HINDU LAW

Hindu codes complete.

Codes of Hindu Sages Complete —The Jurisprudence or positive law as dealt with in the Codes of the Hindu sages appears to be complete and exhaustive, and includes all branches of law, suitable to the exigencies of Hindu society, and actually prevalent therein, so that it cannot be said that the Codes were defective, and left out of consideration any department of law. And the charge of incompleteness brought forward by Sir Henry Maine in his Village Communities, in consequence of there being a singular scarcity of rules relating to tenure of land, and to the mutual rights of the various classes engaged in its cultivation,—appears to be erroneous and due to the misconception that the present system of land tenures which came into existence since the Permanent Settlement had always existed here. On the contrary, according to Hindu law the peasant was the proprietor of the land cultivated by him, and the ruling power was entitled not as Landlord but as Sovereign, to a certain proportion of the produce yielded by the land, not exceeding one-sixth, which was *tax* not *rent*, there being no words in the Sanskrit language for *landlord*, *tenant* and *rent*, and the relation upon which this payment was based is expressed by the conjoint word राजा-प्रजा-सम्बन्ध meaning *relation of*

(*m*) Manu, Ch VIII
(*n*) Yajnavalkya, Ch II.

Sovereign and subject, though this word is now used to convey the *relation of landlord and tenant,* but it embodies the true fundamental principle of the Land Revenue, and negatives the idea of the State being the Landlord or Proprietor of land,—an idea contrary to the ancient law and customs of this country.

The division of Hindu Jurisprudence

The Hindu Jurisprudence is divided into two parts the first deals with adjective law under the name of Vyavahara-Matrika meaning literally "mother of litigation", and the second deals with substantive law All possible wrongs were at first divided into eighteen classes, and there were eighteen Forms of Action corresponding to them (*o*) Later on another class was added to obviate the difficulty created by the earlier classification, similar to that which gave rise to the Court of Chancery in England, and another Form of Action was recognised corresponding to that class under the name of Miscellaneous प्रकीर्णकम् (*p*) in which the proceeding commenced at the instance of the King, who had to be moved by parties in cases instituted for their benefit, when these cases could not come under any one of the eighteen Forms of Action. (*q*)

English versions of Sanskrit codes are means of access to Hindu law.

English versions of Sanskrit law books—Hindu law is locked up in Sanskrit, the most perfect and difficult of the ancient classical languages, the codes and the commentaries are all written in it, to which our lawyers and judges have no access. They have, therefore, to acquire the knowledge of Hindu law from the English versions of the Sanskrit works, the English text-books on Hindu law, and the reports and the digests of the case-law.

As regards the translations of works on Hindu law, a few purport to have been done by persons who were either almost ignorant of Sanskrit, or had but a smattering of the same. The Vivada-Chintamani purports to have been translated into English from the original Sanskrit by a Bengali gentleman who had very little knowledge of Sanskrit it was translated into Bengali by a Pandit appointed by him, and then

How Vivada-Chintamani translated

(*o*) Text No 22 (*p*) Text No 23

(*q*) Introduction to Vivada-Ratnakara, by the author, p xvii *et seq*

the Bengali version was done by him into English. This accounts for the many mistakes that are found in this work. The author of the English version of the Smriti-Chandrika also, had only an imperfect knowledge of Sanskrit The Sanskrit works on law cannot be fully understood even by a Sanskrit scholar except with the aid of learned Pandits familiar with the traditional interpretation of them

Judges and lawyers sometimes misled by translation

Besides, lawyers and judges without Sanskrit, sometimes misconstrue and misunderstand the meaning of passages of the English versions, in consequence of their ignorance of the method of writing and the process of reasoning adopted by the commentators. The Full Bench decision in the case of *Apaji* v *Ram* (*r*) furnishes an instance of misapprehension of the meaning of a passage of the Mitakshara by the majority of the learned Judges.

Colebrooke's method of translation.

The division of the English versions into small paragraphs made by Colebrooke and other translators, solely for the convenience of reference, misleads the readers to think each of these paragraphs to correspond to a verse in the original, and to be complete in itself, whereas the originals are written in prose, quoting passages from the Smritis, which are no doubt, in verse, in the majority of instances, and a paragraph may be a link in a chain of argument extending over more than one paragragh

Sanskrit learning,

Sanskrit learning—Although the members of all the regenerate classes were entitled to *learn* the Shastras, yet the Brahmanas claimed for themselves the exclusive privilege of *teaching* them. The regenerate classes other than the Brahmanas have almost disappeared by reason of the prevalence of Buddhism for many centuries, and the subsequent compromise between Brahmanism and Buddhism in the shape of the Tantric system, so that in Bengal if the Brahmanas, a few Rajputs claiming to be Kshatriyas, and a section of the Vaidyas claiming to be a mixed regenerate class, be excepted, the rest of the Hindus who form the majority and include the other regenerate castes that had adopted Buddhism and had consequently renounced all claims

(*r*) 16 B. 29.

to superiority by birth, and therefore still follow some of the practices prescribed by the Shastras for Sudras, are all deemed to be Sudras, though many of them are no doubt, either Sudras or inferior to them. It was, however, by the action of the Calcutta University in making Sanskrit the compulsory second language for study by Hindu students, that Sanskrit learning has been disseminated amongst Hindus. Previously Sanskrit was not taught in our English schools and colleges, and the result was that the Hindu students of all classes, educated in those schools, who had graduated before 1869 A. D, were, as a general rule, ignorant of the classical language of their own country.

its revival by the Calcutta University

Queen Victoria and British Rule, Defender of Hindu Faith.—The selfish policy pursued by the Brahmanas for maintaining the superiority of their class by means of their monopoly of the Sanskrit learning, and the practical exclusion of other classes from the same, could not but react on themselves and the natural consequence of such an ignoble and illiberal principle must necessarily be, as it was, that the knowledge of Sanskrit, became ultimately confined to a few Brahmana families only, the members of which sought to maintain their own superiority by the application of that very principle, by throwing obstacles in the way of acquisition of learning hy members of other families of even their own class The quality of learning must in such circumstances necessarily deteriorate when competition is narrowed by excluding the majority of the people from acquiring the same And the ultimate effect of all this, was the degradation and downfall of the Hindus

Sanskrit learning was a monopoly of Brahmanas,

The British rule has conferred immense good on the people of this country by the spread of education and by other civilising institutions introduced by it The people of the present day are not aware of the intellectual, moral and religious thraldom, and the various disabilities under which the general body of the Hindus laboured, and which have been, and are silently and gradually being, removed by the benign influence of the British rule It is indeed a very high privilege conferred by the British Government on the general body of the Hindus, that they do now enjoy an easy access to their sacred books which were beyond the reach not only of the ordinary people, but also of the Hindu students of the former English schools without Sanskrit. Englishmen as well as the people of this country will perhaps be astonished to hear that practically the British Government has bestowed on the mass of the Hindus the privilege of perusing their own religious books, which is expressly denied them by the Brahmanical legislation providing severe punishment for Sudras trying to pry into the sacred literature And such was the ignorance of the religious truths taught in the sacred books, that the English-educated Hindus including even Brahmanas had their faith in their religion considerably weakened, and some of them had recourse to other

but under British rule accessible to all

systems of faith But with the revival of Sanskrit learning, and an easy access to the sacred books there has been a revival of the Hindu faith to an extent unknown before And as it is during Queen Victoria's prosperous and glorious reign, that this grand consummation has taken place, Her Majesty may properly be styled the Defender of the Hindu Faith The Hindu religion being moulded on the principles of asceticism, the revival of the Hindu faith can by no means be politically dangerous as is erroneously taught by some persons

Difference of English and Hindu idea of tying up of property.

Tying up of property and alienation—The law of an independent country may be taken to represent the character and feelings of the people. For instance, the English law is said to abhor the tying up of property and regard being had to the fact that its people are characterized by prudence and self-reliance, the above feature of the English law is required by the exigencies of English society and conducive to its welfare But the same rule cannot be applied to India, where the state of things is quite different, and where the tying up of property was the general rule, and alienation of it could be justified only for special causes. If it is borne in mind that India is an agricultural and not a commercial nor a manufacturing country, that its people are more subjective than objective, that the caste of the Hindus debars them from the freedom of choice in respect of a calling or occupation, that the father gets his minor sons married, and the sons look to the ancestral property for the support of themselves and of their family, one cannot entertain any reasonable doubt that the rule of Hindu law which imposes limitations on the father's right of alienation of the ancestral property, except for legal necessity, was the most salutary one And what the exigencies of Hindu society require, and whether it requires a change in the law, are questions most difficult to solve And it may be said without meaning any offence that the effect of an exclusive English education has been more or less to anglicize its Hindu recipients in their ideas and feelings, and to create a wide gulf between them and the bulk of the Hindu community who retain their old habits of thought.

Hindu law as it is, should be followed.

The safest principle to follow seems to be that the Hindu law as it is, should in all cases be adhered to, and

no change should be introduced under the pretext of interpreting the same: the Legislature may be appealed to, should any rule of law require a change.

Legislation to protect debtors

It is remarkable that as regards the treatment of debtors and creditors the Legislature and the Highest Tribunals appear to be guided to a certain extent by opposite principles. While the Legislature thinks that in this country the debtors should be protected against the creditors, and passes such Acts as the Chota-Nagpur Encumbered Estates Act, the Oudh Encumbered Estates Act and the Deccan Ryots Relief Act, for the protection of the debtors, and recognizes the same principle in framing the Bengal Tenancy Act which does not allow voluntary transfer of occupancy rights, our courts of justice are changing the Mitakshara law by enabling the father's creditors to seize and sell the family property, and to deprive the family of its hereditary source of maintenance.

CHAPTER II

DEFINITIONS

ORIGINAL TEXTS

१। सपिण्डता तु पुरुषे सप्तमे विनिवर्तते।
समानोदकभावस्तु जन्मनाम्नोरवेदने॥ मनुः—५। ६०।

1 But the *sapinda* relationship ceases in the seventh degree (from the father and the mother), *samânodaka* relationship, however, ceases if the descent and the name are unknown —Manu, v, 60

२। सपिण्डता तु पुरुषे सप्तमे विनिवर्तते।
समानोदकभावस्तु निवर्तेताचतुर्दशात्।
जन्मनाम्नोः स्मृतेरेके तत्परं गोत्रमुच्यते॥
मिताक्षराधृत वृहन्मनुवचनम्।

2 But the *sapinda* relationship ceases in the seventh degree the *samanodaka* relationship, however, ceases after the fourteenth, according to some, it exists if the descent and the name are remembered the word *gotra* is declared to comprise these, (i. e. Sapindas and Samânodakas)— Vrihat-Manu cited in the Mitakshara, 2, 5, 6

३। प्रपितामहः पितामहः पिता स्वयं सोदर्य्या भ्रातरः सवर्णाः पुत्रपौत्रप्रपौत्राः एतान् अविभक्तदायादान् सपिण्डान् आचक्षते। विभक्तदायादान् सकुल्यान् आचक्षते। सत्स्वङ्गजेषु तद्गामी ह्यर्थो भवति सपिण्डाभावे सकुल्य तदभावे चाचार्य्योऽन्तेवासी ऋत्विग् वा हरेत् तदभावे राजा॥

दायभागधृत—बौधायनवचनम्।

Sapinda

Sukulya

3 The paternal great-grandfather, the paternal grandfather, the father, the man himself, his brothers of the whole blood, his son and son's son and son's son's son by woman of the same tribe all these participating in undivided *daya* or heritage, are pronounced *sapindas* Those who participate in divided *daya* or heritage, are called *sakulyas* Male issue of the body being left, the property must go to them on failure of *sapindas*, the *sakulyas*, (and) in their default, the preceptor, a pupil, or the priest, (and) in default of these, the king shall take (the property).—

Baudhayana cited in the Dayabhaga, xi, i, 37

Daya according to Dayabhaga

[The author of the Dayabhaga takes the word "*daya*" in the text, to mean *pinda* or funeral oblation See D B, xi,i, 38]

४। त्रयाणाम् उदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते।
चतुर्थः सम्प्रदातैषां पञ्चमो नोपपद्यते॥
अनन्तरः सपिण्डाद् यस्-तस्य तस्य धनं भवेत्।
अत-ऊर्द्ध्वं सकुल्यः स्याद्-आचार्य्यः शिष्य एव वा॥

मनुः—९।१८६-१८७।

To whom libations of water and oblations to be made

4 To three must libations of water be made, to three must *pinda* or oblations of food be presented, the fourth is the giver of these offerings, the fifth has no concern with them Whoever is the unremote from (among) *sapinda*, his property becomes his After him the *sakulya* is the heir, then the preceptor or a pupil —Manu ix, 186-187

Colebrooke's translation of the above.

[The third line in the above extract from Manu has been translated by Colebrooke, thus "To the nearest *sapinda*, the inheritance next belongs" The literal rendering is given for the purpose of showing the peculiar wording of the line, such as requires grammatical explanation]

५। अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत्।
अनन्यपूर्व्विकां कान्ताम् असपिण्डां यवीयसीं।
अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजां।
पञ्चमात् सप्तमाद् ऊर्द्ध्वं मातृतः पितृतस्तथा॥

याज्ञवल्क्यः।१।५२।५३।

Selection of bride and the prohibited degree

5 Let a man, who has finished his studentship of the Vedas or sacred literature, espouse an auspicious woman who is not defiled by connection with another man, is agreeable, *non-sapinda*, younger in age and shorter in

stature, free from disease, is born from a different *gotra* and *pravara*, *and is beyond the fifth and the seventh from the mother and from the father* (*respectively*)."
—Yajnavalkya, 1, 52-53.

[These two Slokas are in that part of Yajnavalkya's Institutes, where the subject of marriage is dealt with The Mitakshara which is a running commentary on the Institutes, explains the term non-*sapinda* in the above text in the following passage,—]

६। असपिण्डाम्—समान एकः पिण्डो देहो यस्याः सा सपिण्डा न सपिण्डा असपिण्डा ताम्। सपिण्डता च एकशरीरावयवान्वयेन भवति। तथाहि पुत्रस्य पितृशरीरावयवान्वयेन पित्रा सह सापिण्ड्यम्। एवं पितामहादिभिरपि पितृद्वारेण तच्छरीरावयवान्वयात्। एवं मातृशरीरावयवान्वयेन मात्रा। तथा मातामहादिभिरपि मातृद्वारेण। तथा मातृष्वसृमातुलादिभिरपि एकशरीरावयवान्वयात्। तथा पितृव्यपितृष्वस्रादिभिरपि। तथा पत्न्या सह पत्युः एकशरीरारम्भकतया। एवं भ्रातृभार्याणामपि परस्परम् एकशरीरारम्भकैः सह एकशरीरारम्भकत्वेन। एवं यत्र यत्र सपिण्डशब्दः तत्र तत्र साक्षात् परम्परया वा एकशरीरावयवान्वयो वेदितव्यः।

यद्येवं मातामहादीनामपि "दशाहं शावम् आशौचं सपिण्डेषु विधीयते" इत्यविशेषण प्राप्नोति। स्यादेतत् यदि तत्र "प्रत्तानाम् इतरे कुर्युः" इत्यादि विशेषवचनं न स्यात्। अतश्च सपिण्डेषु यत्र विशेषवचनं नास्ति तत्र "दशाहम्" इत्येतद्वचनम् अवतिष्ठते।

अवश्यं चैकशरीरावयवान्वयेन सापिण्ड्यं वर्णनीयम्। "आत्मा हि जज्ञे आत्मनः" इत्यादिश्रुतेः। तथा 'प्रजाम् अनुप्रजायसे" इति च। "स एवायं विरूढः प्रत्यक्षेणोपलभ्यते" इत्यापस्तम्बवचनाच्च। तथा गर्भोपनिषदि—"एतत् षाट्कौशिकं शरीरं, त्रीणि पितृतस्त्रीणि मातृतः, अस्थिस्नायुमज्जानः पितृतः त्वङ्मांसरुधिराणि मातृतः' इति तत्र तत्रावयवान्वयप्रतिपादनात्। निर्वाप्य-सपिण्डान्वयेन तु सापिण्ड्ये मातृसन्ताने भ्रातृतत्पुत्रादिषु च सापिण्ड्यं न स्यात्। समुदायशक्त्यङ्गीकारेण रूढिपरिग्रहे अवयवशक्तिरत्र तत्रावगम्यमाना परित्यक्ता स्यात्। परम्परयैकशरीरावयवान्वयेन सापिण्ड्ये यथा नातिप्रसङ्गस्तथा वक्ष्यामः।

6 **Non-sapindam**—She whose *pinda* *i e*, body, is the same *i e*, one, is *sapinda*, one who is not *sapinda* is *non-sapinda* Sapinda relationship arises from connection with parts of one body accordingly, a son's *sapinda* relationship with the father arises by reason of connection with parts of the father's body, similarly (Sapinda relationship) also with the paternal grandfather and the like (arises) by reason of connection with parts of his body through the father, similarly with the mother, by reason of connection with parts of the mother's body, likewise, with the maternal grandfather and the rest, through the mother, similarly, also with the mother's sister, the maternal uncle and the like, by reason of connection with one body, so also with the paternal uncle, the father's sister and the like, similarly (arises the *sapinda* relationship) of the husband with the (*Patni*) lawfully wedded wife,

Sapinda, how it arises

by reason of (they together) forming one body (i e, one person, hence the wife is called half the body of the husband); similarly also (arises the *sapinda* relationship) of the wives of brothers (with each other), by reason of (the wives) forming one body reciprocally with those (i e, their husbands) formed from one body (of their father) thus wherever the term *sapinda* is used, there directly or mediately connection with parts of one body is to be understood

(It is objected), if it be so, then the text, namely,—"Obituary pollution for ten days is ordained among *sapindas*"—would without distinction apply also to the maternal grandfather and the like (cognates) (The answer is), that would have been the case, had there not been special provision (by way of exception) such as,—"In the case of married women pollution is observed by others (not by their paternal relations)" Hence where there is no special text relating to the *sapindas*, there the (general) ordinance, namely, "Obituary pollution for ten days, &c," remains (as the one to be applied).

Sapinda relationship, however, must be explained as arising by connection with parts of one body, by reason of the (Sruti) revelation, namely,—"One's own self (in the shape of son) is born from one's own self (in the shape of father), &c", likewise, also by reason of another revelation, namely, "Thou art (thyself) born as offspring", and by reason of the text of A'pastamba, namely,—"That one's own self is born as son, is visible by perception", likewise, by reason of the connection with (particular) parts of the father's and the mother's bodies being established in the Garbha-Upanishad (Upanishad dealing with child in the womb), thus,—"This body is composed of six constituents, three (are derived) from father, (and) three from mother, bone, nerve and marrow from father, (and) skin, muscle and blood from mother" But if *sapinda* relationship were by connection through *pinda* the sense of oblations presented to deceased ancestors, then there would be no *sapinda* relationship with the mother's line of ancestors, and also with the brother and his son and the like, and if that meaning of the word *sapinda* were accepted as traditional, upon the assumption that the whole word (irrespective of its component parts) has the power of expressing that meaning (by traditional usage), then, the power of the several constituent parts (of this word *sa-pinda*, namely *sa* and *pinda*) to express their respective apparent meanings would have to be rejected It will be stated (hereinafter) how *sapinda* relationship by mediate connection with the parts of one body (has been curtailed and so it) would not include those that are not intended

[The sentence in the above passage of the Mitàksharà, relating to the *sapinda* relationship of husband and wife has been erroneously translated by West and Buhler in their Digest of Hindu Law p 113, 4th Edition, thus,—

"So also the wife and the husband (are *sapinda* relations to each other), because they produce one body (the son)"

The sentence has similarly been wrongly rendered in the Tagore Law Lectures of 1880, p 470, 2nd Ed, thus,—

"So with the wife, by reason of her being a common generator of the same body (the son)"

These learned writers misunderstood the meaning of the Sanskrit words

as well as the purport of the sentence According to their version the husband and the wife would not be *sapindas*, until and unless a son be born to them, and consequently they would not be *sapindas* at all to each other, should they be destitute of issue, whereas they do become each other's *sapinda* from the moment of their marriage]

७। असपिण्डाम् इत्यत्र, एकशरीरावयवद्वारेण साक्षात्परम्परया वा सापिण्ड्यमुक्तं, तच्च सर्वत्र सर्वस्य यथाकथञ्चिदनादौ संसारे भवतीत्यतिप्रसङ्ग इत्यत आह—

पञ्चमात्सप्तमादूर्ध्वं मातृतः पितृतस्तथा।

मातृतो मातुः सन्ताने पञ्चमादूर्ध्वं पितृतः पितुः सन्ताने सप्तमादूर्ध्वं सापिण्ड्यं निवर्तत इति शेषः। अतश्चायं सपिण्डशब्दोऽवयवशक्त्या सर्वत्र प्रवर्तमानोऽपि निर्मन्थ्य पङ्कजादिशब्दवन्नियतविषय एव। तथा च पित्रादयः षट् सपिण्डाः पुत्रादयश्च षट् आत्मा च सप्तमः, सन्तानभेदेऽपि यतः सन्तानभेदस्तमारभ्य गणयेत् यावत् सप्तमः, इति सर्वत्र योजनीयम्। तथाच मातरमारभ्य तत्पितृपितामहादिगणनायां पञ्चमपुरुषवर्तिनी मातृतः पञ्चमीत्युपचर्यते। एवं पितरमारभ्य तत्पित्रादिगणनायां सप्तमपुरुषसन्तानवर्तिनी पितृतः सप्तमीति। तथाच "भगिन्योर्भगिनीभ्रात्रोर्भ्रातृपुत्री-पितृष्वसोः। विवाहे भ्रात्रादिभूतत्वाच्छाखाभेदोऽवगण्यते।"

यदपि वसिष्ठेनोक्तम्—'पञ्चमीं सप्तमीं चैव मातृतः पितृतस्तथा' इति। "त्रीनतीत्य मातृतः पञ्चातीत्य च पितृतः" इति च पैठीनसिना, तदर्वाङ्निषेधार्थं न पुनस्तत्प्राप्त्यर्थमिति सर्वस्मृतीनामविरोधः।

एतच्च समानजातीये द्रष्टव्यम्। विजातीये तु विशेषः। यथाह शङ्खः—
'यद्येक-जाता बहवः पृथक्क्षेत्राः पृथग्जनाः। एकपिण्डाः पृथक्शौचाः पिण्डस्त्वावर्तते त्रिषु" ॥ एकस्मात् ब्राह्मणाद्ये जाता एकजाताः। पृथक्क्षेत्रा भिन्नजातीयासु स्त्रीषु जाताः। पृथग्जनाः समानजातीयासु भिन्नासु स्त्रीषु जाताः। ते एकपिण्डाः सपिण्डाः किन्तु पृथक्शौचाः। पृथक्शौचमाशौचप्रकरणे वक्ष्यामः। "पिण्डस्त्वावर्तते त्रिषु" त्रिपुरुषमेव सापिण्ड्यमिति ॥

7. While explaining the term non-*sapinda* the *sapinda* relationship is stated to be directly or mediately through connection with one body, but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included, hence it is ordained—

"and is beyond the fifth and the seventh from the mother and from the father (respectively)."

Computation of degrees

The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i e*, in the mother's line, and beyond the seventh from the father, *i e*, in the father's line, hence although the word *sapinda* by its etymological import applies to all relations, yet it is restricted in its signification like the word *pankaja* (the derivative meaning of which is "growing in the mud," but which by

usage means a lotus, being a species of its primary import), &c, accordingly the six (ascendants) beginning with the father are *sapindas*, as also the six (descendants) beginning with the son, the man himself being the seventh, also in the case of divergence of the line, the counting shall be made until the seventh in descent (is reached) including him *i e*, ancestor within six degrees of ascent), from whom the line diverges (*i e*, a collateal within the sixth degree of descent, from an ancestor within the sixth degree in ascent, is seventh), in this mode is the computation (of degrees) to be made everywhere (*i e*, in all texts relating to degrees such as three, five or fourteen degrees) Accordingly, it is to be understood that the fifth from the mother is she who is (the fifth) in the line of descent from (any ancestor of the mother, up to) the fifth ancestor (and counting her and such ancestor, each as one degree)—in the computation—beginning with the mother (and counting her as one degree),—of the mother's father, paternal grandfather, and the like similarly, the seventh from the father is she who is (the seventh) in the line of descent from (any ancestor up to) the seventh ancestor (and counting her and such ancestor, each as one degree),—in the computation—beginning with the father (and counting him as one degree),—of the father's father, and the like Accordingly (it is said)—"In marriage, two sisters, a sister and a brother, and a fraternal niece and a paternal uncle, are taken to be two branches by reason of the descent of the two from a common ancestor (from whom computation of the degrees is to be made among their descendants)"

Difference of opinion as to the prohibited degrees for marriage

As for what is said by Vasistha, namely—"May marry the fifth and the seventh from the mother and the father respectively,"—and by Paithinasi, namely—"Beyond the third from the mother and the fifth from the father,"—these should be taken to intend the prohibition of the nearer degrees indicated therein, and not to allow the espousal of the nearer degrees expressed in them thus is the conflict between all the Smritis avoided

This again should be understood to be applicable to those of the same caste But there is a different rule when the caste is different, thus Sankha ordains—"If there be many sprung from one (but) of separate soil, (or) of separate birth, they are, of one *pinda* (but) of separate impurity, and the *pinda* exists in three."—'Sprung from one' means, sprung from the same Brâhmana or the like father, 'of separate soil,' means, born of wives belonging to different castes, 'of separate birth', means, born of different wives belonging to the same caste, 'they are of one *pinda*' *i e*, *sapinda*, 'but of separate impurity,'—the separate impurity will be explained in the Chapter on Impurity, 'the *pinda* exists in three,' means, *sapinda* relationship extends to three degrees only."

८। किञ्च पिता पुत्रान्तरेष्वपि साधारणः माता तु न साधारणीति प्रत्यासत्त्यतिशयात्,—'अनन्तरं सपिण्डाद् यस्तस्य तस्य धनं भवेत्'—इति वचनात् मातुरेव प्रथमं धनग्रहणं युक्तम्।

न च सपिण्डेष्वेव प्रत्यासत्तिर्नियामिका, अपि तु समानोदकादिष्वपि, अविशेषेण धनग्रहणे प्राप्ते प्रत्यासत्तिरेव नियामिका इति अस्मादेव वचनादवगम्यते इति॥—मिताक्षरायां दायभागाध्याये॥

8 **But** the father (of a person) is a common parent of other sons (by a different wife), but the mother is not so (of other sons by another husband), consequently by reason of her propinquity being greater (than that of the father), it is fit, that the mother alone should take the estate in the first instance comformably with the text (of Manu)—"*Whoever is the unremote from (among) sapinda, his property becomes his*" (Text No 4)

Propinquity in determining order of successon

Nor is propinquity the principle for determining the order of succession among only the *sapindas* (technically so called, in texts Nos 1 and 2, namely, relations within seven degrees), but it is also (the principle for determining the order) among the *Samânodakas* and the like, for, it appears from this very text (of Manu) that when succession is predicated of a body of persons without any distinction, then propinquity alone is the principle for determining the order of succession (among the individuals composing the body).—Mit, 2, 3, 3-4

Mitakshara on the text of Manu

9 [The above text of Manu, does, according to the Mitâkshara mean,—'To the nearest relation, the inheritance next belongs,'—but its wording literally means,—"Whoever is the unremote from (among) *sapinda*, his property becomes his"—This peculiar wording requires grammatical explanation, and accordingly the two commentators of the Mitakshara have made the following verbal comments on it —]

'य सपिण्डात् अनन्तर' सन्निहित "तस्य" सपिण्डसन्निहितस्य "धन तस्य' सपिण्ड सन्निहितस्य 'धनं भवेत्"। विश्वेश्वरभट्ट।

Grammatical explanation of the text by Visvesvara Bhatta

"Whoever is the unremote" *i e*, nearest "from (among) the *sapinda* his" *i e*, the nearest *sapinda's*, "property becomes his" *i e*, the nearest *sapinda's* "property"—Visvesvara Bhatta

"सपिण्डात् इति दूरान्तिकार्थैरिति षष्ठ्यर्थे पञ्चमी। तथाच, सपिण्डस्य "योऽनन्तर:" सन्निहित. "तस्य" सपिण्डस्य "धन तस्य" सपिण्डसन्निहितस्य 'धन भवेत्" इत्यर्थ:। बालम्भट्ट।

and by Balambhatta

The ablative case in the word "from (among) the *sapinda*," is used in the genitive sense, agreeably to (the aphorism of Pânini the celebrated grammarian) दूरान्तिकार्थै &c, accordingly, the meaning is,—"whoever is unremote," *i e*, nearest "of the *sapinda*, his," *i e*, the *sapinda's* "property becomes his," *i e*, the nearest-of-the-*sapinda's* "property"—

Bâlambhatta

Comment on the *sapinda* relationship for inheritance

[These are merely grammatical comments, but the rule intended to be laid down is what is clearly expressed in Colebrooke's lucid translation of the text, given above The context of the Mitâkshara, in which the above text of Manu is cited, shows beyond the shadow of a doubt that the word *sapinda* in that text is taken by the author of the Mitakshara in its etymological sense of any relation near or distant, as explained by himself (*supra* p 81), and that the rule applies to heirs of all descriptions whether *sapindas* technically so called, or *samânodakas*, or *sagotras* or *bandhus* Hence the suggestion made by some writer that Visvesvara Bhatta and Bâlambhata mean to indicate by those comments that two persons must be *sapindas of*

each other in order that they may inherit from each other,—is not only fanciful but simply absurd, being founded, as it is, upon the erroneous assumption that one man can be *sapinda* of another man who is not *sapinda* to himself, which again is based upon another absurd assumption that the *sapinda* relationship of females for the purpose of marriage is applicable to their brothers, for which there is absolutely no authority]

१०। पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवम् ॥

10 Where the paternal ancestors are worshipped, there the maternal ancestors also should certainly be worshipped

११। अविभक्त-धनास्त्वेते सपिण्डाः परिकीर्त्तिताः। ब्रह्मपुराणम्।

Sapinda according Brahma-Purana

11 But these whose property is undivided, are pronounced *sapindas* — Brahma-Purana

१२। सम्बन्धविवेके सुमन्तु —'ब्राह्मणानाम् एकपिण्डस्वधानाम् आ-दशमाद्-धर्मविच्छित्तिर्भवति। आ-सप्तमाद्-रिक्थविच्छित्तिर्भवति। आ तृतीयात् पिण्ड ("स्वधा"—इति रघुनन्दनधृतापाठः ?)-विच्छित्तिः, अन्यथा पिण्डशौचक्रियाविच्छेदाद् ब्रह्म (हत्या ?) तुल्यो भवति"।

अस्यार्थमाह शूलपाणि —जीवत्पित्रादित्रिकस्य वृद्धप्रपितामहादयस्त्रयः श्राद्धदेवतात्वात् पिण्डभाजो भवन्ति। तदूर्द्धं त्रयो नवपुरुषपर्यन्ता लेपभाजः। श्राद्धकर्त्ता च दशम इति दशमाद् ऊर्द्ध्वं सापिण्ड्यनिवृत्तिः। दशमादित्युपलक्षणम्, तेन पितृपितामहजीवने नवपुरुषपर्य्यन्तं, पितृजीवने चाष्टपुरुषपर्य्यन्तं सापिण्ड्यं ज्ञेयम्। अपुत्रधनग्रहणे सन्निहिताभावे सप्तपुरुषपर्य्यन्तम् अधिकारः। धनग्राहिणम् आरभ्य तृतीयः पौत्रः, तदूर्द्धं श्राद्धविच्छेदः। अन्यथा धनहारित्वे अपुत्रश्राद्धाकरणे ब्रह्महत्या इत्यर्थः।

निर्णयसिन्धौ तृतीयपरिच्छेदे विवाहप्रकरणे सम्बन्धविवेकधृतसुमन्तुवचनं शूलपाणिकृततद्व्याख्यासहितम् उद्धृतम्। रघुनन्दनस्य शुद्धितत्त्वे च उद्धृतमेतत् वचनम्।

Different degrees of Sapindaship for different purposes

12 Sumantu—cited—in the Sambandha-viveka says,—

"Of Brahmanas whose *pinda* (*i e*, oblation in the form of ball of rice) and *swadha* (*i e*, food-offering to the *manes* of deceased ancestors) are common, the status of *sapinda*-ship ceases after the tenth (degree), heritable right by *sapinda*-ship ceases after the seventh degree and (*sapinda*-ship for) offering *pinda* (*i e*, oblation of food in the exequial rites of a deceased person) ceases after the third degree if, otherwise, there be cessation of offering of the *pinda*, and of performance of the purifying exequial rites, that would be equal to the murder of a Bràhmana

Sulapàni explains the meaning of this (text thus),—

Explanation of the above by Sulapani

(If a deceased person's) three paternal ancestors viz, the father, the paternal grandfather and the paternal great-grandfather be alive, then the three remoter paternal ancestors viz, the great-great-grandfather and his father and paternal grandfather become, by reason of their being Gods in the *çràddha* ceremony of the Ancestor-worship, partakers of the (three) *pindas* in the

sapindi-karana sràddha ceremony of the deceased, and the three (remoter) ancestors after them up to the ninth degree become partakers of the *lepa* or remnants of the *pinda* oblations, and thus the person performing the Sràddha becomes the tenth, and hence *sapinda* relationship ceases after the tenth degree It should be understood that the term—"after the tenth degree" is illustrative, therefore when (the two paternal ancestors viz,) the father and the paternal grandfather are alive the *sapinda* relationship extends to *nine* degrees, and when the father (alone) is alive it extends to *eight* degrees To the estate of a person destitute of male issue the heritable right by *sapindaship* extends to *seven* degrees in default of nearer relations, counting from the first heir, his son's son is the third (in degree) and after him there is cessation of exequial *Sràddha* ceremony "Otherwise &c" means, if a person inheriting the estate of a sonless deceased relation do not perform his *sraddha* and the like exequial ceremonies, he becomes guilty of murdering a Brahmana This is the meaning.

Cited in the chapter on marriage in the 3rd book of Nirnaya-Sindhu Also cited by Raghunandana in his Suddhi-Tattwa

Sec. 2 – GENERAL TERMS

Da'ya —There is a difference between the two schools with respect to the meaning of the term *dàya* According to the Mitakshara, it is defined thus —"The term *dàya* signifies that wealth which becomes the property of another, solely by reason of his relationship to the owner". Jimutavahana, however, says that the word *dàya* by derivation means gift, but in the Law of Inheritance "The term *dàya* is by usage employed to signify wealth in which proprietary right dependent on relation to the former owner, arises *on the extinction of his ownership* by death natural or civil (such as degradation, renunciation of worldly objects, and retirement to a holy place for religious purpose)

Daya defined by Mitakshara,

by Dàyabhàga

This difference in the definition of the term *dàya* arises in consequence of the Mitakshara doctrine of the right by birth, of male issue in the property of the father and other paternal male ancestors in the male line The Dàyabhaga repudiates that doctrine The Mitakshara therefore adds that *dàya* is of two sorts, namely, *a-pratibandha* or unobstructed, and *sa-pratibandha* or obstructed According to the Dàyabhaga, *dàya* is always *obstructed*, inasmuch as the right does not accrue during the life-time of the previous owner in any case.

Reason for the difference

Unobstructed and obstructed heritage

Having regard to the definition of the term *dàya*, as

given in the Mitakshara, it cannot be rendered into *heritage* which signifies only what is called *obstructed dàya*, and cannot include the *unobstructed dàya* or the congenital coparcenary of the male issue, for *nemo est hæres viventis* (=No one is the heir of a living person).

Partition according to Mitakshara and Dayabhaga.

Partition—According to the Mitakshara,—"Partition is the adjustment into specified portions, of divers rights (of the coparceners) which (divers rights) extend to the whole estate" According to the Dayabhaga,—"Partition is the manifesting or making known, by the casting of lots or otherwise, the proprietary right (of each coparcener), which had arisen in the land and moveables, but which extended only to a fractional portion of the same, that was previously unascertained, and was unfit for exclusive dealing by reason of there being no evidence of any ground of discrimination"

Difference between Mit, and Dàya, on partition

According to the Mitakshara, the right of each coparcener extends to the whole property, but according to the Dayabhaga, it extends to a fractional portion only, or to that portion only which on partition is allotted to him, or, in other words, coparceners take as *joint tenants* under the Mitakshara, but as *tenants in common* under the Dayabhaga.

Gotra not exclusive to Brahmanas

Gotra—The *gotra* of a person is the name of the sage (*rishi*) from whom he or his agnate is supposed to have descended in the main line The later Brahmana writers say that properly speaking Brahmanas alone belong to some *gotra* or other, as being descended from the *rishi* who is the founder of the *gotra* or family, but the three inferior tribes have no *gotra* of their own, their *gotra* being that of their Guru (preceptor of the Vedas) or priest. But this theory seems to be opposed to admitted facts. For Visvamitra, who was a Kshatriya by birth, and Vasishtha who was not a pure Brahmana by birth, are admittedly founders of *gotras* or ancestors of many founders of *gotras*

Thus a text of Smriti cited by Raghunandana says :—

जमदग्निर्भरद्वाजो विश्वामित्रात्रि गौतमाः ।
वशिष्ठ-कश्यपागस्त्या-मुनयो गोत्रकारिणः
एतेषां यान्यपत्यानि तानि गोत्राणि मन्यते ॥

Which means,—"The sages—Jamadagni, Bharadvaja, Visva-mitra, Atri, Gotama, Vasishtha, Kasyapa, and Agastya—were progenitors of *gotras* · those that were descendants of these, are known to be the *gotras* or founders of *gotras*."

The fact that persons of different castes have the same *gotras*, rather proves that the caste system itself is a later institution or classification based upon occupations and qualifications,—a theory supported by many Sanskrit works of authority.

Sagotras are descendants in male line from the founder of gotra.

Sagotras—Two persons are *sagotra*, or of the same family, if both of them are descended in the male line from the *rishi* or sage, after whose name the *gotra* or family is called, however distant either of them may be from the common ancestor Every Hindu knows the *gotra* to which he belongs.

Pravara

Pravara—The word cannot be logically defined as it will violate the fundamental rules of definition It can be best described as follows —The principal sages of a *gotra* or race by whom that race or its branch is distinguished from other *gotras* or the rest of the same *gotra* are called *Pravaras*. For instance in the *Visvámitra gotra* there are three *pravaras*, namely, *Visvamitra, Marichi* and *Kausika* of whom Visvamitra is the founder of the *gotra*, which is distinguished from other *gotras* by having for its *pravaras* the sages *Marichi* and *Kausika*

All persons have not only a *gotra* but also a *pravara*. The number of *rishis* included in *pravara* are usully three but never exceeds five. The term is used in the Dayabhaga, but not in the Mitakshara. Raghunandana cites the explanation given by Madhava-Acharyya of the term *pravara*, thus,

प्रवरस्तु गोत्रप्रवर्त्तकस्य मुने-र्व्यावर्त्तको मुनि-गणः, इति माधवाचार्य्यः ।

which means "Madhava-Acharyya says, that *pravara* is the group of sages distinguishing the sage who is the founder of a *gotra*" It seems that two different *gotras* may have the same name, and they are distinguished from each other by their *pravaras*, which term may also mean the most distinguished members of a *gotra*.

Samana pravara.

The Samana-Pravaras—are descendants in th male line of the three paternal ancestors of the founder of a *gotra*

Sec 3—RELATIONSHIP

Sub-Sec I—SAPINDA

Sapinda

Sapinda.—The term *sapinda* means one *of the same pinda.* The word *pinda* is used in various senses, it signifies thickness, mass, corridor of a house, a ball, food, body which is but assimilated food, and food for departed ancestors, such as a ball composed of rice, &c, presented to the *manes* of ancestors at the Sraddha ceremony.

used in two senses

In the Hindu law books the term has been used in two different senses. in the one sense, it means a relation connected through the same body, and in the other, it means a relation connected through funeral oblations of food.

Sapinda according to Mitakshara

According to the Mitakshara.—In the Mitakshara the term *Sapinda* is used in the sense of, one *of the same body, i e,* a blood relation In this literal sense the term would include all relations however distant. But this derivative denotation of the term, is curtailed by technical limitations, and so it includes relations within the seventh degree according to the Hindu mode of computation Then again there is this further restriction that this term when used without qualification, signifies agnatic relations only, *i e*, the relations of the same *Gotra,* the relations of a different *Gotra*, being included under the term *bandhu* in the Mitakshara. (*a*)

forty-eight in number,

According to the Mitakshara, therefore, the *sapindas* of a person are, his six male descendants in the male line, six male ascendants in the male line, and six male descendants in the collateral male line of each of the six male ascendants,—altogether forty-eight relations (*b*)

wives of these and himself are *Sapindas*

The lawfully wedded wives of these relations as well as of the person himself are his *sapindas.* The sacrament of marriage effects physical unity of husband and wife. (*c*)

Sapinda relationship for marriage

As regards the Sapinda relationship of females with males, for the purpose of marriage, it extends to different degrees on the paternal and the maternal sides of the males, according to most of the sages. The sages again are not

(*a*) Text No 2 cited in Mit, 2, 5, 6
(*b*) See table infra p 97
(*c*) Text No 61, D B, 4, 2, 14

agreed as to the number of degrees, to which the Sapinda relationship of females extends according to different sages, the number of degrees is either 8 or 7 or 6 on the paternal side, and respectively 6 or 5 or 4 on the maternal side, of the bridegroom which constitutes females within those degrees, his *sapindas* for the purpose of marriage, and therefore prohibited.

does not affect *Sapinda* relationship between males,

It should be specially noticed that this connubial *sapinda* relationship is one between males and females only. It does not affect the *sapinda* relationship between males. There is absolutely no authority for its application to males. But an *obiter dictum* is expressed in two cases, (*d*) which seems to be based on the suggestion made by a writer as to the intention of the two commentators of the Mitakshara, in the passages (*e*) explaining Manu's text. The Privy Council, (*f*) however, has extended this *sapinda* relationship to *Bandhus*. This will be considered while dealing with the term *Bandhu* and while discussing the above Privy Council case.

but held contrary by court

Computation of degrees, English mode different from Hindu mode.

Computation of degrees.—The Hindu mode of computation of degrees is the same as that adopted by the Canonists and is different from the English or Civilian mode which is adopted in the Succession Act, Sections 21 and 22, and according to which one is to exclude the *propositus*, and count as one degree each ancestor and each descendant lineal or collateral, down to the relation whose degrees of distance from the *propositus* one is computing. According to the Hindu or Canonist mode which is also called the classificatory mode one is to count the *propositus* as one degree, and then count his as many ancestors as will make up the given number, taking each ancestor as one degree, and then count as many descendants of the *propositus* himself, and of each of the said ancestors, as together with the *propositus* or that ancestor respectively, will make up the given number. The above enumeration of the male *sapindas* according to the Mittàksharà, affords an instance of relations within seven

(*d*) Umaid *v* Udoy 3 C 119 4 C L R, 400 Babu Lal *v* Nanka 22 C 339.
(*e*) Text No 9, p 85 Supra
(*f*) Ramchandra *v* Vinayak, 41 I A 290 42 C 384 20 C L J 573 18 C. W N 1154 25 I. C 290 27 M L J 333 10 N L R 112 16 Bom L R 863 12 A L J 1281.

degrees, and the enumeration given below, of the first class Dàyabhàga *sapindas*, is an instance of relations within four degrees.

Madras decision and wrong computation

In this connection, the Madras decision (*g*) in which it has been held that a person's maternal garndfather's brother's daughter's daughter is beyond five degrees and therefore eligible for marriage according to the Mitàksharà It is difficult to understand how she could be held to be beyond five degrees except according to the English mode of computation of degrees The Hindu judge who was a party to that decision appears to have been "a lawyer without Sanskrit", otherwise the error would not have crept into the judgment.

Sapindas according to Dàyabhàga,

Sapindas according to the Dàyabhàga.—The above definition of *sapinda* is not altogether lost sight of, in the Dàyabhàga But the author of that treatise explains it to relate to marriage, mourning, &c, and not to inheritance For the purpose of inheritance, he takes the word *sapinda* in the sense of one connected through the same funeral oblation.

F B holds three classes of *Sapindas* :

According to the Dàyabhàga as understood by the Full Bench in the case of *Guru Gobind Shaha Mandal* (*h*) the term *sapinda* includes three classes of relations.

(1) three relations who partake undivided oblations at *Sapindikarana*,

The *first class* includes those relations of a person with whom that person, when deceased, and after the *sapindakarana* ceremony, partakes of undivided oblations They are his three male descendants in the male line, three male ascendants in the male line, and three male descendants in the male line of each of the three male ascendants or in other words, the son, grandson and great-grandson, the father, grandfather and great-grandfather, the brother, brother's son and brother's grandson, the paternal uncle, his son and grandson, as well as the paternal granduncle, his son and grandson,—altogether fifteen relations The lawfully wedded wives of these relations as well as of the person himself are his *sapindas*, in this sense. It is worthy of remark that the Hindus living in joint families could not conceive an idea of heaven without joint family, the first class

(*g*) Venkata *v* Subhadra, 7 M 548
(*h*) 5 B L R 15 13 W R, F B 49

sapindas are in fact the members of the joint family, associated together in heaven after death (*i*)

The *second class* comprises those relations of a person, that present oblations participated in by that person, when deceased, but do not partake of undivided oblations with him. They are the grandsons by daughter, of the person himself, of his three paternal ancestors, as well as of the son and the grandson of the person himself and his three paternal ancestors—altogether twelve relations (*j*)

(2) grand son by daughter of the person of his 3 male ancestors, of son, grandson of the person and his 3 male ancestors,

The *third class* comprehends the three maternal grandsires, to whom the deceased was bound to offer oblations, and those relations that present oblations to them. They are the three maternal grandfathers, three male descendants of each of them, and the grandsons by daughter of the three grandsires, and of two male descendants of each of the three grandsires,—altogether twenty-one relations (*k*)

(3) 3 maternal grandfathers, 3 male descendants of them, grandsons by daughters of 3 grandsons and of 2 male descendants of them

The list of relations falling under each class mentioned above, can be easily drawn, if the following propositions be borne in mind in connection with the *Parvana Sradha* ceremony, namely (1) A person is bound to offer funeral cakes to his three immediate *sagotra* ancestors male as well as female, and to his three immediate maternal male grandsires. (2) A person after his death, and after the *sapindi-karana* ceremony partakes of undivided oblations with his three *sagotra* male ancestors with whom he is united by that ceremony. The *sapindas* of a person are (according to the Full Bench) those relations with whom he partakes of undivided oblations, those who offer oblations enjoyed by him, those to whom he was bound to present oblations, as well as those who offer oblations to those to whom he was bound to present oblations.

How the 3 classes worked out

In connection with this subject it ought to be particularly borne in mind that if a person die during the life-time of one or two of his three immediate *sagotra* ancestors, then his *sapindi-karana* ceremony which must be performed with three *sagotra* ancestors, is to be performed by uniting him

How *Sapindi-karana* to be performed when there is immediate ancestor

(*i*) See table infra p 96 (*j*) See table infra p 96 (*k*) See table infra p 97

with two or one respectively of his paternal ancestors further removed than three degrees Thus, most, if not all, of the *sakulyas* may come under the first class of *sapindas* (*l*)

Sapindas according to commentators

According to all the Sanskrit commentators, the term *sapinda* in the sense of connected through funeral oblations, includes the first class only of these also, the three ancestors and the three descendants in the male line, only, are *sapindas* in this sense, the rest are not so except in a secondary sense And it is extremely doubtful whether the author of the Dàyabhàga intended to apply the term to all the relations of the latter two classes Srikrishna the commentator of the Dàyabhàga and author of the Dayakrama-Sangraha, however, refuses to call them *sapindas*.

Doctrine of spiritual benefit

Points not placed before the Full Bench—The exposition of Sapinda relationship according to the Dayabhàga, set forth above, was made by the Full Bench as being what is logically deducible from the general expressions used by the author in the course of his arguments founded on the doctrine of spiritual benefit, whereby he maintained the particular *order of succession* of certain relations, as laid down by him, differing from the author of the Mitakshara

Difficulties of oblation theory

There were however certain difficulties against his *oblation theory*, which stood in the way of the logical deduction of the principle of spiritual benefit from the generality of the expressions, of which the author was fully conscious but which were neither argued at the bar nor considered by the Full Bench while enunciating what appeared to follow logically from the author's arguments in particular instances, as legitimate generalisations with respect to Sapinda relationship The difficulties are these,—

1. The *oblation theory* is founded solely on two texts, one of Baudhàyana, and the other, of Manu (*m*) Baudhayana's text cannot be construed to support the theory unless the word *dàya* means *pinda* There is no authority in support of this novel meaning sought to be put upon it by Jimùtavàhana, for, the plain natural meaning of the important passage is—" All these participating in *undivided heritage* are pronounced *sapindas*, those who participate in *divided heritage* are called *sakulyas*."

2. The author's interpretation is,—" All these partaking of *undivided oblations* are pronounced *sapindas*. Those who partake of *divided oblations* are called *sakulyas* "

Oblations may be said to be *undivided*, only on the occasion of performing the *sapindi-karana* ceremony on the first lunar anniversary of the day of a person's death, when four *pindas* are made, one for the deceased, and three for his three paternal ancestors, and the *pindas* are mixed up, thereby indicating

(*l*) Text No 12

(*m*) Text Nos 3 and 4 p 80 supra

that the soul of the deceased is to pass from the *preta loka* or the region for the dead (purgatory) to the *pitri-loka* or region for the spirits of ancestors or heaven But the oblations presented while the Pàrvana Sràddha, the foundation of the doctrine of spiritual benefit, are performed,—are separate and divided and cannot be called *undivided.*

It is difficult to understand the meaning of the term *divided oblations,* whereby must be understood the *Pinda-lepas* or remnants of the *pindas i e*, what are attached to the hand while mixing up the things, of which the *pindas* are composed, and scraped by the Kusa grass and formed into an offering for the three remoter ancestors. There is no reason why these should be called *divided oblations,* and why the three oblations presented to the three nearer ancestors, one to each, should be called *undivided oblations*

3 According to the text of Manu (*n*) oblations are to be presented to three ancestors, and not to six, there cannot be any doubt that Manu provides for the offering of *pindas* to the three paternal ancestors only, and not to the three maternal ancestors also

And this is consistent with the provision that "the *fourth* is the giver of these offerings, the *fifth* has no concern with them." The terms *fourth* and *fifth* are used relatively to the remotest of the three ancestors Hence it is clear that Manu cannot be taken to contemplate the offering of oblations by a person to his maternal grandfather, great-grandfather and great-great-grandfather, for, that person is undoubtedly *fifth* relatively to the remotest of the three maternal ancestors

4 The Ancestor-worship like the worship of the Gods, is performed for the benefit of the worshipper and not for the benefit of the ancestors

5. The doctrine of spiritual benefit, derived from the performance of any Sraddha ceremony by a son or the like, is contrary to the doctrine of *Karma* and *Adrishta,* one of the fundamental principles of the Hindu religion, according to which a man's condition of happiness or misery depends solely on his own acts and omissions.

As to other objections against the doctrine of spiritual benefit derived from oblations, see preface to the second edition of the Dàyatattwa translated by the author

Jìmùtavàhana was well aware of the weakness of his position, and did therefore conclude by saying that if the learned are not satisfied with his *principle,* still the *order of succession* maintained by him should be accepted (*o*)

So it is the *order* and not the *principle,* which is of higher importance, according to the author himself Hence the principle enunciated by the Full Bench does not appear to be justified, but none the less, the *principle* of *spiritual benefit* has been followed by the courts (*p*)

(*n*) Text No 4, p 80 supra

(*o*) D B, Ch xi, Sec, vi, para 33 (*p*) See foot-note (*j*) page, 50

The following tables will be of some use in understanding the *sapinda* and the *sakulya* relationships.

The first class *Dayabhaga sapindas*

G_2F_{12} — S_{13} — S_{14} — S_{15}
|
G_1F_8 — S_9 — S_{10} — S_{11}
|
F_4 — S_5 — S_6 — S_7
|
P — S_1 — S_2 — S_3

The second class *Dayabhaga sapindas.*

The third class *Dayabhaga sapindas*

The *Mitakshara sapindas*

$G_5F_{19}—S_{20}—S_{21}—S_{45}—S_{46}—S_{47}—S_{48}$

$G_4F_{16}—S_{17}—S_{18}—S_{41}—S_{42}—S_{43}—S_{44}$

$G_3F_{13}—S_{14}—S_{15}—S_{37}—S_{38}—S_{39}—S_{40}$

$G_2F_{10}—S_{11}—S_{12}—S_{33}—S_{34}—S_{35}—S_{36}$

$G_1F_7—S_8—S_9—S_{29}—S_{30}—S_{31}—S_{32}$

$F_4—S_5—S_6—S_{25}—S_{26}—S_{27}—S_{28}$

$P—S_1—S_2—S_3—S_{22}—S_{23}—S_{24}$

The first group of *Sakulyas.*

$G_6 F_{27}-S_{28}-S_{29}-S_{30}-S_{31}-S_{32}-S_{33}$
|
$G_5 F_{20}-S_{21}-S_{22}-S_{23}-S_{24}-S_{25}-S_{26}$
|
$G_4 F_{13}-S_{14}-S_{15}-S_{16}-S_{17}-S_{18}-S_{19}$
|
$G_3 F\ -S\ -S\ -S\ -S_{10}-S_{11}-S_{12}$
|
$G_2 F\ -S\ -S\ -S\ -S_7\ -S_8\ -S_9$
|
$F\ -S\ -S\ -S\ -S_4\ -S_5\ -S_6$
|
$P\ -S\ -S\ -S\ -S_1\ -S_2\ -S_3$]

Sub-Sec ii—SAKULYA

Sakulya

The term *sakulya* means one belonging to the same *kula* or family, and designates two groups of heirs according to the Dàyabhàga. The first group of *sakulyas* of a person comprises the 4th, 5th and 6th male descendants in the male line of that person, and of his father, grandfather and great-grandfather, and it includes the 4th, 5th and 6th paternal male ancestors in the male line, and also six male descendants in the male line of each of these ancestors, altogether thirty-three relations. The term *sakulya* therefore includes those male *sapindas* according to the Mitàksharà, that do not fall under the first class Dàyabhàga *sapindas* as enumerated above. The term *sakulya* is not used in the Mitàksharà for denoting any class of heirs.

Whom *sakulya* includes

Besides the above meaning, the author of the Dàyabhàga puts upon the term *sakulya* as used in Manu's text, (*q*) another sense in which it includes the group of heirs also called *samanodakas*

Sub-Sec iii—SAMANODAKA

Samanodakas are agnates within 14 degrees excluding *Sapindas.*

The term *samanodaka* includes all agnatic relations of the same *gotra* or family, within fourteen degrees calculated according to the Hindu mode of computation ; that is to say, thirteen male descendants in the male line, thirteen similar ascendants, and thirteen similar descendants of each of these thirteen ascendants, excepting, however, those included under

(*q*) Text No 4, *Supra* p 79

the terms *sapinda* and the first group of *sakulya*. According to some, it comprises all such *sagotras* or agnatic relations whose common descent and name are remembered. The meaning of the term *samanodaka* is the same as *sagotra* in the Mitàkshara but in the Dàyabhàga, it is limited as mentioned above. *See* Ch. vi, *post*

Sub-Sec iv - BANDHUS

Bandhu used in Mit, and not in Daya., to designate a class of heirs

Bandhu—The term *bandhu* is used in the Mitàkshara, and not in the Dàyabhàga, to designate a class of heirs, and according to the Mitàkshara, it means and includes, as is already said, the *bhinna-gotra sapindas* or relations belonging to a different family. The meaning of the term *sapinda* is explained in the Mitàkshara while commenting on the slokas of Yàjnavalkya's Institutes, in which the qualifications of the damsel to be married by a man are dealt with. It is declared that the intended bride must, amongst others, be non-*sapinda*, must not belong to the same *gotra* or *pravara*, and must be beyond the fifth and the seventh degree from the mother and the father respectively (r)

Sapinda according to Mit, means a blood-relation,

Meaning of Sapinda in Mitakshara—In explaining the terms non-*sapinda*, the Mitàkshara says, that the word *sapinda* means one connected through the same body i e, any blood-relation however distant. It is observed that the husband and the *Patni* or lawfully wedded wife become *sapindas* to each other in this sense, because a text of revelation says, that the sacrament of marriage unites them "bones with bones, flesh with flesh, and skin with skin" It is erroneous to say that they become *sapindas* through their child, for, if that were so, they should not be *sapindas* before childbirth, whereas the true theory is, that they become *sapindas* from the moment of their marriage.

to be taken in that sense wherever

After giving the above exposition, the Mitàkshara says that wherever the word *sapinda* is used in that work, it should be understood in the sense of a blood-realation. (s)

gotra or pravara applies to regenerate classes only.

The Mitàkshara then goes on to observe that the qualification non-*sapinda* applies to all castes, but the

(r) Texts Nos 5, 6 & 7, *supra* pp 80-83
(s) Text No 6, *supra* pp 81-83

qualification of not belonging to the same *gotra* or *pravara* applies to the regenerate classes only.

Limitation for *Sapinda*-ship for marriage is 5 degrees on mother's and 7 on father's

Sapinda relationship for Marriage.—It is next observed that in explaining the word non-*sapinda* it has been said that *sapinda* relationship means immediate or mediate connection through same body, but as such connection may be taken to exist between all persons, marriage itself would be impossible; hence Yajnavalkya has declared that if the bride be "beyond the fifth and the seventh degree from the mother and the father respectively, she may be espoused" The Mitakshara adds that *sapinda* relationship should be taken to cease beyond those degrees, evidently meaning, for the purpose of marriage; because, this conclusion is arrived at as the proper construction of the text No. 5, which prohibits marriage of a *sapinda* damsel, but permits marriage of one if beyond five and seven degrees from the mother and the father respectively, though she be included under the term *sapinda* according to its ordinary meaning,—this conflict being reconciled by restricting in that way the meaning of the term Sapinda *in this text* of Yajnavalkya and then explains the mode of computation of degrees (which has been already explained),(*t*) and goes on to observe that the same mode should be adopted everywhere (*i. e*, in all cases of contemplated marriage, or in all texts relating to degrees)

The line may pass through male or female

It should, however, be specially noted that the Mitàksharà does not say whether or not, the lines of the seven and the five ancestors of the *propositus* on the paternal and the mternal sides respectively, may pass through males or females or both indifferently, although it is admitted on all sides that the lines of descent from those ancestors may pass through males or females or both without any distinction. But in illustrating the mode of computing the degrees, the Mitakshara refers only to the lines of the father's and the mother's male ancestors in the male line, though in computing five degrees the mother is counted as one.

Mit., on conflicting texts

Conflicting texts noticed.—The Mitàkshará then cites a text of Vasishtha which says · "The fifth or the seventh from

(*t*) *Supra* p 91-92

the mother and the father respectively (may be married),"— and a text of Paithinasi, which says "(A girl may be taken in marriage, who is) beyond the third from the mother and the fifth from the father ,"—and explains these texts away by saying that they do not intend to authorize marriage of girls distant by lesser number of degrees (given in these texts) than in the above Sloka of Yajnavalkya, but they intend to prohibit the espousal of the girls of nearer degrees indicated in them.

Reconciliation unsatisfactory ;

Reconciliation unsatisfactory.—The above mode of reconciliation, adopted by the Mitakshara does not appear to be satisfactory at all, nor is the view put forward by that treatise, respected and followed in practice The customs and usages relating to the prohibited degrees for marriage are so divergent in different localities, and among different tribes and castes, that it may be safely affirmed that as regards marriage, the written texts of law found in the Smritis and the commentaries are nowhere followed in practice

Conflicting rules on prohibited degrees

Conflicting rules on prohibited degrees.—If prohibited degrees for marriage be taken as the standard or *sapinda* relationship, then it would extend to eight degrees on both the mother's and the father's side, according to Manu , to five and seven degrees (calculated from the mother and the father) respectively on the mother's and the father's side, according to Yajnavalkya , to four and six degrees respectively on the mother's and the father's side, according to Vasishtha , and to three and five degrees respectively on the mother's and the father's side, according to Paithinasi , and to still lower degrees on the two sides according to the Vedic texts (*u*) and according to custom prevailing in many places and among many classes of people.

Marriage between same *gotra* prohibited

It should be remarked that as damsels belonging to the same *gotra* are separately prohibited to the regenerate tribes for marriage, the *sapinda* girls on the father's side, who need be considered for the purpose of marriage among these tribes are those that are cognate to the bridegroom, that is to say,

(*u*) Original texts No 9 under Marriage, Ch III, *post*.

between whom and the bridegroom females intervene. But as regards the Sùdras who form the majority of Hindus, both the agnate and the cognate *sapinda* damsels should be taken into consideration in this connection, for, they only are prohibited to the Sùdras.

among regenerate tribes.

As regards the regenerate tribes the only rule of prohibited degrees for marriage, which seems to be followed in all parts of India, is that a damsel of the same *gotra* with the bridegroom is not taken in marriage.

In practice prohibited degrees divergent

Marriage usages, contrary to Shastras.—But it should be specially noticed that as regards prohibited degrees outside the *gotra* that is to say, girls who are *bhinna-gotra sapindas*, or relations belonging to a different family, the usages are most divergent. It is already noticed that the *Rishis* or lawgivers propound different rules on the subject. So in actual practice observed by the people it is found that even amongst the Bràhmanas of Madras the *bhinna-gotra sapinda* relationship for marriage, extends only to two degrees from the mother, because, there they marry even their father's sister's daughter and their mother's brother's daughter. So also among the Chhatris or Ràjputs claiming to be Kshatriyas, domiciled in Bengal and Chhota-Nagpur, very few cognate girls are eschewed for marriage. The reason appears to be, that when in a particular locality there are only a few families belonging to the same caste, so that the observance of the prohibited degrees as propounded in the Shàstras would render marriage itself impracticable for want of lawfully eligible brides, then we find a departure from the Shàstras, to a greater or lesser extent, according to the exigency The prohibited degrees are not observed also by the Kulin Bràhmanas of Bengal, whose so-called high position depends only on marriage of girls of certain families according to the modern and artificial rules of *Kulinism,* and who are often found to contract what may be called incestuous marriages for maintaining their *Kulinism* by disregarding the rules propounded by the Shàstras, and explained by Raghunandana whose authority is respected in Bengal.

Rules to be observed for prohibited degrees for marriage

The golden rule of prohibited degrees.—For marriages, to follow, therefore, in a case where the validity of a marriage is called into question on the ground of being within prohibited degrees, is to pronounce it valid if found to be celebrated in the presence, and with the presumed assent, of the relations and caste people, notwithstanding written texts of law to the contrary, which must be taken to be recommendatory in character, as appears from the language of Manu's text on the subject :—

असपिण्डा च या मातु-रसगोत्रा च या पितुः ।
सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने ॥

Which means,—"She who is non-*sapinda* also (non-*sagotra*) of the mother, and non-*sagotra* also (non-*sapinda*) of the father, is *commended* for the nuptial rite and holy union among the twice-born classes" Similarly, the Mitâksharâ expressly says that many of the qualifications of the bride, ordained by Yâjnavalkya (*v*) are directory only.

Prohibited degrees for marriage are not for inheritance

Prohibited degrees are not Bandhus for inheritance —Thus the prohibited degrees for marriage can by no means be taken to be *bhinna gotra sapindas* or *bandhus* for the purpose of inheritance, on account of the following reasons —

(1) While explaining *sapinda* relationship for the purpose of marriage, the Mitâksharâ says that wherever in that work the word *sapinda* is used, it shall be taken in the sense of one connected through the same body but it does not say that the restriction of *sapinda* relationship within seven degrees on the father's side and five degrees on the mother's side, which is undoubtedly laid down by Yâjnavalkya for the purpose of marriage, is to be understood as applicable for all purposes

(2) If the intention of the Mitâksharâ had been to apply the said restriction to inheritance and other purposes as well, it would not have explained the degrees of *sapinda* relationship again while dealing with the *Parvana Srâddha*, and with inheritance, by citing the text of Vrihat-Manu (*w*) but would have referred to the earlier explanation of it given for marriage (*x*)

(3) The principles upon which marriage is prohibited between certain relations, are not the same on which inheritance is based

(4) *Sapinda* relationship for marriage has reference only to *female* relations of the intended bridegroom, whereas *sapinda* relationship for inheritance relates mainly to male relations, females, as a general rule, being excluded from inheritance

(*v*) Text No 5, p 80, *supra*
(*w*) Text No 12 p 79.
(*x*) Mit, 2, 5, 6

(5) The proposition that if A can marry B's sister, then B cannot be A's heir, is not correct, for a Brâhmana of Madras can marry his maternal uncle's daughter whose brother is expressly recognised as an heir, and Sûdras can marry within the same *gotra*, a girl whose brother is a *samânodaka* and, as such, an heir

(6) *Sapinda* relationship for marriage not being uniform but divergent, as shown above, cannot be the basis of a rule of inheritance, which must be invariable, certain and uniform:

(7) There is neither authority nor reason for excluding a *bhinna-gotra* relation from inheritance when his relationship can be traced, seeing that the Mitâksharâ says that *bhinna gotra sapindas* are included under the term *bandhus*, declared heirs after *sagotras*, and that the term *sapinda* means any relation, and seeing further that when the estate of a Brâhmana goes to his caste-people in default of *bandhus*, a very strong presumption arises against cutting down and confining the meaning of the term to some relations only with a view to exclude others

(8) These arguments and considerations for the purpose of establishing that the *prohibited degrees* for marriage are not *bandhus* for inheritance, would appear unnecessary and superfluous to a careful reader of the exposition given in the Mitâksharâ, of the *sapinda* relationship for marriage, (*y*) because, the Mitâksharâ distinctly says that the seven degrees on the father's side and the five degrees on the mother's side are to be computed from the *father* and the *mother* respectively hence the six descendants of the father's seventh ancestor who is eighth from the *propositus* (in the Hindu mode of computation) are *sapindas* for marriage But the eighth ancestor's descendants are admittedly not *sapindas* for inheritance, for, the Mitâksharâ has explained *sapinda* relation for inheritance to extend to seven degrees from the *propositus*, and not from his father This conclusively shows that the *sapinda* relationship for marriage is inapplicable to inheritance

Bandhus according to Privy Council.—But inspite of the reasons stated above, the PRIVY COUNCIL has held that the prohibited degrees for marriage are the same as *bhinna-gotra sapindas* or *bandhus* for the purpose of inheritance, (*z*) and this must now be taken to be the law until reversed by the same Board or the Legislature.

P C, on the same

Meaning of the word Bandhu—Having regard to the structure and organisation of Hindu society founded upon the caste-system, it appears that Hindus have special reasons for attachment to even their most distant relations as well as to their caste-people. A well-known Sloka says —

Meaning of *Bandhu*

(*y*) Text No 7, pages 83-84, *Supra*

(*z*) Ramchandra *v* Venayek, 42 C 384 41 I A 290 20 C L J 573 18 C W N 1154 10 N L R 112 25 I C 290 27 M L J 333 16 Bom L R 863, 12 A L J 1281

उत्सवे व्यसने चैव दुर्भिक्षे राष्ट्रविप्लवे ।
राजद्वारे श्मशाने च यस्तिष्ठति स बान्धवः ॥

Which means,—"He who stands by you, on the occasions of joy and distress, at a time of famine or of political revolution, and in the King's Court as well as in the cremation ground, is your *Bândhava* or relation"

Thus the agnate *sapindas* are *bandhus* or relations *par excellence*, and in this sense the word has been used in the text of Vishnu, dealing with inheritance. (*b*) The words *bandhu* and *bândhava* are both derived from the root *bandh*=bind, and means any relation agnate or cognate In Manu (*c*) the word *bandhu* has been used in the sense of *sagotra* or member of the same *gotra* (*d*) In the text of Yâjnavalkya (*e*) dealing with the order of succession, the word *bandhu* has been used in the sense of a cognate, the agnates being denoted by the term *gotrajas*, hence, it means cognate in the Mitâkshara But in many texts of the Smriti the term appears to be used in the sense of *sapinda* or *sagotra* or in the wider sense of *relation*

Conclusion as to who are *Bandhus*.

Conclusion as to who are Bandhus—The conclusion, therefore, which appears to legitimately follow from the foregoing considerations, is, that the word *bandhu* in the Mitâkshara means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's and on the mother's side This view, however, is opposed to an *obiter dictum* thrown out for the first time in the Full Bench of *Umaid Bahadur* v *Uday Chand* (*f*) and repeated in the case of *Babu Lal* v *Nanku Ram* (*g*)

P C, on *Sapindas* and *Bandhus*

The Judicial Committee have in an elaborate judgment discussed the subject of *sapinda* relationship and have come to the conclusion that Sapinda relationship ceased after seventh degree from the *propositus* on the father's side and fifth on the mother's side both for the purposes of marriage and inheritance In this connection the following passage from their Lordships' judgment will be interesting "The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows (*i*) that the Sapinda relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinna-gotra sapinda with the fifth degree from the common ancestor, (*ii*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other, which is only a paraphrase of Manu's rule" (*h*)

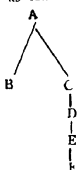
Obiter dictum of F B, on *Bandhus*

Obiter dictum on Bandhus—It is held by the Full Bench that a person's sister's daughter's son is his *bandhu* and heir, but it is added that his sister's daughter's son's son would not be his *bandhu* and heir The

(*b*) Original text No 2 under Mitakshara Succession
(*c*) Ch ix, Slokas 159 and 160
(*d*) Original text No 12 under Adoption
(*e*) Ch ii, 135
(*f*) 6 C 119 6 C L R 500
(*g*) 22 C 339
(*h*) Ramchandra *v* Vinayek, 41 I A 290, 312 42 C 384, 420 18 C W N 1154 20 C L J 573 25 I C 290 27 M L J 333

question for consideration by the Full Bench was whether the sister's daughter's son is an heir, but whether his son also is an heir, was not a matter for consideration by the Court in that case The word *sapinda* was erroneously rendered into "kinsmen connected by funeral oblations of food," by Colebrooke in his version of the Mitâksharâ. This error was exposed by two learned oriental scholars, West and Bühler, the former of whom was an eminent judge, in their valuable Digest of Hindu law, by giving a translation of portions of the passages of the Mitâksharâ, dealing with marriage, where the meaning of the term *sapinda* and *sapinda* realtionship for marriage, have been explained The correct view was adopted in the case of *Lallubhai Bapubhai* v *Mankuvar Bai* (*i*) The Clacutta Full Bench in their judgment in the above case followed this Bombay decision on that point, and then made the following observations :—

"The next question for consideration is, whether the defendant in the case that has been referred to us, stands in such a relation to Mooktar Bahadur the (*propositus*) that they are each other's *sapindas* as defined by the author of the Mitâksharâ in A'châra-Kânda"

Then proceeding to explain what is intended by the above passage, the facts of the case relating to relationship, are referred to, and then, the following table is given for illustration, and the same is elucidated as follows —

" A is the common ancestor, B, his son, is the *propositus*, C, a daughter of A, D, her daughter, both dead ; E is the son of D, and has a son F

"Now B and E are *sapindas* to each other, but not B and F Although F is within six degrees from the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother, they are not *sapindas* to each other, but B being a *sapinda* of E through his mother, they are *sapindas* of each other,"

F B dictum inexplicable

Dictum inexplicable —There is nothing in the A'châra-Kânda, in support of the above view in fact, there is nothing anywhere in the Mitâksharâ which may justify the foregoing *dictum* On the contrary, B being a relation on F's father's side and being within seven degrees, is a *sapinda* of F, the circumatance of two females intervening cannot make any difference, for, F is admittedly a *sapinda*, and E is not only a *sapinda* but also heir, of B Bearing in mind that the word *sapinda* means a *relation* according to the Mitâksharâ, it is difficult to conceive any case in which A is B's *sapinda* and at the same time B is not A's *sapinda* it seems to be opposed to common sense This somewhat anomalous view appears to be due to the misapprehension of the meaning of the comments made by Visvesvara Bhatta and Bâlambhatta

(*i*) 2 B, 388, 422, Affirmed by P C, 5 B 110 7 I A 212 7 C L R 445,

on the text of Manu (j) as appears from the later judgment referred to above

Neither Visvesvara Bhatta nor Bálambhatta has said anything which may justify the inference of the rule sought to be deduced from their verbal comments on Manu's text,—"To the nearest Sapinda, the inheritance next belongs",—which according to the Mitákshará means,—"To the nearest *relation*, the inheritance next belongs" The Mitákshará takes the word "*sapinda*" in this text of Manu, in its primary sense, namely, *relation*, whether *sapinda* technically so called, or *samanodaka*, or *sagotra*, or *bandhu* The text is construed to lay down the rule of propinquity as the principle governing the order of succession among the said groups of heirs (l)

Visvesvara & Balambha'ta

It is impossible to suppose that the commentators, who profess to elucidate the Mitákshará, entirely ignored the interpretation put by its author on that text, and made comments on it, for the purpose of indicating, without expressing, a novel construction limiting its operation to the technically called *sapindas* alone (l) If the word *sapinda* in that text means *any relation*, as is maintained by the author of the Mitákshará, how could the comments of Visvesvara and Bálambhatta, which are undoubtedly verbal in character, be taken to imply a rule of exclusion, upon the assumption that the term *sapinda* is used by them in the technically limited sense, when the author of the Mitákshará takes that term in its widest etymological sense, and when the commentators do not express dissent from the author's interpretation And even if the commentators had differed from the author, though they in reality did not, how could their view be accepted while opposed to that of the author The two commentators merely explain the meaning of the individual words of Manu's text, in a mode well-known to Sanskrit scholars, which is not the mode adopted for *construction of sentences*, as distinguished from *definition* or grammatical interpretation of the words composing sentences.

Value of the interpretation.

The aforesaid *obiter dictum* in *Umaid Bahadur's* case can be maintained, if the exposition by the comparatively recent commentators, of the prohibited degrees for marriage, be assumed as if given by the Mitákshará itself, and if it be further assumed, that in order that A a cognate may be heir of B as his *bandhu*, it is necessary that their relationship must be such that A may marry B's sister, and also B may marry A's sister according to the said exposition of prohibited degrees

How the dictum can be maintained.

The learned Hindu Judge who delivered the judgment of the Full Bench, seems to have consulted the Tagore Law Professor of 1880, and embodied in it the Professor's own novel view which is unsupported by any authority, and is clearly erroneous as it is not justified by anything said by the two commentators of the Mitakshara, who never dreamt what is sought to be deduced from their language.

(j) *Supra*, Texts Nos. 4 and 9, pp 80 & 85

(k) Text No 8, pp. 84-85 *Supra*

(l) Tagore Law Lectures of 1880 p. 443, 2nd Ed.

How the degrees computed in these cases

It has already been observed that, while explaining the mode of computing the five and the seven degrees from the mother and the father respectively, the Mitàkshara does not say anything about the lines passing through males only, or through both males and females without any distinction It is, however, clear that in counting five degrees from the mother, she is computed by the author as one degree, thus indicating that although each link is called a *purusha* which means a generation, but which also means a male, still that word is not to be taken to imply exclusion of females thus when the Mitàksharà does not lay down any restriction, it may be taken that according to that treatise the lines may pass through both males and females, or either

But the recent commentators confine the upward lines to male ancestors only, although the downward lines according to them, may pass through males and females, or either, and although the upward lines of the five and the seven ancestors from the mother's and the father's *bandhus*, are computed by them by taking the female ancestor as one degree No reason is assigned by them for this distinction

Recent commentator's construction of texts on prohibited degrees for marriage

The reason which induced the recent commentators to construe the texts permitting marriage beyond five and seven degrees from the mother and father respectively, as meaning the exclusion of the female descendants of only the six and the four *male* ancestors of the father and the mother respectively—appears to be, to prevent the prohibited degrees from becoming too large

They have confined the prohibited degrees to the descendants of only four lines of male ancestors, namely, the father's and the mother's male ancestors as stated above, and the father's five maternal male ancestors, and the mother's three maternal male ancestors

The latter two lines of ancestors are deduced in a curious manner, from the following text of Narada on prohibited degrees,—

आसप्तमात् पञ्चमाच्-च बन्धुभ्य पितृमातृतः।
अविवाह्या सगोत्रा च समान-प्रवरा तथा ॥ १२, ७ ॥

Which means,—

"A damsel within the seventh and the fifth (degrees) from among the *bandhus* on the father's and the mother's sides, should not be espoused, likewise also one of the same *gotra*, and one of the same *pravara*" 12, 7.

Nàrada's text and conclusion therefrom.

The term *bandhus* in this text undoubtedly means *sapindas*, inasmuch as this text cannot but be held to lay down prohibited degrees such as are ordained by other sages, and it would be perfectly consistent with other texts, only by putting that meaning on the word It cannot surely be contended that Narada does not prohibit *sapindas* at all, by taking the word *bandhus* in the limited sense of the three cognate first cousins of the parents, that are enumerated as their *bandhus* in the text cited in the Mitàksharà (m) upon the assumption that the enumeration of *bandhus* in that text is *exhaustive*

Recent commentators on Nàrada's text.

The recent commentators, however, have taken the word in that limited sense, and have deduced from Nàrada's text the prohibition of six descendants

(m) Chapter 2, section 6, para. 1

of the father's five maternal ancestors, and of four descendants of the mother's three maternal ancestors, in a way which will be explained in . . Chapter on Marriage

Now, it is worthy of special notice that the prohibited degrees are thus ascertained, upon the footing that the enumeration of *bandhus* in the text referred to above,—is *exhaustive*, and not illustrative How can then the prohibited degrees so ascertained, be reasonably relied on, for ascertaining who are *bandhus* upon the contrary footing that the said enumeration is *not exhaustive*, but is merely illustrative ?

Discussion on the above

It is difficult to understand why F and B in the above table are not *sapindas* to each other It appears to be admitted that F is *sapinda* to B, but it is said that B is not *sapinda* to F Bearing in mind that one is *sapinda* to another, if they are connected through particles of one body, it seems to be a contradiction in terms, to say that F is *sapinda* to B, but B is not *sapinda* to F The reason assigned being that B not being a descendant of the line of the maternal grandfather of F or of his father and mother, they are not *sapindas* to each other But it is not explained why, being such a descendant, is the *sine qua non* of mutual *sapinda* relation

The real reason appears to be, that although B could not marry F's sister, still F could marry B's sister according to the recent commentators : because, the descendants of the father's mothers's maternal ancestors, are not, according to them, included within prohibited degrees

But according to the Mitàksharà, F could not marry B's sister, because, she being a relation on F's father's side and within seven degrees, is a *sapinda* for marriage The two females C and D form two degrees whether they be in the descending line relatively to B, or in the ascending line relatively to F, but according to the dogmatic view of the recent commentators, they cannot be so in the latter case

Hence the *bhinna gotra sapindas*, or *sapindas* of a different *gotra*, who are *bandhus* according to the Mitàksharà, cannot reasonably be restricted in the manner maintained by the Tagore Law Professor of 1880, without any authority excepting his own erroneous novel construction of the verbal comments made by the two commentators of the Mitaksharà on Manu's text

Ramchandra Martand Waiker v. Vinayak —In the cases of *Umaid Bahadur* (n) and *Babu Lal* (o), the claimants were within five degrees of the common ancestor and therefore the reference to the limitations of *sapindaship* in the chapter on marriage of the A'chàradhaya, did not affect the final decision in those cases It has been otherwise in the case of *Ramchandra Martand Waiker* v *Vinayak* (p) before the Judicial Committee, as by reason of reliance placed on that passage, a claimant within six degrees of the common ancestor has been deprived of his inheritance

It is true that according to the Mitàksharà, a *sapinda* is a person connected by particles of one body and that, the word is to be taken in the same sense throughout the work, in the absence of any indication to the contrary This

(n) 6 C. 119 . 6 C L. R 509
(o) 22 C 339
(p) 41 I A 290 42 C 384 20 C L J 573 18 C W N 1154 10 N L R 112 : 25 I C 290 27 M L J 333 16 Bom. L. R 863 12 A L J. 1281.

is all that was decided by Chief Justice Westropp in the case of *Lallubhai* But limitations have been put by Vijnànesvara, the author of the Mitàkshàrà, upon the denotation of the term in its use in the different branches of the law

In the first book, namely, the *Acharadhyaya*, in the chapter on marriage, Vijnànesvara, in explaining Sloka 53 of Yajnavalkya lays down the limitation of sapinda relationship in one way, and in the chapter dealing with the subject of Sraddhas he explains Slokas 253 and 254 and lays down another limitation for sapinda relationship Then again in the second book, namely, the *Vyavaharadhyaya*, in explaining the Slokas 135 and 136 of Yajnavalkya, where the subject of inheritance is discussed, Vijnanesvara has prescribed the limitation of sapinda relationship for inheritance and has quoted the text of Vrihat Manu Similarly in the third book, namely, the *Prayaschitya Adhyaya*, in explaining Sloka 18 of Yajnavalkya, the author of the Mitàksharà has prescribed other limitations of sapinda relationship for the purposes of observing impurity on the occasion of birth or death

As there is no English translation of the Mitakshara, excepting of the portion bearing on inheritance, their Lordships could not possibly have any access to those other portions of the work and had to proceed upon insufficient materials. It would appear from the above, that the observation of their Lordships, that in the chapter on marriage "Vijnanesvar was laying down rules for limitation of Sapinda relationship generally," (q) is contrary to the texts of the Mitakshara itself and that there was a clear confusion of ideas when the proposition of the appellant was stated to be "that the limitations of Vijnanesvara on sapinda-relationship are confined to marriage impurity and exequial rites, and do not relate to inheritance" (r) What their Lordships missed was that there was a separate limitation for each one of the branches of the law dealt with specifically in separate parts of the work

It was pointed out to their Lordships from the summary of the law made by Mr Mandlik that "sapinda-relationship for inheritance is not always the same as for marriage or impurity "(s) Their Lordships passed that over and proceeded to refer to another passage where the writer had said "This is Sapinda connection in general and is co-extensive with that for marriage purposes " (t) Their Lordships took it to mean that the extent of Sapindaship was the same for purposes of marriage and for other purposes. That it was very different from what the author had meant to convey, would appear clearly from his work, some passages of which are given here for reference

In Appendix iii at page 345 Mr Mandlik has discussed the question of Sapinda relationship The first paragraph runs thus "Sàpindya (the relationship of a Sapinda) is a very important subject in the Hindu Law, and has reference to three branches of it, *viz*, marriage, impurity on birth or death, and inheritance" Then in the next paragraph the learned author goes on to discuss the two different ways in which different writers define the word

(q) 41 I A, at p 302.
(r) 41 I A, at p 304
(s) 41 I A, at p 310.
(t) *Ib.*

Sapindya. He says. "I may say in general terms that Sapinda relationship extends on the father's side to the sixth ascendant These ascendants may be males or females, and may further be connected with the father through males or females***. This process being extended on the father's side, up to the sixth ascendant, male or female, six descendants, male or female, must be counted through males and females, from the six ascendants, and from himself or herself who is the seventh in the series In counting these descendants, wives of male Sapindas are also included The same is to be done on the mother's side up to three ascendants above the mother and the four descendants of those three ascendants above the mother The wives of the male descendants are included as before This is Sapinda connection in general, and *is co-extensive with that for marriage purposes* (The Italics are not in the original)

"All these Sapindas do not enter into the other two of the aforesaid three divisions of *Dharmasastra* affected by the *Sapinda* relationship But whilst this is so, it may be said that the general statement of *Sapindas* as above given is the widest and includes *Sapindas* of all kinds and degrees. Further on, they will be treated of as coming from different departments for different purposes The distinction of *Sapindas* for different purposes, the contraction of *Sapindaship*, and all other kindred matters, will then be cleared up "

Then Mr Mandlik deals with Sapinda relationship for marriage in Section I, for impurity on account of birth and death in Section II and for inheritance in Section III At page 390 he says as follows —"It is said (referring apparently to the observation of Westropp, C J, in the case of *Lalubhai* quoted by the Judicial Committee) (*u*) that the definition of sapinda relationship in the *Achârâdhyâya* of the Mitákshará by Vijnáneswara and in the Samskára Mayukha by Nilakanta agree, and the laws of the Hindus (Aryans) of succession and religious ceremonial are so blended, that a *sapinda* for one purpose must be a *sapinda* for another. The Aryan law is no doubt so framed that one influences the other, but succession and ceremonial are distinct subjects, and are separately treated, and must be so The classification of *sapindas* in the preceding portion and the authorities noted below will make it clear that a *sapinda* for one purpose is not necessarily a sapinda for another "

Foot note.—"See Viramitrodaya, leaf 199, p 2 lines 8 and 9, Nirnayasindhu *para* iii 1st half leaf 22 p 2 line 7 where Kamalakara distinctly says

तेन विवाहे आशौचे धनग्रहणे च त्रिधा सापिण्ड्यम् सिद्धम् ।

Translation —It is thus established that Sapinda relationship is of three kinds—for marriage, impurity, and for taking *dhana* (wealth) "

The reference to a passage in the Viramitrodaya (*v*) is equally irrelevant Their Lordships have quoted from p 156 —

"And the text, 'the *Sapinda* relationship, however, ceases in the seventh generation'—is to be explained consistently with the text of *Yajnavalkya*,

(*u*) 41 I A, at p 302
(*v*) Author's Ed

namely,—'After the fifth and the seventh from the mother and father (respectively)'—to mean that it remains in the seventh but ceases in the eighth generation Hence, as in the case of the unmarried females, the sapinda relationship extending over three generations, as is declared in the chapter on impurity (occasioned by death, etc),—is considered to be with reference to that alone , so it is to be deemed that this sapinda relationship (extending to the fourth-degree) is relative to succession alone" From the above passage their Lordships seem to conclude that *sapinda* relationship extends to the fourth degree It will be clear to any one who carefully reads the whole of Section II of Part I of Chapter iii, that the Viramitrodaya was discussing the succession of *sapindas* as distinguished from that of *sakulyas* The following passage of the *Viramitrodaya* from the next paragraph at page 157 will clearly show what was meant —

"But it is to be borne in mind that the cessation of the right of the great-great-grandson and the like who are further removed than the great-grandson,—as mentioned in this text, refers to them as *sapindas* , for as *sakulyas* they are certainly entitled to succeed according to proximity" The author of the Viramitrodaya was using the Sapinda relationship in the sense in which it is used in the Dáyabhága It is to be remembered that the term *sakulya* is not used in the Mitákshará for denoting any class of heirs , on the other hand the author of the Viramitrodaya at the beginning of the paragraph at page 156, the latter portion of which has been quoted by their Lordships, distinctly says that, "This sapinda and sakulya relationship is declared with reference to succession, as it is mentioned in the chapter relating to that subject "

The Viramitrodaya does not support the proposition laid down by their Lordships but, so far as it goes, rather supports the opposite view

There is a more serious confusion of ideas in another part of the judgment Their Lordships had observed that there was the limitation of seven degrees in the Mitákshará in the chapter on marriage They also found that in the Viramitrodaya, in connection with the question of inheritance, seven degrees were the limit of Sapindaship in the same *gotra* From this they drew the inference that the latter had borrowed it from the former Their Lordships said, " It is quite clear, therefore, that the limitation of the seventh degree with regard to the samána-gotra sapindas given by Mitra Misra in the Viramitrodaya is taken from the rule enunciated by Vijnánesvara on Yájnavalkya in the Achára-Kánda in respect of the cessation of sapinda-relationship " (*w*) This was a pure assumption It will appear from the Viramitrodaya that the anthority for the limitation was the text of Manu cited at page 199 " Thus Manu says,—The *sapinda* (or consanguine) relationship, however, ceases in the seventh generation, but the *samánodaka* relationship extends up to the fourteenth (generation), or as some affirm to those whose birth and name are known The term *gotra* signifies these (*i e*, the *sapindas* and the *samánodakas*) It has already been shown that, in

(*w*) 41 I A , at p 307-308

the text of Vishnu (p 142) the term *bandhu* signifies a *sapinda*, and the term *sakulya* means a *sagotra* The *samânodakas* also become heirs in the order of propinquity." (*x*) It was not the text of the Mitâkshârâ referred to by their Lordships It is to be observed that the Mitâkshara itself in the chapter on inheritance, while prescribing the limit of sapindaship in the same gotra to seven degrees, for its authority refers to Vrihat-Manu (*y*) and not to the texts of Yâjnavalkya bearing on the chapter on marriage This makes it clear that the view of their Lordships, that "a part of the limitation appears to have been applied to the succession of samano-gotra sapindas, their Lordships are unable to see on what principle it can be said that the other part relative to kinsmen, who are equally sapindas but belong to a different gotra or gens, must be restricted to matrimonial affinity," (*z*) is an assumption pure and simple and has no foundation in fact

A careful consideration of the matter discussed in the foregoing pages (*a*) and the various points mentioned above would have cleared up all difficulties, but as their Lordships' attentions were not drawn to them, the conclusion stated above did not commend itself to their Lordships The conclusion, however, follows directly from the texts of the Mitâksharâ itself The word sapinda in its primary sense "would apply to all men" (*b*) Now if, as stated in the chapter on inheritance, the sapindas in a different gotra are to be called bandhus, that term would, in the same way, apply to all cognate relations. Now as to the matter of limitations, the chapter on inheritance prescribes one of seven degrees and that too for the agnates alone From that it would follow that the author did not intend to lay down any limitation for the cognates If on the other hand, sapindaship has first to be limited to seven degrees and then the sapindas are to be divided into agnates and cognates, the limitation would be seven degrees for both When there is a limitation, namely, of seven degrees contained in the chapter on inheritance itself, it would not be permissible, under any rule of construction, to ignore the same and to borrow another limitation from a different chapter which, for all practical purposes, is a different work, though of the same author, dealing with altogether a different topic Such incomplete grasp of the subject led their Lordships into many digressions and some of the remarks made by them ought not to have found a place in a judgment of the highest tribunal

Further, there is a serious inaccuracy in the statement of the law made by their Lordships at the close of their judgment Their Lordships have said that "the general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows (1) that the sapinda relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinna-gotra sapinda with the fifth degree from the common ancestor, (2) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other, which is only a paraphrase of Manu's rule" (*c*)

(*x*) Author's translation of Viramitrodaya, pp 199 200
(*y*) Ch II, Sec 5, para 6 (*z*) 41 I A 309
(*a*) See pp 103-109 *supra*. (*b*) See *A'chara-adhyaya* of Mit
(*c*) 41 I A. 312

Assuming that the limitations are to be taken from the A'chârâdhyâya, it does not follow that the inheritance of cognates must be limited to five degrees. If the last two degrees on each side be males and if the female or females come in above them, the ascent on each side will be in the father's line and the limitation prescribed in the A'chârâdhyâya will, in such a case, be seven degrees and not five. Their Lordships failed to notice that both the limitations of the five degrees and seven degrees were meant for the cognates alone as the agnates were excluded by the other rule making persons of the same gotra ineligible for marriage. In the case before the Judicial Committee although the claimant lost, being sixth in descent from the common ancestor in his mother's line, his son would be an heir, as in his case, it would be his father's line and he would be seventh in descent. This is an anomaly which their Lordships lost sight of.

The authority of this judgment as laying down a general rule of law may well be doubted, as the inquiry was not a complete one and many of the important texts of the law had not been adverted to. Their Lordships themselves complained that the texts showing the variety of limitations had not been placed before them. It may well be expected that when an occasion again arises, their Lordships would make a more complete survey of the law on this important subject.

The principle laid down in the above Privy Council case of *Ramchandra Martand* has been followed by the Board again in the case of *Adit* v *Mahabir* (d). The very fact that, inspite of the judicial decisions reported since 1881 the question has been raised over and over again, shows that the decisions are not free from doubt.

Sec. 4—GENERAL OBSERVATION

Etymological meaning of the terms

Village Community, and the above terms.—It may be interesting to enquire into and trace the etymological meaning of some of the terms, and the probable connection of the same with the Village Community System, and with their explanation as given above. The words *sapinda, sakulya, samânodaka, sagotra* and *samâna-pravara* mean, respectively, those whose *pinda, kula, udaka, gotra* and *pravara* are common. *Gotra* is derived from *go* a cow and *trà* to protect and means that which protects the cow, such as a pasturage; *Udaka* is water or a reservoir of water such as a tank or well, *Kulya* may be derived from *kula* (similar to Latin *colo*) to cultivate, and means a field or cultivated land, and *pinda* means food.

(d) 33 C L J 263 40 M L J 270 48 I A 86 6 Pat L J 140 on appeal from 1 Pat L J, 324 35 I C 687

According to the rules laid down by Manu (8,237-239) and Yàjnavalkya (2,166-167) relating to the establishment of villages, there should be a belt of uncultivated land, set apart for pasture, at least four hundred cubits in breadth, immediately round that part of a village, where the dwelling houses are situated, saparating the same from the cultivated land, and on that side of this belt, which is contiguous to the fields, hedges should be erected so high that a camel might not see over them, so that the cattle might not trespass into the fields.

Assuming that a single family established a new village, and bearing in mind that pasturage, and a reservoir of water indispensable in a tropical country, are not divisible according to Hindu law, we may take the words *sagotra* and *samàno-daka* to mean all members of the family, holding in common the pasturage and the reservoirs of water used for domestic or agricultural purposes, the word *sakulya* to signify those members that jointly carried on cultivation, and the word *sapinda* to comprise those that lived in common mess When a family increased in the number of its members, they would separate in mess first, and might still continue to hold in common their *kulya* or property, consisting mainly of land, by jointly carrying on the cultivation and dividing the produce according to their shares, and when this was felt to be inconvenient, they divided the family land, continuing, however, to use and occupy jointly the *gotra* or the land reserved for grazing the cattle, and the *udaka* or reservoirs of water, which remained common to the most distant agnatic relations. The plain meaning of the texts of Baudhàyana and of the Brahma-Puràna cited above, lends some support to this view.

CHAPTER III

MARRIAGE

Sec 1—ORIGINAL TEXTS

१। असपिण्डा च या मातुरसगोत्रा च या पितुः।

सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने ॥ मनुः ३, ५।

(The Mitàksharà, however, reads the first line of this text thus —

असपिण्डा च या मातुरसपिण्डा च या पितुः।)

सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।

समानोदकभावस्तु जन्मनाम्नोरवेदने ॥ मनु ५, ६०।

Marriage prohibited between sagotras

1 She, who is the mother's non-*sapinda* also (non-*sagotra*), and the father's (non-*sagotra*) also (non-*sapinda*), is commended for the nuptial rite and holy union amongst the twice-born classes —Manu iii, 5

(According to the reading of this text, adopted by the Mitakshara it would mean · She, who is non-*sapinda* of the mother, and also non-*sapinda* of the father, is &c)

Prohibited degrees for marriage according *Manu*,

But *sapinda* relationship ceases in the seventh degree from the mother and the father ,) and the *Samanodaka* relationship ceases if (common) descent and name be not known —Manu —v, 60

२। न सगोत्रां न समान प्रवरां भार्य्यां विन्देत।

मातृत स्वापञ्चमात् पुरुषात् पितृत-स्वासप्तमात् ॥

विष्णु —२४, ९ १०।

Vishnu,

2 Let not a damsel be married who is of the same *gotra*, or of the same *pravara*, or within the fifth degree on the mother's side, or within the seventh on the father's side —Vishnu, xxiv, 9-10

३। अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत्।

अनन्य-पूर्व्विकां कान्ताम् असपिण्डां यवीयसीं।

अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजाम्

पञ्चमात् सप्तमाद् ऊर्द्ध्वं मातृतः पितृतस्तथा ॥

याज्ञवल्क्य.—१, ५२-५३।

Yajnavalkya,

3 Let a man who has finished his studentship, espouse an auspicious wife who is not defiled by connection with another man, is agreeable, non-*sapinda*, younger in age and shorter in stature, free from disease, has a brother living, is born from a different *gotra* and *pravara*, and is beyond the fifth and the seventh degrees from the mother and the father respectively —Yajnavalkya, i, 52 53

४। पञ्चमीं सप्तमीञ्चैव मातृतः पितृतस्तथा। मिताक्षराधृतवशिष्ठवचनम्।

Vasistha,

4 (A man may espouse a damsel who is) the fifth and the seventh (in degree) on the mother's and the father's side respectively —Vasishtha cited in the Mitàksharà while commenting on Yajnavalkya, i, 53

५। आसप्तमात् पञ्चमाच्च बन्धुभ्यः पितृमातृतः।
अविवाह्या सगोत्रा च समानप्रवरा तथा॥—नारदः १२, ७।
सप्तमे पञ्चमे वापि येषां वैवाहिकी क्रिया।
ते च सन्तानिनः सर्वे पतिताः शूद्रतां गताः॥ नारद'—
रघुनन्दन धृत।

Narada,

5 A damsel within the seventh and the fifth (degrees) from among *bandhus* (=relations or *sapindas*, on the father's and the mother's sides respectively, should not be married, likewise one of the same *gotra*, and one of the same *pravara* (Narada xii, 7) Those among whom marriage rite takes place within the seventh and the fifth (degrees) respectively, they all with their offspring become degraded and reduced to the position of Sudras - Narada cited by Raghunandana

६। असमानार्षेयी कन्या वरयेत्, पञ्च मातृत परिहरेत् सप्त पितृत', त्रीन् मातृत पञ्च पितृतो वा। पैठीनसि।

Paithinasi

6 Shall espouse a damsel not belonging to the same *gotra* shall avoid five (degrees) on the mother's side, and seven on the father's, or three (degrees) on the mother's side and five on the father's —Paithinasi cited in the Mitakshara and by Raghunandana

७। मातृपितृसम्बन्धा, आसप्तमाद् अविवाह्या कन्या भवन्ति, आपञ्चमाद् अन्येषां मते सर्वाः पितृपत्नो मातर, तद्भ्रातरस्तु मातुला तद्दुहितरो भगिन्यः, तदपत्यानि भागिनेयानि ताश्चाविवाह्या अन्यथा सङ्करकारिण्यः तथाचार्यपितुरेतदेव॥ रघुनन्दधृत सुमन्तु वचनम्॥

Sumantu,

7. Damsels connected on the mother's or the father's side shall not be taken in the marriage, up to the seventh degree, up to the fifth degree, is the opinion of others all the wives of the father are mothers, their brothers are maternal uncles, their daughters are sisters, their daughters are nieces, they too shall not be married, otherwise they would cause disorder, this applies also to the daughter of the *preceptor* —Sumantu cited by Raghunandana

८। असम्बद्धा भवेद् या तु पिण्डेनैवोदकेन वा।
सा विवाह्या द्विजातीनां त्रिगोत्रान्तरिता च या॥ वृद्धमनु।

8. She, who is not connected by *pinda* or water, is fit for marriage among the twice-born classes, as also she who is distant by three *gotras* —Vrihat-Manu citd by Raghunandana

and Vrihat-Manu,

९। आयाहीन्द्र पथिभिरीळितेभि र्यज्ञम् इमं नो, भागधेयं जुषस्व।
तृप्तां जहुर्मातुलस्येव योषा भागस्ते पैतृष्वसेयी वपाम्॥ वेदः।

9. Indra! Come by paths that are praised, to this our sacrifice, accept the offering, well-cooked meat is offered (by us to thee), which is thy due, as (one's) maternal uncle's daughter or father's sister's daughter (is his due) Veda

Marriage beteen nearer degrees in Vedic times

१०। तस्माद् वा समानाद् एव पुरुषाद् अत्ता चाद्यश्च जायते।
उत तृतीये सङ्गच्छावहै चतुर्थे सङ्गच्छावहै॥ वाजसनेयके।

10 From the very same common stock are descended the enjoyer (husband), and the enjoyed (wife): we marry in the third or we marry in the fourth (degree). Bajasaneyaka

११। त्रिंशद्वर्षो वहेत् कन्या हृद्या द्वादशवार्षिकी ।

त्र्यष्टवर्षोऽष्टवर्षा वा धर्म्मे सीदति सत्वर । मनु —९।९४ ।

Marriageable age of girls

11 Let a man of thirty years marry an agreeable girl of twelve years, or a man of thrice eight years, a girl of eight years, one marrying earlier deviates from duty (or one may marry earlier to prevent failure of religious rite) — Manu, ix, 94

१२। प्राप्ते द्वादशमे वर्षे य कन्या न प्रयच्छति ।

माता चैव पिता चैव ज्येष्ठो भ्राता तथैव च ।

त्रयस्ते नरक यान्ति दृष्ट्वा कन्या रजस्वला ॥

यस्ता विवाहयेत् कन्या ब्राह्मणो मदमोहित ।

असम्भाष्यो ह्यपाङ्क्तेय, स विप्रो वृषलीपति ॥

यम, २२, २३ ।

and her parents' and brother's duty

12 If a girl be not given in marriage when she has reached the twelfth year, her mother and father as well as her elder brother, these three go to the infernal regions having seen her catamenia before marriage. That Brahmana, who being blinded by vanity espouses such a girl, should not be accosted and should not be allowed to sit at a feast in the same line with Brahmanas, for, he is deemed the husband of a Sudra wife —Yama, 22, 23

१३। प्राग् रजोदर्शनात् पत्नी नेयात् गत्वा पतत्यधः

व्यर्थीकारेण शुक्रस्य ब्रह्महत्याम् अवाप्नुयात् ॥

निर्णयसिन्धु धृत आश्वलायनवचनम् ।

Rules for consummation of wife

13 (A man) shall not approach the wife before the appearance of catamenia, approaching

Brahmana by reason of wasting the virile seed —A'svalayana cited in the Nirnayasindhu

१४। पिता पितामहो भ्राता सकुल्यो जननी तथा ।

कन्याप्रद पूर्व्वनाशे प्रकृतिस्थ. पर पर ।

अप्रयच्छन् समाप्नोति भ्रूणहत्याम् ऋतावृतौ ।

गम्य त्वभावे दातॄणा कन्या कुर्य्यात् स्वय वर ॥

याज्ञवल्क्य १, ६३-६४ ।

Who is to give girl in marriage, their order

14 The father, the paternal grandfather, the brother, a *sakulya* or member of the same family, the mother likewise, in default of the first (among these) the next in order, if sound in mind, is to give a damsel in marriage, not giving, becomes tainted with the sin of causing miscarriage at each of her courses (before marriage), in default, however, of the (aforesaid) givers, let the damsel herself choose a suitable husband —Yajnavalkya, i, 63-54

१५। पिता पितामहो भ्राता सकुल्यो मातामहो माता चेति
कन्याप्रदः पूर्व्वाभावे प्रकृतिस्थ. परः परः । विष्णु; २४, ३८-३९ ।

15 The father, the paternal grandfather, the brother, a *sakulya*, the maternal grandfather and the mother, in default of the first among these, the next in order, if sound in mind, is the giver of a maid in marriage —Vishnu, xxiv, 38-39

same

१६। पिता दद्यात् स्वयं कन्या भ्राता वानुमते पितुः ।
मातामहो मातुलश्च सकुल्यो बान्धवस्तथा ।
माता त्वभावे सर्व्वेषां प्रकृतौ यदि वर्त्तते ।
तस्याम् अप्रकृतिस्थायां कन्या दद्युः स्वजातयः ॥

नारदः—१२, २०-२१ ।

16 The father himself shall give a girl in marriage, or with his assent the brother, the maternal grandfather and maternal uncle, and a *sakulya*, a *bandhava* likewise, on failure of all, however, the mother, if she is in sound mind, if she be not in sound mind, the people of the same caste shall give a damsel in marriage —Narada, xii, 20-21

same

१७। पिता रक्षति कौमारे भर्त्ता रक्षति यौवने ।
पुत्रो रक्षति वार्द्धक्ये न स्त्री स्वातन्त्र्यमर्हति ॥ मनु ९, ३ ।

17 A woman is not entitled to independence her father protects her in her maidenhood, her husband in her youth, and her son in her old age —Manu, ix, 3

Woman never independent.

१८। रक्षेत् कन्यां पिता, विन्नां पतिः, पुत्रास्तु वार्द्धके ।
अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं क्वचित् स्त्रियाः ॥

याज्ञवल्क्य १, ८५ ।

18 A woman is never entitled to independence let the father protect her when maiden, the husband when married, the sons when old, and in their default their kinsmen —Yajnavalkya, i, 85

१९। कन्या वरयते रूपं माता वित्तं पिता श्रुतं ।
बान्धवा. कुलम् इच्छन्ति मिष्टान्नम् इतरे जनाः ॥

19. The bride is anxious for beauty, her mother for wealth, her father for education, her relations for family honour (in the bridegroom), and all the rest for a sumptuous feast

What different persons desire at a marriage

२०। यस्मै दद्यात् पिता त्वेनां भ्राता वानुमते पितुः ।
तं शुश्रूषेत जीवन्तं संस्थितञ्च न लङ्घयेत् ॥
मङ्गलार्थं स्वस्त्ययनं यज्ञश्चासां प्रजापतेः ।
प्रयुज्यते विवाहेषु, प्रदानं स्वाम्यकारणं ॥ मनुः ५, १५१-२ ।

20 To whom the father has given her, or the brother with the father's assent, him shall she serve while he is alive, and shall not disregard (her duties to him) when dead

Wife's duty towards husband

Husband's marital dominion over wife.

The recitation of the benedictory sacred texts, and the sacrifice (with Homa in the nuptial fire) in honour of (the God) Prajàpati (=Lord of creatures) are used in marriages, for the sake of procuring good fortune (to the brides), but the gift (by the father) is the cause of the status of husband (or the marital dominion of the husband) Manu, v, 151-152

२१ । पाणिग्रहणिका मन्त्रा कन्यास्वेव प्रतिष्ठिता ।
नाकन्यासु क्वचिन् नृणां लुप्तधर्मक्रिया हि ताः ॥
पाणिग्रहणिका मन्त्रा, नियतं दारलक्षणम् ।
तेषां निष्ठा तु विज्ञेया विद्वद्भिः सप्तमे पदे ॥

मनु, ८, २२६ ७ ॥

Sacred nuptial texts apply to virgins only

21 The sacred nuptial texts are applied solely to virgins and not, among people anywhere, to non-virgins, since these are excluded from religious rites The sacred nuptial texts are the certain cause of the sacrament of marriage, their completion is known by the learned to be on the seventh step —Manu, viii, 226-227

MARRIAGE

Sec. 2—GENERAL DISCUSSION

Sub-Sec i—INSTITUTION OF MARRIAGE

Necessity of marriage.

Necessity of marriage, exception—The institution of marriage which is the foundation of peace and good order of society, is considered as sacred even by those that view it as a civil contract. According to the Hindu Shàstras it is more a religious than a secular institution. It is the last of the ten sacraments or purifying ceremonies. The Shàstras enjoin all men to marry for the purpose of procreating a son necessary for the continuation of the line of paternal ancestors and for the spiritual benefit of their and his souls According to the Shàstras a man may not at all enter into the order of householder, or the married life, but may choose to continue a life-long student when he is desirous of *moksha* or liberation from the necessity of repeated deaths and births. But all bachelors must not be mistaken for life-long students because, most of them do not marry, not because they are averse to the pleasures of marriage, but because they are unwilling to take upon themselves the responsibilities of conjugal life These do not bear the remotest resemblance to the life-long students that are to lead the austere life of real celibacy.

Definition of marriage.

Definition of marriage—Marriage is defined by Raghunandana to be the acceptance by the bridegroom, of the

bride, constituting her his wife. The bride is not, in one sense, a real party to the marriage which is a transaction between the bridegroom and her guardian, in which she is the subject of the gift. The expression "bride's marriage" is said to be a figurative one. The Hindu law vests the girl absolutely in her parents and guardians by whom the contract of her marriage is made, and her consent or non-consent is not taken into consideration at all. (*a*)

Marriage in ancient times.

Marriage in anciant times and the religious principle.— In ancient times marriage involved the idea of the transfer of dominion over the damsel, from the father to the husband. Slavery, or the proprietary right of man over man, was a recognised institution among all ancient nations, and it appears to have owed its origin to the *patria potestas* or the father's dominion and unlimited power over his child. A daughter was an item of property belonging to her father who could therefore transfer her by sale, gift or other alienation, like any other property ; and marriage consisted in the transfer, in any one of the said modes, of the parental dominion over the bride, to the bridegroom who acquired by the transaction, the marital dominion over her. Marriage by capture was also based on the same principle. The condition of a slave, a wife, and a son or daughter, was similar in ancient law, and founded on the same principle of absolute dependence on the one side, and of unlimited power, extending to even that of life and death, on the other. The earliest and common form of marriage was the sale of the bride for a price paid to her father by the bridegroom. The father's choice in the matter was under such circumstances likely to be influenced more by the amount of the price offered, than by a consideration of the alliance being beneficial to the daughter. This purely selfish and secular principle became, in course of progress, repugnant to refined feelings, and the Hindu sages sought to establish the altruistic and religious principle as the only guide for the father's selection, by laying down that the free gift, of a daughter decked with dress and ornaments, to a

(*a*) Purshotamdas v. Purshotamdas, 21 B 28, 29-30.

suitable husband to be found out by him, without any other consideration than her happiness, is an imperative religious duty imposed on the father,—and by condemning the existing practice of marriage by sale in consideration of the *sulka* or bride's price, as being unworthy of persons having a sense of spiritual responsibility, and a pretension to purity, whose conduct should be characterised by higher principles, although that practice might be allowed to Sûdras among whom purity of conduct could not be expected.

Hindu ideal of marriage—The Hindu ideal of marriage is, that it is a holy union for the performance of religious duties, hence, where the sexual pleasure is the predominant idea in the mind of a party to it, it is disapproved and is condemned as a secular marriage, as distinguished from that in which the religious element prevails The custom of marriage of girls before puberty proves that the idea of sexual pleasure is not associated with the holy nuptial rite of the Hindus. The legal consequences of the approved and the condemned marriages, are different, a wife married in an approved form becomes a *Patni* but one espoused in the disapproved form does not become a *Patni* According to the Mitâksharâ a *Patni* or the lawfully wedded wife, or the indispensable associate for religion, becomes his *sapinda* and may become his heir, and her husband also may become her heir · whereas a wife who is married in a disapproved form and consequently does not become *Patni* does not become her husband's *sapinda* and cannot inherit from her husband, nor can he inherit from her. This distinction, however, is not recognised by the courts, and wives espoused in the Asura marriage which though disapproved is still prevalent among manly classes of Hindus, (*b*) enjoy the rights of a *Patni* or lawfuly wedded wife

Patni

Sub-Sec ii —FORMS OF MARRIAGE

Eight kinds of marriage

Various forms of marriage—Accordingly the Hindu sages divided marriages into eight kinds for the purpose of distinguishing those that are approved on acconnt of there

I Approved forms are —

b Punjabrao v Atmaram, 87 I C 1018 1926 N. 124

being no improper motive on the part of any person concerned in them, and are therefore declared to be religious, from those that are condemned on some ground or other, and are therefore disapproved and pronounced to be irreligious.

(1) *Brahma,*

In the marriage called *Bràhma* the father or other guardian of the bride has to make a *gift* of the damsel adorned with dress and ornaments to a bachelor versed in the Brahma or Veda, and of good character, who is to be sought out and invited by the guardian, to accept the bride offered to him. It has been observed by the Allahabad High Court, that it cannot be contended that a widow can never remarry in the Brahma form. (*c*).

(2) *Daiva,*

In the *Daiva* marriage the damsel is given to a person who officiates as a priest in a sacrifice performed by the father, in lieu of the Dakshinà or fee due to the priest ; it is inferior to the Bràhma because the father derives a benefit, which being a spiritual one is not deemed reprehensible.

(3) *Arsha,*

Still inferior is the *A'rsha* marriage in which the bridegroom makes a present of a pair of kine to the bride's father, which is accepted for religious purpose only, otherwise the marriage must be called A'sura described below.

(4) *Prajapatya.*

Another kind of approved marriage is called *Pràjàpatya* which does not materially differ from the Bràhma, but in which the bridegroom appears to be the suiter for marriage and he may not be bachelor, and in which the gift is made with the condition that "you two be partners for performing secular and religious duties." These are the four kinds of marriage, the male issue of which confers special spiritual benefit on the ancestors.

The four disapproved and censured kinds of marriages are the *Gàndharva,* the *A'sura,* the *Rakshasa* and the *Paisacha.*

II Disapproved forms are —

(1) *Gandharva*

The *Gàndharva* marriage, which is not disapproved by some sages, appears to be the union of a man and a woman by their mutual desire, and to be effected by consummation ; this seems to be inconsistent with the father's *patria potestas* over the damsel, and it appears to relate either to cases where a damsel had no guardian, or to cases where consummation

(*c*) Kishen v Sheo 23 A L J, 981 90 I C, 358 1926 A

by mutual desire had already taken place, and the law requires that the father should give his assent to the daughter's marriage with the man. Gandharva form of marriage has been held nothing more or less than concubinage and has become obsolete. (*d*) But instances of such marriage are to be found in some places where it has been held that some nuptial ceremonies are necessary in such marriages. (*e*)

(2) *Asura*

The *A'sura* marriage amounted to a sale of the daughter: (*f*) the Sulka or the bride's price was the moving consideration for the gift by the father, of the daughter in marriage (*g*) A substantial contribution towards the expenses of a marriage by the party of bridegroom is equivalent to paying consideration of marriage to the bride and the marriage becomes one under the A'sura form (*h*). The fact that the rites prescribed for the Brahma form are gone through cannot take it out of the category of A'sura form, if there was pecuniary benefit to the giver of the girl (*i*). The payment of *parisam* (or *parisupanam*, presents such as jewels &c, paid by the bridegroom to the bride before he proceeds to the house for marriage) at the time of marriage, (*j*) or marriage by exchange, *i. e.*, where a girl from one family is married to a boy of another family and *vice-versa*, (*k*) does not necessarily render the marriage one in the A'sura form.

Parisam.

Marriage by exchange

(3) *Rakshasa.*

The *Rakshasa* marriage was by forcible capture and was allowed only to the *Kshatriyas* or military classes. Among certain classes of the *Gonds* (*l*) of Berar and Batul this form of marriage is prevalent. (*m*)

...lhaoni *v* Maharaj, 3 A. 738, *see also* Viswanathaswamy Kai M L J 271 21 I C 724

(*e*) Brindavana *v* Radha, 12 M 72 In this connection see Benode *v* Shashi, 24 C W N 958 59 I C 882

(*f*) Chunilal *v* Surajram, 33 B 433, 438, S Authikesavulu *v* Ramanujam, 32 M 512, Hira *v* Hansji, 37 B. 295 17 I C 949 14 Bom L R 1182 see Rathnathanni *v* Soma, 62 I C 931 41 M L J 76 13 L W 582

(*g*) Govind *v* Savitri, 43 B 173, see Shambhu *v* Nand, 58 I C 963 23 O C 284

(*h*) Samu Asari *v* Anachi, 49 M L J 554 22 L W 462 1925 Mad 37.

(*i*) Chunilal v Surajram, 33 B 433, 437 11 Bom L R 708

(*j*) Gabrielnatha Swami *v* Vialiammi, 53 I C 423 26 M L T 348 1920 M W N. 158 10 L W 491 (*k*) Punjabrao *v* Atmaram, 87 I C 1018, 1926 N 124

(*l*) Whether Gonds are Hidus *see ante* p. 61

(*m*) Gorali *v*. Emperor, 1927 N 279

(4) *Pisacha*

The *Paisàcha* marriage was the most reprehensible, as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drunk by administering intoxicating drug It must not be thought that this is an instance in which fraud is legalised by Hindu law , the real explanation appears to be that chastity and single-husbandedness were valued most, and so the Hindu law provided that the ravisher should marry the deflowered damsel. It appears, therefore, that the Gàndharva and the Paisàcha marriages were preceded and caused by sexual intercourse, in the first case with the consent of the girl, and in the second by fraud The A'sura and the Gàndharva seem to resemble respectively the *Co-emptio* and the *Usus* in Roman law which, however, positively forbade the Paisàcha marriage.

Eight kinds of marriage and their form

It should be remarked that these eight kinds of marriage are not really eight different *forms* of marriage, as they are loosely called , the form appears to be the same in all cases except perhaps in the Gàndharva and the Ràkshasa, namely, the gift and acceptance of the damsel, coupled with religious rites which are necessary and more multiplied in the approved ones. This form of gift and acceptance seems to be observed even by Christians, among whom it is undoubtedly a survival.

6 forms obsolete.

Of the eight forms of marriage ennumerated above, it is now the accepted law that all except the Bràhma and the A'sura forms are obsolete. (*n*)

Other forms —Besides the eight forms of marriage mentioned above there are other forms of marriage valid by custom (*o*) and by statutes (*p*).

Anand.

In the Punjab there are forms of marriage known as *Anand* (*q*) and *Chadar Andazi* the latter of which, however, is

(*n*) Kolapur, Maharaja v Sundaram, 48 M 1

(*o*) Kishan v Sheo, 23 A L J 981 90 I C 358 1926 A I

(*p*) Hindu Widow Remarriage Act, xv of 1856 , Special Marriage Act xxx of 1923, *see pp* 70 and 73

(*q*) Sohan v Kabla, 10 L 372 1928 L 706.

not one of the approved forms of marriage. (r) A marriage of an *Arora* who is governed by Hindu law, cannot legally marry his maternal aunt. (s)

Karao. *Karao* is a form of marriage prevalent among some lower castes in the North-Western Provinces. (t)

Natra. There is another form of marriage in Bomby in which the wife is called *Natra* wife. (u)

Pat *Pat* marriage is another form prevalent in certain parts in Bombay and the Central Provinces. (v) In this form a widow can marry (w)

Patri *Patri* form is one prevalent among a sect of the *Bairagis* of Bengal (x) by exchange of *Kathi*, (y)

Shunga *Shunga* or *Sagai* is another form of marriage among some lower castes in Bengal. (z)

Sword wife. There existed in Southern India, a form of marriage known as *sword-marriage* among the *kshatriya* castes which is even now prevalent among some zemindars in Southern India. In the case of *Maharaja of Kolhapur v Sundaram* (a) where the parties were *Sudras*, sword wives are held to be permanently kept concubines

Sub Sec iii.—PARTIES AND MARRIAGABLE AGE

Every person, **Who are competent to marry** —According to Hindu law every male Hindu is competent to marry unless he is otherwise prohibited. Marriage is more emphaticaly ordained for a woman than for a man. (b) Of the ten *Samskaras* or sacraments, marriage, like that of a Sudra male, is the only one for women. (c)

The disqualifications for marriage are fewer in Hindu law than in other civilized systems of law (d) Persons who are suffering from derangement of mind are not generally disquali-

(r) Gardial v Bhagwan, 8 L 366, 371, Sohan v Kabli, *supra*
(s) Sadagar v Emperor, 1928 L 165
(t) *See post*, Sec 6
(u) Sama v Bai Wali, 54 B 548, *see post* Sec 6
(v) See Mani v Ziboo, 22 N L R 134 *see post* Sec 6
(w) *See post*, Sec 10 "Widows"
(x) Adwaila v Lalit, 33 C W N 957 1930 C 57
(y) Gopal v Broja, 34 C W N 944 (z) See *post* Sec 6
(a) 48 M 1, 154 1925 M 957
(b) Manu, IX, 4
(c) Manu, II, 67, Kameswara v Veeracharlu, 34 M 422 20 M L J 855 8 I C 195 9 M L J 26
(d) Banerjee's "Stridhana" 4th Ed p 35

fied to marry, but the mental disqualification must depend on a question of degree (e) There is an early case (f) in which it has been held that the marriage of a lunatic is valid The Madras High Court, however, in a case in which the point indirectly arose, has abstained from expressing any opinion on the question whether a male lunatic can contract a valid marriage (g)

Lunatic,

The ancient custom (h) of raising issue by procreation in a wife of a eunuch goes to show that the Hindu law did not view the disqualification of impotency in the same light as it is generally considered by other polished systems of law

Impotent,

The Dayabhâga (i) and the other leading treatises of all the other schools, namely, the Mitâkshara, (j) the Vivâda-Chintâmoni, (k) the Smriti-Chandrikâ (l) and the Vyavahara Mayukha (m) hold that the issues of such disqualified persons are legitimate and as such competent to inherit if they themselves are free from those disqualifications

Whether a *Mahant* or a *Bairagi* can marry *see post* Ch. XIV, Sec 5, Sub-Sec 1 and Sec 6.

Mahant

The Hindu law has laid down certain restrictions upon marriage which, however, with the change of ideas and feelings of the Hindu society, are now considered to be mere moral obligations Instances of such injunctions are the marriage of a younger brother when the elder brother is unmarried, (n) and the marriage of a younger sister before an elder sister. (o)

Moral injunctions regarding precedence

Marriageable age and marriage without consent.— According to the sages the marriageable age of a man is between twenty-four and thirty years and that of a girl is between eight and twelve years (p) But contrary to the Shâstras

Marriage negotiated by guardian,

(e) Mouji v Chandrabati, 38 C 700, 706 38 I A 122, 125
(f) Dabychurn Mitra v Radha, 2 Morl 99
(g) Chellathammal v Annmayappa 32 M 253
(h) Manu, IX, 203
(i) Daya Ch V, 18
(j) Mit Ch II, Sec X, 9-10
(k) Vivada Chintamoni, P C Tagore's translation p 244 para 2
(l) Smriti Chandrika, Ch V,32
(m) Vyavahara Mayukha, Ch IV, Sec XI, II, Sec Mandlik, p 101
(n) Banerjee's Stridhana 4th Ed p 42.
(o) *Ib* p 56
(p) Texts Nos 11 and 12.

a custom grew up according to which marriages were negotiated by the guardians of the bridegrooms and were celebrated at an earlier age, and excepting in a few instances, the real parties to the marriage even now see each other for the first time when they are actually passing through the ceremony of wedlock But nevertheless it is an indisputable fact that in the majority of instances Hindu marriages, though thus contracted did not prove to be unhappy ones

Its justification,

Justification of marriage without express consent.—There are many persons who being dazzled and blinded by the material civilization and the political greatness of the European nations, consider their social institutions to be superior to those prevalent amongst the Hindus whose political degradation is attributed by them to the assumed inherent inferiority of their social organization and also of their religion. Marriage by mutual consent of grown-up men and women is what prevails among the Christian nations of Europe, and is on that account thought to be the most civilized and proper form, whereas the contrary is the rule in India, which is therefore taken to be a barbarous usage and an evil of a grave character. The Hindus, however, say that when one cannot have one's mother and father, one's brother and sister, or any other relation, according to one's choice, why then should the person have a wife or a husband according to the person's own choice ? If all other dear and near relations are one's own without a choice, one may as well have a wife or a husband dear to oneself, though chosen by others ; and this is conclusively proved by what is found in Hindu society. The alleged superiority again of marriage by mutual consent, is negatived by the fact of there being so many divorces and separations, showing that union by choice is not the condition of the happiness of married life As for political greatness and degradation, there are pious men who would say that the height of the political greatness of a nation is often the measure of the depth of its religious degradation, for the attainment of worldly prosperity by one nation is frequently accomplished at the expense of others, and therefore, by transgressing the rules of religion.

Early marriage, its justification

Early marriage of Hindu girls, father's duty—It is a religious duty imposed by the Hindu Shâstras upon the father or other guardian of a damsel, that she should be disposed of in marriage at a tender age not earlier than the eighth year, but before the signs of puberty make their appearance. The reason of the rule appears to be three-fold. The *first* is,—that marriage should be contracted from a sense of religious duty, and not from a desire of sexual pleasure, and so the immediate gratification of it is made impossible. The *second* is,—that by marriage a girl becomes not only the partner in life of her husband, but becomes a member of the joint family to which her husband belongs, and that, therefore, being admitted into the family at a tender age when her mind and character are yet unformed, and placed amidst the associations and peculiarities of the family of her husband, she becomes assimilated to it, upon which she is, as it were, engrafted in the same way as a member born in it. The *third* reason is,—the anxiety felt by the Hindu legislators for securing the chastity of women, which is the foundation of the happiness of home, of the belief in the reality of the family tie and relationship, and of the mutual love and affection of the relations towards each other based thereon, which are so prominent in Hindu society. The two strongest propensities to which man, in common with the lower animals, is subject, are the desire for food and the desire for offspring. With the first he is born and the second manifests itself later on at a certain stage of development and marriage of a damsel before that age is strictly enjoined, so that her mind may be concentrated on her husband alone as the means for the gratification of that appetite. And it cannot but be admitted that in the generality of cases the attachment that grows up between the husband and the wife is of the strongest kind, and the devotion of Hindu wives to their husband is unparalleled.

It should, however, be particularly noticed that while the Hindu sages enjoin the early marriage of females, (*h*) they do

(*h*) Texts Nos. 11 and 12

at the same time, condemn, in the strongest terms, the premature consummation of the same (z)

According to modern practice even the bridegroom is a mere passive agent in marriage. Our Shâstras, however, appear to lay down that he should be a free agent in this matter, and contract it at a mature age when he is in a position to fully understand the responsibilities of conjugal life.

Early marriage, such as, at present, prevails in our society, is considered as an evil by many 'educated' Hindus Some condemn the early marriage of females on the ground that it may lead to premature consummation. Others disapprove of early marriage of the young men that are prosecuting their studies as students. They do really condemn the modern practice in so far as it is contrary to the Shâstras.

Child Marriage Restraint Act--By this Act (XIX of 1929) the marriage of a boy below the eighteenth year with a girl below the fourteenth year has been restricted and the violation of it is made penal. This Act was passed with all the precipitate haste possible in the teeth of opposition throughout the length and breadth of the country, not only from the Hindus but from the Mahomedans also Instead of following the usual procedure, adopted by all the civilized countries in passing such a controversial Bill, of appealing to the country, the Bill was incorporated in the statute book At any rate the matter was not of such an urgent nature that it could not have been delayed till the constitution of the new Assembly, when the election of members might have been distinctly made on that issue. If the Hindus had followed this so-called pernicious custom for six thousand years since the dawn of Hindu civilization and if inspite of this social evil, they instead of being extinct left behind worthy descendants who could think of a reform, the matter could easily have been delayed to ascertain the views of the masses for whom the enactment was intended.

It should be stated at the outset that the Hindu sages did not approve of child marriage with the object of imme-

(z) Text No 13

diate consummation as is understood by some and misrepresented by others. The Hindu marriage consists of two different parts: *first*, the marriage of bridegroom of twenty-four to thirty years with a bride of eight to twelve years of age. Soon after this part of the marriage is solemnized, the parties to the marriage live apart in the family of their respective parents. After the girl attains puberty, the *second* part of the ceremony, namely, the *dwiragamana* or *gamana* or *gowna* ceremony is performed. It is the ceremony of parting by the girl of the family of her parents for that of her husband, to live there parmanently as husband and wife. Be it noted, as has already been stated, (j) that the sages condemn the early consummation of marriage. (k) It is no doubt the duty of the legislature to put a bar against sexual connection before the time nature allows, and this is what is practically done in England (l) in fixing the time limit at the sixteenth year for the girls, where they generally attain puberty at a much higher age. English law is quite consistent with the laws of nature and habits, customs, circumstances and much higher longivity of the people for whom it is meant. An age restriction may similarly be put at the average age when the girls in this country attain puberty which is the twelfth year. (m) Let the marriageable age after that limit be left to the discretion of the parties suitable for themselves. Public opinion should be created in favour of increasing the marriageable age, if the proposition is correct that greater the marriageable age the better for the country. Legislation to regulate the consummation of marital rights, at a time much later than nature dictates and parties to it like, on grounds other than public policy or economic conditions, cannot at all be justified. If any body urges that in normal conditions the child-bearing age should be artificially postponed to a period

(j) *Ante* p. 129.

(k) Texts No. 11 and 12.

(l) 19 & 20 Geo. 5, C. 36.

(m) As regards the age in which Indian and English girls attain puberty, *see* Page 336, Apx. VIII of Report of the Age of Consent Committee, 1928-1929, Government of India, Central Publication. They have attempted to distinguish 'puberty' and 'first menstruation' without any difference.

later than nature commands, on the ground of health of the parties and the prospective child, it will be violating the nature's law with consequential results No body can predict, that on normal conditions nature's call if postponed, enures for the benefit of the persons concerned.

Had the age limit in this Act been fixed at the twelfth year, the age at which the girls in this country generally attain puberty, the whole Hindu community, perhaps, would not have objected to the legislation It is well known that amongst the educated Hindus, particularly of Bengal, a girl's marriage is seldom solemnised before the age of fourteen But from this it should not be made a universal rule of law, restricting the marriage of a girl before the fourteenth year to the great hardship of the parties concerned

Whatever may be the reasons in support of increasing the marriageable age of girls or of the age of consent, the sex attraction shall ever be present after the sexes attain puberty There may be placed an artificial barrier to the marriage, but that will not prevent the union of the sexes unless strong guard be arranged for by their guardians This is practically impossible in a Hindu family in which the joint family system and maintenance of poor dependants are still in vogue with immense mutual benefit. The sexul connection of a girl before her marriage is looked upon with the greatest horror by the Hindus, particularly because the Hindu social organization does not approve of the marriage of such a girl with any member of a family and even the society goes the length of out-casting that girl and her parents' family

The age restriction should be reduced to the twelfth year and it is not too late to amend the wrong done to the masses who in the course of time will adopt the spirit of the law, if the legislators would but pay a little more attention to the root cause and try to remove the stumbling block on the path of a nation's civilization, namely, poverty and ignorance.

Another important aspect of the question which should

be considered in fixing the marriagable age of the parties, is the average longivity of the people of this country. It is highly desirable that a man's issues, or at any rate some of them, are settled in life before the age at which a Hindu is directed by the *sages* to retire from the life of a householder or the age at which the government-service rules provide for retirement from service, if he be not already in the other world, otherwise, the children will be stranded in life, as the majority of the people here hardly succeed in amassing sufficient funds out of his poor income to make provision for them

This legislation will no doubt be some source of revenue to the State but at the same time it will be an engine of oppression to the illiterate masses who cannot rise above the social organisation and kick at its rules, driving away their poor dependants into the street to die of starvation, there being no law for the protection of such unfortunate people

Objection to 2 rules of *Shastras*,

Objection to two rules of marriage, considered.— Exception, however, is taken to the two rules of the Shastras, the *first* of which imposes the duty on the father or other guardian of girls, of providing them with suitable husbands before puberty, and the *second* of which enjoins all men to enter into matrimony

(1) Duty of father and guardian to provide husband for girls

The objection to the *first* rule has arisen from the fact that the observance of the rule entails ruin upon fathers of daughters in consequence of the heavy expenditure they are compelled to incur in disposing of their daughters in marriage. A most pernicious custom has been growing up in Hindu society according to which bridegrooms are becoming marketable things, and extortionate demands are made by their guardians, that are to be satisfied by the bride's father in order to bring about the marriage. The custom owes its origin to the vanity of the Calcutta people, but it is gradually extending its mischievous influence over the Muffassil. It is detrimental to the best interests of the Hindu community, and directly or remotely it affects every member of Hindu society, not excepting those that, blinded by a short-sighted policy, believe themselves to be gainers. The good sense of

the Hindu community seems to have left them altogether, as, in a matter of such vital importance to their society, they do not exert themselves and do not make any efforts to put down the growth of this reprehensible custom.

(2) Duty imposed on every man to marry

The objection to the *second* rule is of a very serious character By contact with the Western civilization the ideas regarding comforts have expanded amongst all classes of people, 'educated' or not, the simplicity in the habits of Hindu life is passing away, and marriage is almost come to be regarded as a luxury, its responsibilities having become heavier than before To the early and improvident marriages is attributed the want of self-respect, self-reliance, independence and enterprising spirit, that, in one sense, characterises the Hindus, and that is thought to have led to their present political degradation

Ideals of a Hindu's life

The Hindu civilization and the Western civilization are different in character and somewhat opposed to each other. The Western civilization is directed to the promotion of the happiness and prosperity in this world, of the people of different localities respectively, that constitute different political states, whereas the Hindu civilization is directed to the attainment of happiness in this as well as the next world in the true sense of the term, for according to the Christian belief, their next world is not to commence until doomsday, while according to the Hindu belief, it commences immediately after death, when the human soul attains liberation or eternal beatitude, or assumes another heavenly or earthly body, according to its merits and demerits The Hindus are therefore more religious than worldly. Self-abnegation, self-sacrifice and self-humiliation are necessary for the attainment of their religious aspiration, and the passiveness, the mildness, the tenderness and the dependent spirit of the Hindus, are the effects of their institutions moulded in a way calculated to subserve that purpose

The great question, therefore relates to the *summum bonum* and the mode of its attainment, and the continuance of our institutions depends upon its solution, or rather upon the belief in this respect.

It cannot but be admitted, however, that the rule itself is required by the law of nature, and non-compliance with it is attended with illegitimacy and various other vices.

Sec 3—PROHIBITED RELATIONSHIP

Reasons for large number of prohibited relationship for marriage.

Principles of prohibited relationship for marriage— The principles on which marriage is prohibited are discussed in Bentham's Theory of Legislation. The joint family system, which is a cherished institution of the Hindus, and which is the normal condition of their society, accounts for the prohibition by the Hindu sages, of marriage between a larger number of relations than by other systems of jurisprudence There are strong physiological reasons in support of the rules of Hindu law on this subject, and the same social reasons that render it necessary to forbid the marriage between brothers and sisters, would justify the prohibition of marriage between relations that may be members of a joint Hindu family. Those relations that are called to live together in the greatest intimacy from their birth, as well as those, one of whom stands in *loco parentis* to the other, should not be allowed to entertain the idea of marrying each other, and an insurmountable barrier between their nuptial union should be raised in the form of legal prohibition, so that the belief in the chastity of young girls, that powerful attraction to marriage, may be maintained unshaken. The Hindu legislators, however, are so anxious to secure the foundation of this belief, that they ordain it to be an imperative religious duty of the father and the like relations to dispose of damsels in marriage before the signs of puberty make their appearance, so that there might not be the shadow of a doubt in that respect.

Sages differed on prohibited degrees

Sages and Vedic texts on prohibited degrees.— It has already been said that the different sages have laid down different rules on the subject of prohibited degrees for marriage. (*n*) Most of their texts are given at the commencement of this chapter. (*o*) On a perusal of these one can perceive the divergence between them, Manu prohibits the largest number, while Paithinasi the smallest. There is an-

(*n*) p. 101 (*o*) Texts Nos 1-10

other important respect in which Manu and Sumantu differ from the other sages, namely, that the former prohibit the same number of degrees on both the father's and the mother's sides, whereas the others forbid a larger number on the father's than on the mother's side the former view appears to be agreeable to popular feelings and in accordance with actual practice Another point deserves special notice, namely, that the language of Manu's text clearly shows that the rule propounded by him is recommendatory in character, and the actual usages of marriage, prevalent, in various localities and among diverse tribes, prove the rules propounded by all the sages to be of that character

Of the two Vedic texts (*p*) one says that damsels of the third and the fourth degrees are espoused, evidently on the mother's and the father's side respectively, while the other implies marriage of cognate first cousins.

Customs on prohibited degrees

Customs thereon actually observed—It is worthy of special remark that Paithinasi's *alternative rule* prohibiting only *five* degrees on the father's side, and *three* on the mother's, is actually *observed* in practice by the Bráhmanas of Bengal, and that the *Vedic text* indicating marriage of the *father's sister's daughter* and of the *mother's brother's daughter*, and thereby implying the prohibition of only two degrees on both sides, is actually *followed* in practice by even the Bráhmanas of Madras, and by the Kshatriya holders of impartible estates in the Jungle Mahals of West Bengal, (now mostly included in Bihar) and also by the Kshatriyas of many other places There is a well-known precedent of marriage of the *maternal uncle's daughter*, namely, the espousal by the Kshatriya prince Arjuna—the hero of the battle of Kurukshetra, that internecine war which extirpated the warrior class of India,—of Subhadrá the beautiful daughter of Vasudeva and sister of Srikrishna, the incarnate Deity

Prohibited degrees by different authorities

Table of prohibited degrees by different authorities—The following table shows very clearly the diversity in the numbers of degrees of cognate damsels prohibited by different authorities —

(*p*) Text No 10

Authorities	Prohibited on father's side.	Prohibited on mother's side.
Manu	7	7
Sumantu	7	7
Do. says, according to others	5	5
Vishnu	7	5
Yâjnavalkya	7	5
Vasishtha	6	4
Paithinasi	7 5	5 3
Yajurveda	3	2
Vedic text	2	2

Mitakshara on prohibited connection for marriage.—The substance of the comments made by the Mitákshara upon the text of Yájnavalkya on this subject is already given (*j*) while discussing the definition of the term *Bandhu*.

The texts of Yájnavalkya are already cited (*k*) and with a view to enable the reader to correctly understand the subject of Sapinda relationship for the purposes of marriage as well as of inheritance the original passages of the Mitákshará bearing on the subject, with their translations, have been given (*l*)

Mitakshara on prohibited degrees

same *gotra*

The Mitákshará says that the qualification that the bride should be non-*sapinda* applies to all castes, for the *sapinda* relationship exists everywhere but the qualification that she shall not belong to the same *gotra* and *pravara* applies only to the three regenerate tribes, (*m*) although the Kshatriyas and the Vaisyas have no *gotras* of their own, and therefore no *pravaras*, yet as they have *gotras* and *pravaras*, derived originally from their ancient Gurus, the rule is applied to them also , in support of this, a text of A'svaláyana is cited . and then the Mitákshará goes on to say that the status of wife does not arise (among regenerate tribes) should the bride be a *sapinda* or *samána-gotra* or *samána-pravara*, but the status of wife does arise although she may be

(*j*) p 99 *supra*
(*k*) pp 80 and 116 *supra*
(*l*) pp 81 86 *supra*
(*m*) Amar *v* Jai, 138 P W R 1917 80 P R 1917 42 I C 351 ; but valid among Baisi Chowrasi Gaddidars—Shah Deo *v* Kusum, 46 I C 929 5 P L J 164 (See P C Appeal p 61 *foot note* (*m*))

diseased or the like, for (the text No. 3 is merely recommendatory and not mandatory as regards the other qualifications of the damsel to be chosen for marriage, since) there would be only inconsistency with perceptible (and not with any spiritual) reasons (in case there be marriage of damsels having the other disqualifications mentioned in Yájnavalkya's text, such as disease) Then the Mitákshará observes that as the qualification that the bride shall be non-*sapinda*, *i e*, non-relation, is too wide, according to the meaning of the word *sapinda* already explained, namely, a relation connected through the same body, therefore Yájnavalkya has added—"*beyond the fifth and the seventh from the mother and the father respectively*" And then goes on to explain this text in the passage which has already been cited (*n*)

Degrees how counted,

From the comments of the Mitákshará on that passage it appears to follow that "*the fifth and the seventh*" are to be counted from the mother and the father respectively, and that the seven ancestors on the father's side and the five on the mother's, may be traced through males or females, or both, for although the Sanskrit word for degree is *purusha* which also means a male, yet it cannot on that account be contended that the lines must pass through the males only, inasmuch as in computing the five degrees on the mother's side, the mother is taken as one degree or *purusha*, and it has already been said that according to the latest commentators the downward lines from each of the ancestors may pass through males or females indifferently Hence the maternal relations of the paternal as well as of the maternal grandfather and of the paternal great-grandfather appear to be prohibited by the above rule of *sapinda* relationship for marriage, if the rule, prohibiting five degrees from the mother of the *propositus* be extended to the maternal relations of the father and other paternal ancestors, instead of applying the rule of seven degrees on the father's side to the maternal relations of the paternal ancestors.

It is now to be considered what the later commnetators say on the subject.

(*n*) pp 81-86 *supra*

Later commentators on prohibited degrees.—The rules regarding prohibited degrees, extracted from the foregoing texts of the sages, by Raghunandana in his Udvāhatattva, a treatise said to be respected in Bengal, are to be found in Dr Banerji's valuable Tagore Lectures on the subject (pages 58-66 3rd Ed) The same rules are reiterated by Kamalākara Bhatta, the author of the Nirnaya-Sindhu which is regarded as an authority in the Benares School.

Later commentators on prohibited degrees

The rules contained in these works may be summarised as follows

Summary of rules

I A man cannot marry a girl of the same *gotra* or *pravara*. This rule is called exogamy This rule does not apply to the Sudras who are said to have no *gotras* of their own, but it applies to the Kshatriyas and the Vaisyas although it is alleged that neither have they any *gotra* nor *pravara* of their own The *gotra* of these three inferior castes are said to be those of the Gurus or preceptors, or the priests of their ancestors.

Marriage between same *gotra* or *pravara* prohibited,

II A man cannot marry a girl who is a cognate relation of any of the following descriptions —

so also between certain cognates,

(*a*) If she is within the seventh degree in descent from the father or from any of his six male ancestors in the male line, namely, the paternal grandfather and so forth

(*b*) If she is within the fifth degree in descent from the maternal grandfather or from any of his four paternal ancestors in the male line, the five degrees from the mother being counted by them exclusive of the mother.

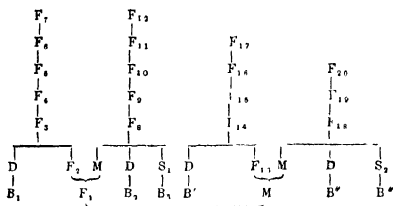
(*c*) If she is within the seventh degree in descent from the father's *bandhus* or from any of their six ancestors through whom the girl is related.

(*d*) If she is within the fifth degree in descent from the mother's *bandhus* or from any of their four ancestors, through whom the girl is related

III A man cannot marry certain damsels though there is no consanguine relationship between them. They are the stepmother's sister, her brother's daughter and his daughter's daughter, the paternal uncle's wife's sister, and the wife's sister's daughter, and the preceptor's daughter. This rule appears to be of moral obligation only, since it is not respect-

and certain relations

ed. Accordingly, it has been held that a marriage between a Hindu and the daughter of his wife's sister is valid (*i*)

The *second* rule is somewhat complicated The following diagram will enable one to understand without difficulty, those that are prohibited by this rule, especially by clauses (*c*) and (*d*)

P is the bridegroom F_1 to F_7 are his seven paternal ancestors in the male line, F_8 to F_{12} are his father's five maternal ancestors in the male line, F_{13} to F_{17} are his mother's five paternal ancestors in the male line, F_{18} to F_{20} are his mother's three maternal ancestors in the male line, B_1, B_2 and B_3 are his father's *bandhus* and B', B'' and B''' are his mother's *bandhus*.

The damsels that are prohibited to a man by the second rule are those that are within the seventh degree in descent from F_1 to F_{12}, from B_1, B_2 and B_3 and from S_1, and that are within the fifth degree in descent from F_{13} to F_{20}, from B', B'' and B''', and from S_2

Exception to rule II

To this rule there is an exception, namely, that a girl, though within the seventh or the fifth degree as above described, may be taken in marriage if she is removed by three *gotras*, or in other words, by two intervening *gotras*, so that there must be four different *gotras* in the line of relationship including those of the bridegroom and the bride, but according to some, five such *gotras* are necessary. This shows that the lines of descent from the ancestors may

(*i*) Ragava v. Jaya, 20 M. 283; Vellanki v. Kanagir 43 M. 830; 12 L. W. 155; 59 I. C. 266.

pass through females also who are transferred by marriage to different *gortas*.

Observations on the above rules

Observations on the above rules —Upon a careful study and consideration of the above rules, the texts from which they are deduced, and the reasons by which they are supported, the following observations suggest themselves —

1 The Brâhmanical commentators say, as it has already been stated, that the Kshatriyas, the Vaisyas and the Sûdras have no *gotras* of their own, and that the *gotras* they have, are those of the preceptors or priests of their ancestors, yet they maintain that the Kshatriyas and the Vaisyas cannot marry within their *gotras*, but the Sûdras can, although the reason assigned in support of this distinction, does not appear to be a cogent one

2 In construing the texts (*j*) prohibiting certain number of degrees on the mother's and the father's sides, the later commentators restrict the counting of the upward degrees to the male line of the paternal male ancestors only, of both the mother and the father, as in the first and the third line in the above diagram, although in counting the descendants of each of those ancestors, they admit that the lines of descent may pass through both males and females indifferently, but no reason is assigned for drawing this distinction They then deduce the prohibition of the relation indicated by the second and the fourth line of ancestors in the above diagram, by putting a forced construction on the text (*k*) of Narada, which ordains that a girl within the seventh and the fifth degree from among the *bandhus* or relations on the father's and the mother's sides respectively, is not fit for marriage,--by taking the word *bandhu* in that text in the limited sense of the nine *cognates* enumerated in a particular text, (*l*) although there cannot be the slightest doubt that Nârada intended by that text to mean and include all the prohibited degrees both agnates and cognates and that he employed that term *bandhu* in the sense of *sapinda*

The truth seems to be that the later commentators found

(*j*) Nos 1-7
(*k*) No 5
(*l*) Mit 2, 6, 1.

practical difficulty in avoiding all the damsels, coming within the rule, by counting the upward degrees through both male and female ancestors without distinction, so they thought it desirable that the descendants of the four lines of ancestors given in the above diagram should only be prohibited, and accordingly they put their own peculiar construction upon the texts for supporting their foregone conclusion

3 That the later commentators count the number of degrees from the mother and the father respectively, by excluding the *propositus* and also the mother, as shown in the 1st, the 2nd and the 3rd line of the diagram, while the Mitâksharâ counts from the parents by excluding the *propositus*, but it includes the mother as one degree

4 That the seventh and the fifth descendants of the father's and the mother's *bandhus* respectively are prohibited, and they are the ninth and the seventh respectively, from the nearest common ancestor of the *propositus* but there is no reason for this special rule

5 That the sixth and the seventh descendants of F5 to F11 who are P's father's maternal ancestors, are prohibited to P, but not to his father through whom they are related to P, or in other words, those relations of the father are not *sapindas* to him for the purpose of marriage, as they are on his mother's side and beyond the fifth degree, and yet they are *sapindas* to his son,—a monstrous proposition sought to be explained by what is called "the analogy of the frog's leap" which is beyond the comprehension of human beings save the speculative Sanskrit writers of the dark age of Mahomedan India

6. That there is no reciprocity, for, P cannot espouse many damsels, whose brothers, however, may, according to the above rule, marry P's sister, and *vice versa* This appears to be opposed to the popular notion according to which, A may marry B's sister, if B may marry A's sister There is no reason why a larger number of degrees should be prohibited on the father's than on the mother's side, so far as relationship is concerned for, the human body, says the Garbha-Upanishad, consists of six parts, of which three, namely,

bone, sinew and marrow are derived from the father, and three, namely, skin, flesh and blood, from the mother.

7. That marriages do, often, take place in contravention of these rules even among those who would follow the same, by reason of the ignorance of distant relationship, owing to the difficulty in tracing out the relationship at the present time when people induced by the sense of security to life and property, set up permanent dwelling-houses in places distant from their ancestral homes, where they reside for the practice of any profession or calling, or for service.

The rules on prohibited relationship for marriage not followed in practice

These rules are not all followed in practice—It has already been said that these rules are not followed in practice. Different usages prevail among different tribes and in different localities There is so much divergence between the sages as well as between the commentators on this subject, that it would not be safe to enforce their views as binding rules of conduct The rule prohibiting marriage within the same *gotra*, which appears to be followed by the Brahmanas in all places, is however, too extensive, but it was laid down at a time when there appears to have been a local union of the families having the same *gotra* and *pravara* When this rule does not apply to Sûdras, there is no reason why it should apply to the Kshatriyas and the Vaisyas, as these three tribes stand on the same footing in this respect, if what the commentators say be correct The Bengal Kayasthas, however, follow this rule in practice, and do not marry within their *gotra* although they are supposed to be Sûdras, by reason of their observance of some usages prescribed for the latter It would seem reasonable that the legal rule of prohibited degrees for marriage cannot be different for different castes hence, it would follow that what is valid marriage among the Sûdras is also valid even among the Brahmanas, notwithstanding special rules to the contrary, which should be treated as Laws of Honour, the violation of which will not invalidate the marriage, but will simply lower the position of the transgressor (*m*) It is useless to discuss this point at length, as the rules are not followed in practice, by all

(*m*) See Text No 5

Smritis not followed in practice

Customs contrary to Smritis—Even the custom of marriage within the *Gotra*, is found to prevail among certain sections of the Brâhmanas. (*n*) It has already been said that in Madras there is a custom prevailing even among the Brâhmanas of marriage of a man with his maternal uncle's or paternal aunt's daughter. There is a text of the Sruti (*o*) in support of this custom, and the instance of Arjuna's marriage with Subhadrâ, his maternal uncle's daughter, forms a well-known precedent. This custom appears to be observed by Kshatriyas in many places It prevails among the families owning impartible Rajs in the Jungle Mahals of West Bengal, that claim to be Kshatriyas The reason for this laxity has already been stated (*p*) It should be noticed that for the purpose of marriage there is no *sapinda* relationship between cognates, where or among whom this custom prevails.

The practical rule of prohibited degrees—for Courts in India to follow, is (*q*) to pronounce a marriage to be valid, which has been celebrated in the presence, and with the presumed assent, of the relatives and the caste-people.

Sec 4—INTERMARRIAGE

Sub Sec 1—CASTES

Caste system

The caste system—is the peculiar social organisation of the Hindus. There being no rational principle upon which the hereditary caste system, irrespective of qualifications, could be based, it is generally represented by comparatively modern writers of the Brâhmanical class who are most interested in maintaining it, to be a divine institution existing from the beginning of creation But the sacred books contain no uniform or consistent account of its origin the various accounts of it given by the different works of ancient Sanskrit literature, have been collected together with considerable research by Dr Muir in the first volume of his Sanskrit Texts.

In some of the Purânas, castes are described as coeval with creation , while there are others which say that originally there was but one caste which became multiplied in the

(*n*) See Sub-Judge's judgment in *Devi* v *Rani Radha*, 31 I A 160
(*o*) Text No 9 (*p*) p 102 *supra* (*q*) p 103 *supra*

Tretà or third age of the world owing to deterioration of men. The Mahàbhàrata categorically asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation; and that the title of a person to recognition as Bràhmana depends not on heredity, but on possession of superior merits :—

युधिष्ठिरः। सत्यं दानं क्षमा शीलम् आनृशंस्यं तपो घृणा ।
दृश्यन्ते यत्र नागेन्द्र स ब्राह्मण इति स्मृतं ॥
सर्पः। शूद्रे ष्वपि च सत्यं दानम् अक्रोध एव च ।
आनृशंस्यम अहिंसा च घृणा चैव युधिष्ठिर ॥
युधिष्ठिरः। शूद्रे तु यद् भवेत् लक्ष्म द्विजे तच्च न विद्यते ।
न च शूद्रो भवेत् शूद्रो ब्राह्मणो न च ब्राह्मणः ॥
यत्रैतत् लक्ष्यते सर्प वृत्तं स ब्राह्मणः स्मृतः ।
यत्रैतन् न भवेत् सर्प तं शूद्रम् इति निर्दिशेत् ॥
आरण्यकपर्वणि आजगरपर्वणि १८० मे अध्याये ।

"Yudhisthira said 'He is ordained to be Bràhmana in whom are found truthfulnes, charity, forgiveness, uprightness, harmlessness, austerity and compassion.'

Qualities of Brahmana.

"The serpent said 'But O Yudhisthira, even in Sùdras (are found) truthfullness, charity, absence of wrath, harmlessness, tenderness to living beings and compassion.'

"Yudhisthira replied 'If in a Sùdra (by birth) the characteristic (of Bràhmanas) exists, and in a twice-born (by birth) the same does not exist, then the Sùdra (by birth) should not be (regarded) a Sùdra, nor the Bràhmana (by birth) a Bràhmana he is ordained, O Serpent ! a Bràhmana in whom is observed the characteristic, and he in whom the same does not exist must be called a Sùdra' &c."—Ajagara-parva, Ch. 180.

Sudra will be a Brahmana if the qualities exist in him.

In the Bhàgavat-Gità a chapter of the same work, the Blessed Lord said,—

चातुर्वर्ण्यं मयासृष्टं गुणकर्मविभागशः । ४, १३ ।

"I created four classes by the different distribution of qualities and actions."—4, 13.

ब्राह्मणक्षत्रियविशां शूद्राणाञ्च परन्तप ।
कर्माणि प्रविभक्तानि स्वभावप्रभवैर्गुणैः ॥

शमो दमस्तपः शौचं क्षान्तिरार्जवमेव च।
ज्ञानं विज्ञानमास्तिक्यं ब्रह्मकर्म स्वभावजम्॥
शौर्यं तेजो धृतिर्दाक्ष्यं युद्धे चाप्यपलायनम्।
दानमीश्वरभावश्च क्षात्रं कर्म स्वभावजम्॥
कृषिगौरक्ष्यवाणिज्यं वैश्यकर्म स्वभावजम्।
परिचर्यात्मकं कर्म शूद्रस्यापि स्वभावजम्॥ १८, ४१-४४।

Qualities of different castes

"Of Bràhmanas, Kshatriyas and Vaisyas, and also of Súdras, O Enemy-vanquisher, the actions are different by reason of qualities sprung from the state of Self (or soul). (41). Equanimity, control of senses, austerity, purity, forgiveness, and straight-forwardness, knowledge, realisation of knowledge, and belief in next world, are the Bràhmana's action sprung from the state of Self: (42). Bravery, spirit incapable of bearing insult or censure with impunity, fortitude, dexterity, and also not flying from battle, generosity, and commanding disposition, are the Kshatriya's action sprung from the state of Self (43). Agriculture, cattle-tending and trade are the Vaisya's action sprung from the state of Self. and the Súdra's action sprung from the state of Self, has the character of service. (44). Gita—xviii, 41-44.

How caste is to be determined

This revelation by the Blessed Lord ordains that it is not by birth, but by qualities and conduct due to his psychic state determined by the *Adrishta,* that the caste of an individual is determined.

The Bhàgavata-Puràna called also Srimat-Bhàgavata assigns different natural dispositions and qualities to the four castes, and assumes them to be hereditary, as a general rulé, but concludes by asserting the possession of the dispositions and the qualities to be the sole test of the caste of individuals, thus,—

यस्य यल्लक्षणं प्रोक्तं पुंसो वर्णाभिव्यञ्जकम्।
यदन्यत्रापि दृश्येत तत्तेनैव विनिर्दिशेत्॥ ७, ११, ३५।

which means,—"Whatever (dispositions and qualities) have been described as the distinctive mark indicative of the caste of a man, if the same are found also in another (*i. e.*, in a person of a different caste by birth), then he shall be desig-

nated by that very caste (which is indicated by the qualities, and not by the caste of his descent)".

This view that qualification is the test of caste, is indicated in several other passages of this work, one of which is as follows,—

स्त्री-शूद्र-द्विजबन्धूना त्रयी न श्रुति-गोचरा । १, ४, २५ ।

which means,—"The three Vedas are not fit to be heard by females, Sùdras, and *dvija-bandhus*," *i e*, male relations of the twice-born, or in other words those males that are descended from the twice-born, but are not themselves so by qualification.

There are also many passages in the Smritis, indicating the possession, by a man, of superior qualities to be necessary for his being a member of the Bràhmana caste in which he is born, and laying down that for certain conduct a Bràhmana shall be reduced to the position of Sùdras. The converse case of a person of inferior caste being admitted to the superior rank by reason of endowment with good qualities, appears to be laid down in a few texts which, however, are interpreted by the commentators to be applicable to an exceptional case (*r*)

Heredity has become the rule of castes

Heredity therefore, is the rule of caste, subject however to a theoretical exception based upon possession or absence of the characteristic qualities. But practically the caste system has become hereditary and has lost the principle upon which it seems to have originally been founded.

Smritis divide me in two classes

1 *Sudras*
2 *Twice-born*

Twice-born and Sudras.—The Smritis, which have thurst into prominence this system, divide man into two large classes namely, the *Sudras* and the *Twice-born* The study of the sacred literature forms the principle of this distinction. They ordain that by birth all men are alike to Sùdras, and the *second birth* depends on the study of the sacred literture. Thus Sankha one of the compilers of the Dharma-Shàstras declares,—

विप्राः शूद्रसमास्तावद् विज्ञेयास्तु विचक्षणै ।
यावद्वेदे न जायन्ते द्विजा ज्ञेयास्तु तत्परं ॥

(*r*) See Manu, x, 64-65

which means,—Bràhmanas (by birth) are, however, regarded by the wise to be equal to Sùdras until they are born in the Veda (*i. e.*, learn the sacred literature), but after that (*i. e.*, this second birth) they are deemed twice-born.

Passages to the same effect are found in most of the codes, according to which the recognition of the title of the Twice-born to superiority over the Sùdras, depends upon acquisition of the knowledge of the Vedas.

Caste system not peacefully established.

Caste not peacefully established.—The caste system does not appear to have been peacefully established, in so far as regards the division of the Twice-born into three castes, namely, Bràhmana, Kshatriya and Vaisya the Bràhmanical pretension to superiority was resented by the Kshatriyas from the first, when the Bràhmanas appear to have been compelled to admit into their class Visvàmitra and his clan, who, according to them, had been Kshatriyas before. The exaggerated story of Parasuràma, the Bràhmanical hero extirpating the Kshatriya race thrice seven times, and the anecdote of Ràma, the Kshatriya prince defeating that hero, proves the continuation of the antagonism between the two castes, which is deprecated by Manu, (*s*) who advised them to cultivate friendly feeling towards each other, not perhaps until after the propagation of Buddhism by a Kshatriya prince, inculcating equality of men, and so striking at the root of the caste system This compelled the Bràhmanas to reduce their pretensions by promulgating the Tantrikism which was a compromise between the Bràhmanism or caste, and the Buddhism. By their intellectual superiority and monopoly of the Sanskrit literature they have, however, succeeded, by fair means or foul, to maintain their acsendancy to some extent What turn the system will take, is yet to be seen, now that the people have been emancipated by modern civilization from the religious, moral and intellectual thraldom under which they used to labour before.

Originally there were four castes

The number of caste.—It is said that there were originally four castes, namely, Bràhmana, Kshatriya, Vaisya

(*s*) ix, 322

and Sûdra , but subsequently the various mixed castes have come into existence by either intermarriage or illicit connection, between them and their issue in all sorts of combination, so that we find a distinct caste for each occupation which is said to be its own. This rather leads to the conclusion that most of these mixed castes must have been in existence when the system was introduced, if the occupations be taken to be the guide

Mixed castes.

Distinction of four castes

It should, however, be observed that having regard to the differences of character and occupation, the members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by intellectuality, learning and religion are the real leaders of society (1) Next in importance are persons forming the royal class or the warriors on whom the safety and the very existence of the State depend, and who are characterized by physical agility, courage, administrative capacity and intelligence. (2) Then come those concerned in the production of wealth by agriculture, trade, and so forth, requiring intelligence and a lower standard of morality. (3) And lastly, the labourers serving the preceding classes or practising the mechanical or similar arts, distinguished by their capacity for physical labour, and spirit of dependence. (4) The virtues and qualities requisite for distinction in these occupations, as well as their importance in society are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society, and its different classes of members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution. The explanation of the mixed classes by supposing them to be the issue of intermarriage appears to be a play of imaginaton ; where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an inter-marriage or illicit connection

Mixed classes,

between a man of the one tribe and a woman of the other. Thus the Ambasthas or the members of the physician caste of Bengal are imagined to be a mixed caste sprung from the issue of a Bráhmana father and a Vaisya mother: a physician resembles a Bráhmana in his general culture and learning, and also a Vaisya, inasmuch as, he does, in a manner, trade with his learning, and so the class is fancied to be mixed of the said two tribes, the worse quality being supposed to be derived from the mother and the better from the father. The number of castes appears to have increased with the increase of occupations, in the course of progress, for, later writers enumerate many that are not mentioned in the earlier works, and they describe the origin of the new castes according to their fancy.

Sudras not now lowest class.

It should be here remarked that the Sudras are not now the lowest class, as is generally supposed, for, all the mixed castes that are deemed to be descended from the issue of a superior mother and an inferior father, are ranked beneath the Súdras. The latest Sanskrit writers on castes say that pure Súdras as well as Kshatriyas and Vaisyas have become extinct. The reason of this assertion seems to be that these Bráhmanical writers do not wish to have two other twice-born castes possessed of privileges like themselves, and as regards Súdras, many castes which they represent to be mixed ones, appear from their occupations to belong to the Súdra tribe, but the policy pursued by these Bráhmanas for the purpose of maintaining their own superiority over all, appears to have been to multiply and subdivide castes in such a manner that each of these, though inferior to the sacerdotal class, may deem itself superior to some others, so that the vanity of that caste might be satisfied to some extent. For, although the rank of the four pure tribes is in the order in which they have been enumerated, yet it is difficult to ascertain the exact position of many of the so-called mixed castes in the order regarding the relative rank of castes, having regard to the various combinations of tribes, which the Bráhmanical imagination gives in describing their

Distinction among sub castes

origin: thus the sense of humiliation which may be felt by a caste at the idea of being inferior to the Bráhmana and the like castes, is compensated by the conceit created by the notion of that caste itself being superior to others.

Kayasthas not Sudra

The Kayasthas—are not Súdras but Kshatriyas and belong to the regenerate class The *Bhavishya-Puràna* gives the story of the creation of Chitragupta, the ancestor of the *Kàyasthas*, who after having sprung from the body of Brahmá or God the Creator, asked Him as to what shall be his name and duties, and the God gave the following answer,—"Because you are sprung from my body (*Káya*) therefore you are to be called Káyastha, and shall be famous in the world by the name of Chitragupta. O my son, let your residence be always in the region of God of Justice, for the purpose of determining the religious merit and demerit, and receiving my irrevocable order, you should observe the Dharma or the Law and usages that are proper for Kshatriya tribe, according to Shástras."

Padma-Purana

There is a similar account of the origin of the Kàyasthas in the *Padma-Purána* in which it is said,—"The usages among different sections of the Kshatriyas are not uniform; among them the Káyasthas who live by letters shall attain superiority."

Vijan-Tantra

In the *Vijan-Tantra, Bràhmà* or God the Creator is reported to have said "As you who are named *Chitragupta* have proceeded from my body, you will be celebrated in the world as Káyastha. Káyastha is a *Kshatriya* by caste, but not Súdra by any means."

5 Kayastha settled in Bengal

The Káyasthas of Bengal are the descendants of *Suchàru* who settled in Bengal. Then again in the reign of *A'disura*, the king of Bengal, the king of *Kànyakubja* (modern Kanauj) at the request of *A'disura*, sent five learned Bráhmanas to officiate at a sacrifice. With these Brahmanas, came five Káyasthas, named Makaranda Ghosh, Dasharatha Basu, Kalidas Mitra, Dasharath Guha and Purushottama Datta. These five *Kàyasthas* also settled in Bengal and their descendants by intermarriage with, the other Káyasthas, form the Káyasthas of Bengal.

Kaysthas held high offices.

The Káyasthas held various high appointments and offices which no one but the regenarate classes ever held. There was scarcely any work in Sanskrit, that may properly be called history. But there is a book called *Raja-Tarangini* composed in the eleventh century which gives the history of Cashmere. In its 4th chapter, there is an account of a Káyastha dynasty that reigned there for 260 years from the 6th to the 9th centuries. The kings of that Káyastha dynasty are described as Kshátriyas in many places of that work. It is stated in the work that from ancient times the Kayasthas held the highest offices, such as those of the Minister of war or peace, (4,710) the Officer in charge of the Treasury, (8,475) the Commander-in-chief, (8,664), and the Chief Minister superior to all (8,562-4).

Smritis &c, on Kayastha's qualities

There are many passages in Smritis and commentaries which deal with the Káyasthas and their duties. The Káyasthas were responsible officers of the Court, (*t*) and executive officers who had to keep accounts and to discharge the duties of a writer, and by reason of their being the favourites of the king they were exceedingly politic and very difficult to be controlled. (*u*) They were sometimes appointed as Revenue Officers (*v*) and writers (*w*) and not mere copyists but those who were strong in accounts, knew the languages of different places. (*x*) About the qualities of the Accountant who is a Káyastha it is said that he must be a person who amongst other qualities, has studied the *Srutis* or what was heard.(*y*) About the other qualities of the writer, Vyasa says,—(*z*) "He must be a person who has command over language (literally who knows particulars about words), is pure in (mind and body), has control over his temper, is not covetous, is truthful and can write clearly and in a lucid style" But they that

(*t*) Code of Vishnu 7, 1-3, *Mrit Sakatikam*, a drama composed about two thousand years ago, gives a description of a trial in a Court in which Kayastha's duties are described as those of the pleader of both parties, as well as of the Bench clerk

(*u*) Code of Yajnavalkya, 1,336, Mit, on the above text, Sulapani in his *Yajnavalkya-Dipakalika* on the Institutes of Yajnavalkya.

(*v*) Aparарka on Yajnavalkya's text on Kayasthas

(*w*) Code of Brihat Parasara, 10, 10 (*x*) Sukra Niti, 2, 173

(*y*) Vyasa's text cited in the Vaijayanti, a commentary on Vishnu's Institute

(*z*) Vyasa cited in the Viramitrodaya

knew the Vedas, the Smritis and the Purânas were proclaimed to be aware of what was heard (from God) (*a*) Thus it is clear that the Kâyasthas, who were writers and accountants, had all the duties and privileges enjoyed by the twice-born classes. The author of the Viramitrodaya makes the following comment on the text of Vyasa and clearly proves that the Kâyasthas are a twice-born class "The Accountant must be twice-born, because it is declared that he should be a person who has studied the Vedas (which none but a twice-born person can do), so also, the writer also must be twice-born, because they go together"

Kayasthas of modern Bengal.

The Kâyasthas of modern Bengal still hold the same high position as before, if not much higher, inasmuch as some of the offices which were specially reserved for Brâhmanas and other regenerate classes, such as those of a judge, governor, minister &c, are now held in large numbers by the Kâysthas.

Kaysth. whether degenerated into Sudras

There are some who are of opinion that the Kâyasthas might have been Kshatriyas, but the Kâyasthas of Bengal have degraded themselves into the category of Sùdras because they do not perform the *Upanayana* ceremony (the investiture with the sacred thread), they observe one month's mourning and they add to their names the surname of *Dâsa*-peculiar to the *Sùdras* It has already been observed, that a caste of person did not depend on heredity but on the occupation and the possession of characteristic merits, (*b*) but by lapse of time it has become a matter of heredity, and merit or no merit, the son gets the caste of his father. If non-observance of the peculiar duties cast upon a member of a particular caste degrades him to the position of a Sùdra, then practically there cannot, at present, exist any regenerate caste but Sùdras. There are very few of the regenerate classes who can say that they and their ancestors did all the duties imposed on the caste. So like other regenerate castes, Kâyasthas of Bengal have not fallen into the category of Sùdras as

(*a*) Sukra Niti, 2,178

(*b*) See *supra* pp 144-147 and Manu, 1, 108 cited in C iv, Sec 5, Sub Sec in "Discussion as to there being any such binding rule," Reason No (3) *post*.

the caste system has become hereditary to all and there cannot be an exception to the case of Káyasthas only. It should be noted that in all other respects the Káyasthas observe the rules enjoined on the Kshatriyas.

The Calcutta High Court, however, has held that the Káyasthas are Sùdras (*c*) But the Allahabad High Court (*d*) has expressed considerable doubts as to the soundness of this view so far as that part of the country was concerned. The Patna High Court has held that Káyasthas are Kshatriyas but not Sùdras, (*e*) even in a case in which the parties were Bengali Káyasthas. (*f*)

Case-law on Castes—The highest tribunals had to consider in some cases questions relating to castes, the results of which are given below —

Ahirs.—Ahirs whether Nandavansis or of any other subcastes are Sudras (*g*) The Ahirs are a class of Yadavas and claim themselves to be Kshatriyas.

The Gopes of Bengal also fall within the Yadavas. But the Madras High Court has held that the Yadavas or Edayers are Sudras, (*h*) they being, unlike the Yadavas of Northern India who are descendants of Srikrishna, of Dravidian origin The Ramayanachavadi thousand Yadavas are a sub-sect of the Yadavas (*i*)

Arovas.— See "Bhatias" below

Bharbunjas.—They do not occupy a position higher than the Kurmi caste (*j*)

Banias.—See "Bhatias" below

Bhatias.—They rank as twice-borns, but are below the Arovas and Banias. (*k*)

(*c*) Raj Coomar *v* Bissesur, 10 C 688, *this has been followed in* Asita *v* Nirode, 20 C W N 901 35 I C 127, (see P C Decision in 24 C W N 794)

(*d*) Tulsi *v* Behari, 12 A 238, 334 F B

(*e*) Rai Iswari *v* Hariprasad, 7 Pat L T

(*f*) *See post foot note,* (*p*) below

(*g*) Domar *v* Hirondi, 54 I C 294 (N)

(*h*) Vennia Koni *v* Vennichi, 51 M 1 F B 1928 M 299

(*i*) *Ibid*

(*j*) Sohan *v* Durga, 24 I C 691 (A)

(*k*) Aya *v* Thari, 74 P L.R 1913 34 P W R 1913 19 I C 87

Bhumihar Brahmans—in Bihar are not Brahmanas. (*l*)

Chettis.—Nattukottai Chettis are Sudras. (*m*)

Edayers.—See "Ahirs" above.

Gopes.—See "Ahirs" above.

Jats.—The Jats are Sudras. (*n*)

Kayasthas.—The Allahabad, (*o*) the Patna (*p*) and in a case the Bombay (*q*) High Court have held that the Kayasthas are Kshatriyas. The Calcutta High Court, however, has held them to be Sudras. (*r*) For fuller discussion of the question see above. (*s*)

The Patna High Court agreeing with the author's reasons disagreed with the view of the Calcutta High Court even in a case in which the parties were Bengali Kayasthas. (*t*) In the appeal from the above-named Patna case, the Privy Council did not express any opinion on this question. (*u*)

Khatiks.—The Khatiks of the Punjab are Sudras. (*v*)

Kshatriyas.—See "Kayasthas" above. The offspring of illicit connection of Kshatriya caste is not a Sudra. (*w*)

Kurmis.—See "Bharbunjas" above.

Nandabansis.—See "Ahirs" above.

Natukottai Chettis—See "Chettis" above.

Surajbansi Rajputs.—They are held to be high caste Hindus, (*x*) but their position has not been stated.

Yadavas—In the persent census the Gopes, the Ahirs, the Nandabansis and the Edayers are all included within the Yadavas. See "Ahirs" above.

(*l*) Sita Devi *v* Gopal, 1928 P 375

(*m*) Vellaiyappa *v* Nalarajan, 1927 M 386, approved by P C. 35 C W N 1278

(*n*) Hira *v* Shibbu, 6 L L J 442, Mewa Ram *v* Lal, 1927 A 410

(*o*) Tulsi *v* Behari, 12 A 328, 334 F B

(*p*) Isri *v* Rai Hariprosad, 6 P 506 1927 P 145 (Behari Kayastha); Rajendra *v* Gopal, 7 P 245 1929 P 51 on appeal to P C, *see* 10 P 187 57 I.A 296 34 C W N 1161 52 C L J 287 1930 P C 242, (Bengali Kayastha)

(*q*) Subrao *v* Radha, 52 B 497, 504 6 1928 B 295

(*r*) Rajkumar *v* Bessesur, 10 C 688, Asita *v* Nirode, 20 C W N 901 35 I C 127 P C, appeal in 24 C W N 794 did not touch the point, Biswanath *v* Shorashibala, 48 C 926 25 C W N. 639 66 I C 590.

(*s*) *Supra* pp 151-154, 34 C W N 1161 52 C L J 287

(*t*) See foot note (*p*) above

(*u*) Rajendra *v*. Gopal, *supra*

(*v*) Bholar *v* Emperor, 181 P L R 1914 15 C L.J 539 24 I C 947

(*w*) Sitla *v* Gajraj, 14 O C 227 12 I C 767.

(*x*) Sahdeo *v* Kusum, 50 I A 58 2 P. 210; 27 C.W N. 901; 37 C. L J. 369. 44 M L. J 476. 25 Bom L R 560

Sub-sec ii—INTER-CASTE MARRIAGE

Intermarriage

Sages and Mitakshara and Dayabhaga on inter-marriage.—The account of the origin of the mixed castes, as *given by Manu* and *other sages*, shows that there were many of them, that sprung from sexual connection between inferior men and superior women.

Anuloma.—But while dealing with marriage, the sages lay down that marriage between persons of the same caste is preferable, and they also recognise marriage between a woman of an inferior caste and a man of a superior caste known as *anuloma* marriage to be valid (*y*)

Pratiloma—They do not say anything about the marriage between an inferior man and superior woman. There are, on the contrary, passages in the Smritis, providing punishment for a man having sexual intercourse with a woman of a superior class. Thus they do, by implication, prohibit inter-marriage between a man of an inferior tribe and a woman of a superior tribe, which is called a *pratiloma* marriage (*z*)

Mit, and Daya, prohibit inter marriage.

The Mitàksharà and the Dàyabhàga, the two treatises of paramount authority in the two schools respectively, appear to take the same view · for, partition of heritage between sons of a man by his wives of the same and the inferior tribes, is dealt with by the former in Chapter I, Section 8, and by the latter in Chapter IX. The Mitàksharà also deals with intermarriage in the A'chàra Kànda while dealing with marriage.

It should be noticed, however, that these works take into consideration only the four original tribes and not the mixed castes, while they deal with intermarriage or partition.

Prohibition, a moral obligation

It should, however, be observed that these prohibitions appear to be of moral obligation only, hence, although marriage of an inferior man with a superior woman may be

(*y*) *See* Natha *v* Mehta, 55 B 1, Bai Golub *v* Jiwanlal, 46 B 871 1922 B. 32 Sohan *v* Kabla, 10 L 372, 378 1928 L 706 1928 L 166 ; Ratansi *v.* Administrator, 1928 M 1279, 1284.

(*z*) Bai Kashi *v* Jamnadas, 14 Bom L R 547 16 I. C 133; in this connection *see* Ratansi *v*, Administrator, 1928 M 1279, 1284; *see foot notes* (*c*) to (*f*) below

disapproved and condemned, still if such a marriage does in fact take place, the same must be regarded valid as between the parties to it, and the issue legitimate. They may be excommunicated, and excluded from inheritance of their relations, (a) but as between themselves the relationship of husband and wife, and of parent and child, must be held legitimate and there must also be reciprocal heritable right among themselves,—there being no authority for pronouncing the marriage to be invalid, however reprehensible, the same may be represented to be

Commentators prohibited intermarriage.

Prohibition of intermarriage by latest commentators—The latest commentators Raghunandana and Kamalákara, however, prohibit intermarriage between the different tribes, upon the authority of some passages in the minor Puránas, enumerating practices that should be avoided in the Kali age. (b) But in this respect they differ from the two leading treatises and the Smritis, which recognize the lawfulness of marriage between a man of a superior tribe and a woman of an inferior tribe. And their view appears to be adopted by the Calcutta High Court which held that a marriage of a *Dome* Bráhmana with a girl of the *Haree* caste is invalid, if not sanctioned by local usage. (c) The High Courts of Bombay (d) and Allahábad (e) have held the same view. So a marriage between a Bráhmin woman and a man of *Khatri* by caste is held invalid under Hindu law (f) But a marriage between a man of *Jhabra Rajput* and *Tarkhani* woman has been held valid in the Punjab. (g) A decision of the Calcutta High Court has laid down a novel proposition that according to law and custom a marriage between a *Kayastha* and a *Tanti* or a *Dome* is valid, unless the contrary is proved (h)

(a) Dayabhaga, XI, 2, 9 (b) See p 8 *supra*

(c) Melaram *v* Thannooram, 9 W R 552, *see foot note (z)* above,

(d) *See* Bai Kashi *v* Jamnadas, 14 Bom L R 547 16 I C 133, *see foot note (z)* above

(e) Sespuri *v* Dwaraka, 10 A. L J 181 16 I C. 222

(f) Pars Ram *v* Hukman, 73 I C 239 (L)

(g) Hardial *v* Kali, 188 P W R 1911 65 P R 1911 10 I C, 152.

(h) Biswanath *v*, Shorasiwala, 48 C. 926 : 25 C.W. N 639 : 66 I. C. 590; see p. 151 154 *supra*.

Kayastha's marriage rules,

There cannot be any room for doubt that the Káyasthas were Kshatriyas, if they are not so now on account of non-observance of a few of the rules enjoined on them. Whatever rules might have been violated by the modern Káyasthas of Bengal, they rigidly adhere to the marriage rules (*i*) and a marriage between a Káyastha and a *Sùdra* is not valid either in law or custom. But a recent decision (*j*) of the Calcutta High Court, which has come as a surprise to the Hindu community of Bengal, lays down that by law and custom a marriage between Káyastha and *Tanti* castes is valid unless a special custom to the contrary disapproving such marriage is proved. Though law is not always logical still a logical conclusion has been drawn in the above case, that inasmuch as Káyasthas have been held to be Sùdras, the law applicable to the Káyasthas must be that applicable to the Sùdras. As inter-caste marriage is allowed by Shástras among the Sùdras, though not followed in practice except in few instances in East Bengal, so on logical conclusion an inter-marriage between a Káyastha and a Tanti is held to be legally valid. In the first court Mr. Justice Greaves distinctly stated that no evidence of custom was adduced to prove the validity of such marriage, still the court of appeal has held that by custom, unknown not only to the Káyastha and Tanti communities, but to the whole Hindu community of Bengal, an inter-marriage between Káyastha and Tanti castes is valid unless the contrary is proved In another case a marriage between a Káyastha with a *Dome* woman has been held valid (*k*)

intermarriage with Sudras held valid,

but not common.

In Oudh, as in Bengal, marriage between different sub-divisions of Káyasthas is not common in daily life. (*l*)

Marriage of illegitimate daughter

The marriage between a *Banya* and the illegitimate daughter of a Brahmin by a *Banya* woman (*m*), and between a *Vaishya* and the illegitimate daughter of a *Vaishya* born

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(*i*) *Supra*, p 157.
(*j*) Biswnnath v Sm Shorasibala, 48 C 926 · 25 C W N 639 66 I C 590.
(*k*) Bhola v. King Emperor, 51 C 488 28 C. W. N 323 . 25 Cr L. J. 997 : 81 I C 709
(*l*) Har v Chand, 48 I C 400 21 O. C 298 5 O L J 655.
(*m*) Madan v. Emperor, 34 A. 589 10 A. L J 82, 16 I C, 513.

of a Sudra woman (*n*) have been held valid. It is observed that illegitimacy is no disqualification for marriage. (*o*)

A marriage of a *Bairagi* with a woman who is not a Bairagi is valid. (*p*)

No prohibition of intermarriage between subdivisions of tribes, but not followed in practice

Different subdivisions of the same caste—There is no text of Hindu law prohibiting an intermarriage of persons belonging to the different sub-divisions of the same tribe or *varna*. (*q*) A practice, however, has grown up, and intermarriage between the different sub-divisions of the same tribe does not now take place, although there is no legal bar to the same. (*r*) For instance, there is no *connubium* between the Bárendra, the Rádhia and the Vaidika subdivisions of the Bengal Bráhmanas, nor between the Bangaja, the Uttara-Rádhíya, the Bárendra and the Dakshina-Rádhiya Káyasthas of Bengal. It is extremely doubtful whether such practice or custom may be the foundation of a rule of law, such as will justify a Court of Justice in declaring an intermarriage in fact to be invalid, when it is not prohibited either by the sages or by the commentators. In Oudh also marriages between sub-divisions of Káyasthas are not in common use though held valid. (*s*) In the Madras case of *Inderun* v. *Ramaswamy* (*t*) the Privy Council has upheld an intermarriage between two different sub-divisions of the Sùdra tribe. In the case of *Narain Dhara*, (*u*) there is one passage in the judgment from which it may be inferred that a contrary view of the law was taken. In that case the question was, whether from the fact that a man of the *Kaibarta* class and a woman of the *Tanti* class lived as husbahd and wife for a period of twenty years, a marriage in fact could be presumed to have taken place between them. And it was held that it could not, inasmuch as the foundation of such a presumption was wanting in that case, for, the parties being members of two different subdivisions of the Sùdra tribe, between whom there is in practice no

(*n*) Bai Gulab *v* Jivanlal, 24 Bom L R 5 (*o*) Madan *v* Emperor, 34A 589 10A. L J 82 16 I. C 513

(*p*) Adwaita *v* Lalit, 33 C W N 697 1930 C 57

(*q*) *See* Domar *v* Hiro [illegible]

(*r*) Har *v* Chand, 48 I C 400 5 O L J 655 21 O C 298, *see foot note* (*l*) p 158

(*s*) Har *v* Chand, 48 I C 400 21 O C 298 5 O L J 655

(*t*) 13 M I A 141 12 W R, P C 41 (*u*) 1 C 1

intermarriage, the Court could not think it a fact likely to have happened. It was not intended to be laid down that an intermarriage in fact, between different sub-divisions of the same tribe is legally invalid, nor did that question arise for decision on the facts of that case. It has, however, been clearly laid down that such intermarriage is valid. (v) The question of intermarriage between two classes of Sûdras and the question of adoption from these classes are the same. (w)

Case-law

It should be remarked, however, that what were taken in those cases to be different sub-divisions of the Sudra tribe, are represented by the latest writers to be mixed castes

Between different castes

It may be mentioned here that in the Eastern Districts such as Sylhet and Tippera, there is a custom of intermarriage between the Vaidyas and the Kâyasthas, (x) as well as between the Kayasthas and the Shahoos. So in the Presidency of Bombay a marriage between different sects of the Lingâyets is not invalid. (y)

Among *Sikhs*

Excepting law relating to marriage (z) the Sikhs are governed by Hindu law, so there can be a valid marriage between members of different castes. (a)

Converted Hindu's Marriage—A woman who is converted to Hinduism can contract a valid marriage under the Hindu law with a Hindu. (b)

Legislation on inter-marriage——By Act XXX of 1923, which amends the Special Marriage Act, (Act III of 1872) marriages between different castes have been sanctioned. But by a marriage under this Act a Hindu loses his right to marry another wife during the presence of one (c) and his

(v) Upoma v Bholaram, 15 C 708, Muthusami v Masilamani, 33 M 342 20 M L J 49 5 I C 42, Mahantawa v Gangawa, 33 B 693, Har Prasad v Kewal, 47 A 169, 172 22 A L J 1009 1925 A 26 83 I C 163, Sohan v Kabla, 10 L 372

(w) Girish v Mahomed, 25 C W N 634 (1888)

(x) Ram Lal, v Akhoy, 7 C W N 619.

(y) Fakirgauda v Gangi, 22 B. 277

(z) *Supra* p 64

(a) Chandika v. Widow of Jagan, 6 O L J 331 52 I C 449

(b) Muthuswami v Masilamani, 33 M 342 5 I C. 42 20 M L J 49, Ratansi v Administrator, 1928 M 1279, *see* Sita Devi v Gopal, 1928 P 375

(c) *Sec* 16

right to adopt a son (*d*) and he is severed from the co-parcenary, if he was its member. (*e*) No man can marry under this Act who is at the time married, (*f*) that is, if he had a wife being married under the Hindu form of marriage.

Sec 5—LIABILITY AND GUARDIANSHIP FOR MARRIAGE

Sub-Sec i—EXPENSES OF MARRIAGE

Marriage expenses.

Marriage-Sanskara or Sacrament—Marriage is the last of the *Sanskaràs* or sacramental rites that are ordained to have the effect of purifying the body specially from inherited taint, if any. As regards the women marriage is declared to be equivalent to initiation by the investiture with the sacred thread, from which they are disqualified The performance of this sacrament for both male and female children is an imperative duty imposed on the father.

Mit, on expenses

While dealing with the subject of gift, the Mitakshara says that a person having male issue is not competent to alienate his *whole* property, and in support of this proposition the following text of Smriti is cited,—

पुत्रान् उत्पाद्य संस्कृत्य वृत्तिञ्चैषां प्रकल्पयेत् ।

which means,—"Having begotten sons (the father) shall perform the *Sanskaras* or sacraments (including marriage) and shall make provisions for their maintenance."

It should be observed that the father has to perform certain religious ceremonies connected with, and to bear the expenses of, the mrrriage of sons although the latter are represented in the Smritis to be free agents with respect to their marriage.

Marriage expense of girl, a legal charge

Liability for expenses.—Although the texts mentioned below enumerating certain relations having the right of duty in their order, of disposing of maids in marriage, may be held to be of moral obligation only, still there is abundant authority in the Smritis and the Commentaries for the proposition that the father is legally liable to celebrate the marriage of his maiden daughters, and that the expenses of the marriage

for daughters,

(*d*) Sec 25

(*e*) Sec, 22,

(*f*) Sec 15

of a damsel, and her maintenance until marriage, form legal charges on the property of the family; of which she is a member by birth. (*g*) Even the daughters of those that are excluded from inheritance, are to be maintained and married at the cost of the family property. It is difficult to understand the principle underlying the view expressed by a Brahman Judge of the Madras High Court, *viz.*, that under the Hindu law a father is not under legal obligation to get his daughter married (*h*) But in the case of *Vaikunta* v. *Kallapiran,* (*i*) in which a brother taking by survivorship the undivided coparcenary interest of a *deceased* brother was held liable to pay the expenses of the latter's daughter's marriage In a later case, the Madras High Court has held that reasonable marriage expenses of a daughter of a deceased co-parcener must be paid out of the estate in the hands of other co-parceners, even when the mother of the girl celebrated the marriage, although the girl's paternal grandfather and the other male members of her father's family have not wrongly or improperly refused to perform such marriage (*j*)

even of those excluded from inheritance,

for brother's daughter,

The expenses for marriage form a charge on the family property. (*k*) Therefore, a debt contracted for the marriage of a member is for the benefit of the family (*l*) But the expenses of a marriage performed after a suit for partition is filed, is not a charge on the estate, (*m*) nor is the marriage

a charge on the estate,

when not

(*g*) Mit I 7, Vir 2, 1, 21, D B 3, 32 *et seq*

(*h*) Sundari v Subramania, 26 M 505

(*i*) 23 M 512 10 M L J 111 and 26 M. 497 13 M L J 25

(*j*) Ranganaiki v Ramanuja, 21 M L J 600 35 M 728

(*k*) Mit 1, 7, 3 *et seq*, Daya 3, 2, 38 *et seq*, Debi v Nand, 1 P 266, Ranganaiki v Ramanuja, 35 M 728, 736 7 21 M L J 600 11 I C 570, Pohumal v Naroomal, 19 I C 835 6 S L R 246, Kameswara v Veeracharlu, 34 M 422 20 M L J 855 8 I C 195 9 M L T 26, Arunachala v Arunachala, 10 I C 285

(*l*) Mit 1, 1, 28-29, Sundrabai v Shivnaryana, 32 B 81 3 M L T 44, Srinivasa v Thisuvengada, 38 M 556 25 M L J 644 15 M L T 307 23 I C 264, Kameswara v Veerucharlu, 34 M 422 20 M L J 855 8 I C. 195 9 M L T 26, Gopalakrishnam v Venkatanarasa, 37 M 273 17 I C 308 23 M L J 288, Marina v Doddisetti, 12 I C 539 2 M W N 380, Malayandi v Subbaraya, 21 M L J 521 8 I C 854 9 M L T 163, Pohumal v Naroomal, 6 S L R 246 19 I C 835, Prabh v. Ralla, 1930 L 672 (sale, sister's marriage).

(*m*) Ramalinga v Narayana, 45 M 489 P C 43 M L, J 428 26 C W N 929 37 C L J 15 24 Bom L R 1209 20 A L J 839 68 I C. 451, on appeal from 39 M 587, *see post* Ch V, Sec 11 Sub Sec iv "Common Charges"

expense of the nephew of a member of a divided family binding on the divided member. *(n)*

Provision for expenses in decrees

The Madras High Court, however, has held that in partition-decrees provision should be made for the marriage expenses of those persons only who are of the same degree of relationship as those who have been married at the expense of the family. *(o)*

Expenses for Dwiragamana ceremony—The *Dwiragamana* or *gamana* or *gowna* ceremony is in effect a part of the marriage ceremony. The expenses relating to such a ceremony is binding on the joint family estate. *(p)*

Sub-Sec ii—GUARDIANSHIP FOR MARRIAGE

Guardianship in marriage of males,

Guardianship—Hindu law does not contemplate marriage of males in their infancy, and so there is no rule regarding guardianship in their marriage According to Hindu law a man attains majority after the completion of the fifteenth year, and this rule is unaffected by the Majority Act, so far as marriage is concerned, so a young man of that age is *sui juris* and may be taken to act for himself as regards his marriage.

and girls

The Shàstras, however, enjoin early marriage of girls, and rules are laid down relating to guardianship in their marriage. *(q)*

Present practice

But according to the practice now prevalent among the Hindus, the marriage contract is made by parents for children, so that the bridegrooms also are mere passive agents exercising no volition, their assents to their marriages are only inferred from the absence of dissents. *(r)*

Guardians for marriage and their order,

Yàjnavalkya has laid down that the persons who are entitled to exercise the power to give a girl in marriage, are in the following order the father, the paternal grandfather, the brother, a *sakulya* or a member of the same family and the mother. *(s)* On a consideration of the texts of Vishnu, Yàjnavalkya and Nàrada cited above, Raghunandana places

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(n) Bhura v Ramrao, 17 I C 366 8 N L R 154

(o) Goparam v Venkataraghama, 29 M L J 710, 715 40 M 632 31 I C 574; *see post*, Ch V, Sec 11 Sub-Sec iv "Common Charges"

(p) Bagrangi v Padarath, 1930 A 504, in this connection *see post* Ch XII, Sec. 2, Sub-Sec ii

(q) Text Nos 14 16, *supra*, pp 118 119

(r) *See* Purshotomdas v Purshotomdas, 21 B. 23, see p 121, *supra*

(s) Text No. 14 *supra*, *p.* 118

the maternal grandfather and the maternal uncle before the mother. But the author of the Mitàksharà has adopted the rule laid down in the above text of Yàjnavalkya *(t)* without any such addition, probably because cognates are not much thought of in that school. It is worthy of notice that the mother, who is the nearest natural guardian, holds the last place in the above order, although she may, after the death of her husband, give away her son in adoption which affects the interests of the boy given, to the same extent as marriage does those of a girl. There are some reported cases showing that a difference does often arise between the mother and the paternal relations of a girl with respect to her marriage. The latter would prefer a bridegroom who though not wealthy, is member of a family deemed highly honourable according to the artificial rules of *kulinism*, such alliance being conducive to the promotion of the social status of their own family ; whilst the mother would prefer a wealthy and otherwise most eligible bridegroom though belonging to a family of inferior social position according to *kulinism.(u)*

position of mother,

her rights explained

The text of Yàjnavalkya has been explained by Chandavarkar, J., of the Bombay High Court According to him the text only deals with the bare right to give a girl in marriage and not to the choice of a husband for the girl. Had that been the intention, there would have been express texts to that effect.*(v)* The Madras High Court has held that after the death of the father, the mother, when she is the guardian of the person of the daughter, is competent to marry her daughter, even if it is not proved that the paternal grandfather of the girl had wrongly and improperly refused to perform the marriage *(w)* The same rule has been observed in the Punjab.*(x)*

Mad H C on mother

Punjab

Court's direction in disputes before marriage,

In a case of dispute *before* marriage between the paternal and the maternal relations for guardianship to dispose of a

(t) p 118 *supra*
(u) Text No. 19 *supra* p 119 Texts Nos 14, 15, 16.
(v) Bai Ramkore *v* Jamnadas, 37 B 18, 24 17 I C 95 · 14 Bom L R 766 *see also* S Namasevayam *v* Annammai, 4 M. H C R 339
(w) Ranganaiki *v* Ramanuja, 35 M 728 11 I C 570 21 M L J 600 10 M. L T 57
(x) Jiwani *v* Mula, 3 L 29, Indi *v* Ghania 53 I C. 783 L ; *see* Maya *v.* Ram, 20 P R. 1916 177 P W R 1915 31 I C 186.

girl in marriage, the Court as representing the Sovereign and as such being the Supreme Guardian, may impose terms upon the relation having the right, for the benefit of the girl, who should not, however, be forced into a marriage odious to her.*(y)*

so in marriage of lunatic

It has been held that a guardian must obtain the permission of the Court, before marrying the lunatic under his care, it was, however, not decided whether a male lunatic can contract a valid marriage according to Hindu law *(z)*

Guardianship of paternal relations preferred.

The Allahabad High Court has held that the maternal relations of a girl have no authority to give her in marriage when there are competent paternal relations in existence, unless, however, the paternal relations refuse to act or have disqualified themselves from acting *(a)*

Guardianship in marriage is duty, not right

Duty not right—The above texts, however, appear rather to impose a moral duty on the relations in the order they have been enumerated, enjoining them to provide a suitable match for a girl before her puberty, than to lay down such a strict rule of priority between them as might invalidate a marriage that has actually taken place but not under the superintendence of a relation who, under the circumstances, is the guardian indicated by the above rule. This appears to follow from what both Raghunandana and Kamalàkara say, namely, that if the betrothal of a girl is made by her father who is of unsound mind, and thereupon a marriage is celebrated with the usual ceremonies, then the fact of the father's insanity cannot render the marriage invalid.

This view of the law on this point, has, subject to certain salutary exceptions, been taken by Justices Norris and Ghose in the case of *Brindabon* v. *Chandra, (b)* in which the paternal uncle of a girl impugned the validity of her marriage celebrated by her mother. Their Lordships lay down the law thus :—"There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu laws, to give the girl away in marriage, but the

(y) Shridhar v. Hiralal, 12 B 480
(z) Chellathammal v Ammayappa 32 M 253.
(a) Kasturi v Panna, 38 A 520, 526 14 A L J, 754 : 36 I C 245.
(b) 12 C 140, in this connection *see* Venkata v Ranga, 14 M. 316, Bai v. Moti, 22 B 509; Mulchand v Bhudhia, 22 B. 812, Kasturi v. Chiranji, 85 A. 265 : 18 I C. 927. 11 A. L J 272.

Factum valet applied in marriages,

mother, the natural guardian, having given her away, and the marriage having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided, of course that the marriage was performed with all the necessary ceremonies."

reasons why it should be applied

Having regard to the fact that amongst the respectable Hindus it would be difficult to find a man willing to marry a girl who has already passed through the ceremonies of marriage with another man, no marriage should be set aside even in a suit by the girl's father, only upon the ground that it took place without his consent or against his will For, the sacrament of the marriage rite has the effect of causing the status of wife, unless the same has been vitiated by fraud or force. This view has been adopted by all the High Courts, and the texts relating to guardianship have been pronouced to be directory and not mandatory. (*c*) Accordingly, in a case where the mother of a girl married her in disobedience of the order of a Civil Court directing her to make over the girl to her paternal uncle for the purpose of getting her married, it was held by the Bombay High Court that the principle of *factum valet* applied : neither the disobedience of the Court's order, nor the disregard of the preferable claim of the male relations would invalidate the marriage. (*d*) But the case may be different when a second ceremony of marriage with another man has already taken place at the instance of the proper guardian, which is possible among low castes, and there is a dispute between the two husbands; for then the Court may take into consideration which of the two marriages is more beneficial to the girl.

Contract for marriage not specifically enforceable

Betrothal.—Marriages are preceded by contracts of betrothal made in more or less solemn form by the guardians of the parties to them. But these contracts of betrothal are not considered to be binding or irrevocable, so as to be capable of specific performance (*e*) But damages may be

(*c*) Venkata v. Ranga, 14 M 316, Ghazi v Sakru, 19 A 515, and Mulchand v. Bhudhia, 22 B 812 (*d*) Bai v. Moti, 22 B. 509.
(*e*) Gunput v. Rajun, 24 W. R. 207.

claimed and awarded for breaches thereof. (*f*) There cannot be an antenatal betrothal and hence there can be no damage for its breach. (*g*)

Extinction of right of guardianship—On the marriage of the minor girl, her father who was till then her natural guardian ceases to be so (*h*)

Sec. 6—CEREMONIES

Gift and acceptance,

Gift and acceptance—It is unnecessary to enter, in detail, into the numerous ceremonies generally observed in marriages, as most of the Hindu readers are aware of them, having passed through the same But the question that strikes a lawyer is, what ceremonies are essential for the completion of marriage? Let us see what is stated by the writers on the ritual of marriage, as well as the customs on the subject.

Homa etc

Saptapadi-gamana

Religious rites.—The necessary ceremonies according to the works on ritual are the formal gift and acceptance, (*i*) accompanied by religious rites consisting of the recitation of Vedic texts and the performance of the nuptial *Homa* called *Kusandikà* including *saptapadi-gamana* or walking seven steps. The Vriddhi-Sráddha is not an essential ceremony, and that if it be proved that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, it ought to be presumed that the marriage was good in law and that all the necessary ceremonies were performed.(*j*) In this case the performance of the ceremony of *saptapadi-gamana* or walking seven steps, was not proved. If the performance of some of the ceremonies usually observed on the occasion of marriage, be proved, a presumption should be drawn that the marriage has been duly completed. (*k*) But if in a marriage of persons belonging to a particular caste certain ceremonies which are in ordinary use for a valid marriage, are not performed, the marriage cannot be valid. (*l*)

(*f*) Purshotamdas *v* Purshotamdas, 21 B 23
(*g*) Atma *v* Banku, 11 L 598 1930 L 561.
(*h*) Narayana *v* Andilakshmi, 51 M. 462
Kali, 28 C 37, 49 5 C W N 195
(*i*) Manu, Ch. V, 152.
(*j*) 12 C 140
(*k*) Bai *v* Moti, 22 B 509.
(*l*) Visvanathaswamy *v* Kamu, 24 M L J 271 21 I C 724 *see also* Rampiayar *v*. Deva, 1 R 129 1923 R 202

Ceremonies in marriages of non-virgins.

It should however be observed that the religious ceremonies including walking seven steps are not necessary in the marriage of non-virgins, whose marriage therefore, may be performed in a secular mode.(*m*) So also in a marriage of a widow all the usual ceremonies may not be observed. (*n*) Accordingly, religious ceremonies do not appear to be performed or deemed necessary in the re-marriage of women who are either widows, or relinquished, deserted or released by their living husbands,(*o*) prevalent amongst the lower castes in all parts of India, under the name of *shunga* or *sagai* in Bengal, *karao* in the North-West, and *pat* or *nàtra* in Bombay. These marriages are instances of the Gandharva form, as they take place by consent of the bride who is presumably a grown-up woman. But some customary secular ceremony is performed, such as exchange of garland of flowers or the putting by the man of a red mark of vermillion on the forehead of the bride, in the presence of assembled friends and relations, (*p*) and some ceremony is necessary, otherwise it would be difficult to distinguish *Gàndharva* marriage from concubinage (*q*) The Gàndharva marriage does not seem to be obsolete, as it was thought in this case. The Madras High Court has held that in order to constitute a valid marriage in the Gàndharva form, nuptial rites are essential. (*r*) But in practice, some secular ceremony only is observed in the marriages of widows in the Gàndharva form, among lower classes. (*s*)

Gandharva marriage

Latest commentators hold religious rites necessary

The latest commentators unanimously maintain the necessity of the performance of religious rites for the completion of marriage in all cases including even the Gàndharva, although the well-known instance of Sakuntalá's espousal by Dushmanta negatives that view. In order to arrive at a correct conclusion, we must take into consideration the

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(*m*) Text No 21, p 120, *supra*
(*n*) Ram Rakhi *v* Daulat, 90 I C 1056 26 P. L R 744 1926 L 31.
(*o*) Jukni *v* Queen Empress, 19 C 627 Vira *v* Rudra, 8 M 440
(*p*) Bissuram *v* Empress, 3 C. L. R. 410 (*q*) Bhaoni *v* Maharaj, 3 A 738
(*r*) Brinda *v* Radha, 12 M 72
(*s*) Benode *v* Shoshi, 24 C W N 958 . 59 I C 882

marriages of virgins, non-virgins and widows, and the ceremonies that are common to them. Manu appears to lay down that the essential ceremony for creating the status or marital dominion of the husband is the gift of the damsel by the father or other person having authority in that behalf, *(t)* the religious ceremonies being performed for procuring good fortune to the bride. Grown-up damsels who have passed the nubile age, as well as widows, are deemed *sui juris* in this respect, and therefore may become self-given, or give their ownselves in marriage to men willing to marry them. The secular gift and acceptance of the bride would be sufficient to create the relation of husband and wife between the acceptor and the woman. Even acceptance is not necessary for the completion of a gift, according to the author of the Dâyabhâga, who maintains *(u)* that the relinquishment by the donor causes the right of the donee whose non-acceptance would extinguish the right created by the donor's act. In this connection the madman's marriage recognised by Hindu law, should be taken into consideration. Under certain circumstances "Silence is evidence of consent". मौनं सम्मति लक्षणं and "What is not dissented from, becomes assented to". अप्रतिषिद्धम् अनुमत भवति ।

Marriage during pollution; It has been held that a marriage celebrated during a period of pollution is not invalid on that ground alone. *(v)* A marriage is not ineffectual in law if it is celebrated at an inauspicious time. *(w)*

Inauspicious time.

Ceremonies for *Khatri* widow It has been held that it is not necessary for the validity of a marriage by *Khatri* widow to go through all the usual ceremonies which have to be performed in case of a *Khatri* girl on her first marriage, but the proof of any such ceremonies expressing unequivocally the intention of the parties to enter into the marriage relation and followed by their living together as husband and wife is sufficient to validate a marriage *(x)*

(t) Text No 20, p 119 *supra* *(u)* D B, 1, 21 24
(v) Venkadam *v* Siva, 22 M L J 49 13 I C 985
(w) Maya *v* Ram, 31 I C 185 20 P R 1916 177 P W R 1915
(x) Ram Rakhi *v* Daulat, 1926 L 31 26 P L R 744 90 I C 1056, La Chand *v* Thakur 49 P R 1903 118 P L R 1903

Sec 7—GHARJAMAI, GHARDAMAD OR GHARJAVAD

Gharjamai,

Gharjamai and Ghardamad.—The usage of *Gharjamai* is a well-known institution prevailing among Hindus in all parts of India *(y)* When the father or other guardian of a damsel is desirous that a girl should not leave her father's house after marriage and go over to her father-in-law's house to live with her husband there, but on the contrary, the son-in-law is to leave his own family and come over to his father-in-law's house to live there with his wife as a member of his father-in-law's family for ever, he is called a *Gharjamai.* According to this arrangement it is well understood if not expressly stipulated by the guardians of both parties to the marriage that the son-in-law is to receive a suitable maintenance from the same source from which the damsel is to be supported, *i e.,* her father's estate of which she, or the son expected to be begotten on her by the *Gharjamai,* is to become the heir. It should be specially noticed that by this arrangement the *Gharjamai* leaves his own family, and becomes a member of his father-in-law's family, and as such lives in the latter's house, in the same manner as an adopted son. He resembles more closely a son adopted in the *Dvyamushyayana* form, who becomes a son of two fathers and whose relationship to his original relations subsists notwithstanding the adoption, *i.e.,* his status in the family of birth continues for all purposes, and in addition to that he acquires the status of being the son of the adoptive father.

resembles *Dvyamushya yana,*

his maintenance,

This analogy is referred to only with a view to explain the right of the *Gharjamai* to claim maintenance from his father-in-law's estate It must be presumed that there was or must have been an implied, if not express, agreement that the *Gharjamai* is to get a suitable maintenance in his father-in-law's family, of which he becomes a member.

after his wife's death,

In these circumstances, if he is willing and continues to reside in his father-in-law's house, then his right to get maintenance from his father-in-law's estate is not affected by the subsequent death of his wife, nor by his marriage with

(y) *See* Sama *v* Bai Wali, 54 B 548, 550

another wife after the death of the former. It has been held, that a son-in-law, who was married with the daughter of a Hindu on the understanding that he should be brought up and maintained as a member of his family, and as such remained in his father-in-law's family, has a right of maintenance so long as he resides as a member of the family of his father-in-law. (*yi*) The Court, under special circumstances, has power to pass a decree for separate maintenance (*z*)

Separate maintenance, whether it is a charge

The maintenance cannot be said to be a charge on the estate, so as to be annexed to it even in the hands of a *bona fide* purchaser for value, unless it is made so by a decree of a Court, declaring the maintenance to be a charge on the estate, or on any particular property appertaining to the same. (*a*)

Ghardamad.—If it is contended that a person has acquired the status of *Ghardamad* and to inherit the property, it is to be proved that, *first*, there was definite intention of the parties that the status should be acquired and *secondly*, the person taken as such, like adopted son, definitely foregoes his rights in natural family (*b*)

Sec 8—LEGAL CONSEQUENCES

Wife comes under control of husband after marriage.

Guardianship.—The effect of marriage is the acquisition by the wife of the domicile of the husband (*c*) and to place the wife under the control of the husband, who is entitled to the custody of her person when she is minor, even in preference to her father (*d*) Though the legal effect of marriage is to transfer the girl under the control of the husband from that of the father, still when the husband is a minor he cannot be a guardian of his minor wife (*e*) So, when the husband dies and the wife is a minor, her deceased husband's relations are entitled to be her guardian in preferenee to her paternal relations (*f*) But the husband's reversionary heir

(*yi*) In this connection *See* Mis Appeals Nos 447 to 449 of 1926, judgment on 1-2-29 by B B Ghose & Panton JJ of Cal H C
(*z*) Gobind Rani *v* Radha, 12 C L J 173 15 C W N 205 7 I C 118
(*a*) See Ch XI (Maintenance) "*How for a charge*" & "*Bona fide purchaser for value without notice*"
(*b*) Naikin *v* Butna, 9 P 683 1930 P 278
(*c*) *See, ante p* 69, Kashiba *v* Sripat, 19 B 697
(*d*) In *re* Dhuroni, 17 C 298
(*e*) Mohideen *v* L Mahomed, 30 M L J 21,27
(*f*) Khudiram *v* Bonwari, 16 C 584, in this connection see Tota *v* Ram, 33 A. 222.

who is interested in determining her life, should not be appointed the guardian of her person

Wife's maintenance, residence, husband's cruelty

Maintenance, residence, &c.—Although the conjugal relation is based upon a contract of the either parties to the marriage, or their guardians, the rights and the duties of the married couple do not arise from any implied contract, but are annexed by law to the connubial relation as its incidents. A contract to maintain as wife a woman, who is not his lawfully wedded wife, is contrary to public policy and unenforceable. *(g)* The wife is bound to reside with the husband wherever he may choose to live The fact of the husband having another wife will not relieve her from that duty. nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere. *(h)* The duty which Hindu law imposes on a wife to reside with her husband, wherever he may choose to reside is a legal and not merely a moral duty

Agreement not to remove wife, or to live apart, invalid

An ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her paternal abode, *(i)* or an agreement that the husband and wife will live apart from each other, *(j)* would defeat the rule of Hindu law, and is invalid on that ground, as well as on the ground that it is opposed to public policy. Obedience and conjugal fidelity to the husband are duties at all times required of the wife, who is not absolved from marital obligation by apostasy *(k)*

Apostasy.

Wife entitled to maintenance and residence,

The husband is bound to maintain the wife, to provide a suitable place for her residence, and to live with her. But the wife's right of residence does not empower her to restrain her husband from alienating the family dwelling house *(l)*

when,

In the absence of any breach of conjugal duties, the wife is entitled to the right of maintenance against the husband

(g) Bai Kashi *v* Jamna, 16 I C 133 14 Bom L R. 547

(h) Sitanath *v* S Haimabutty, 24 W R 377, Dular *v* Dwarka, 34 C 971: 9 C W N 510 32 C 234 Binda *v* Kaunsilia, 13 A 125

(i) Tekait *v* Basanti, 28 C 751, Gobind Ram *v* Radha, 15 C W N 205, 209

(j) Krishna *v* Balammal, 34 M 398, 401

(k) In *re* Ram Kumari, 18 C 264

(l) Olagayee *v* Pichammal, 21 M L J 303, 9 I C 524 9 M L T 311.

personally so long as he is alive, and against his estate after his death *(m)* If being unchaste she is penitant, she has a right to astaiving maintenance. *(n)* But if the wife reside in her father's house against the will of the husband or deserts *(o)* him without sufficient cause, she cannot claim maintenance while living separate from her husband. When she without justification lived apart from her husband for 23 years, she is not entitled to maintenance *(p)*

when not,

But when the husband habitually treats the wife with cruelty and such violence as to create serious apprehension for her personal safety, she is justified in leaving her husband's protection and is entitled to separate maintenance from him *(q)* So also a wife, who is suffering from virulent type of leprosy is entitled to live apart from her husband and claim maintenance *(r)*

separate mainten-ance when

A widow is not compelled to reside with the relatives of her husband and her husband's relatives cannot compel her to live with them if she left her husband's residence from causes other than unchaste and improper purposes. *(s)*

Dowry.—The respective rights of the bridegroom and the bride over the dowry and nuptial gifts are discussed in Ch XII Sec. 2, Sub-Sec. 11 Gift of immoveable property to the daughter at the time of her marriage by *sankalpa* is not, in the absence of a registered deed, a valid gift as the provision of Section 123 of the Transfer of Property Act is imperative. *(t)*

Dowry

Marriage complete without consummation.—According to Hindu law marriage is a sacrament, and in a religious point of view it causes a permanent indissoluble union of the husband and wife, extending to the next world, and when it has been solemnized with the essential rites prescribed for matrimony the status of husband and wife arises, and the

Marriage complete even without consumma-tion

(m) Sita Devi *v* Gopal, 1928 p 375, 389
(n) Sathyauppma *v* Keshava, 39 M 658 29 I C 397 29 M L J 87
(o) Sher Singh *v* Sham, 1928 L 502, Yesubai *v* Sadashiv, 30 I C 934 (B)
(p) Naganna *v* Rajya, 1928 P C 187 reversing 1925 M 757
(q) Matangini *v* Jogendra, 19 C 84
(r) Shinappaya *v* Rajamma, 45 M 812
(s) Prithee Singh, Raja *v* Ram, I A Sup Vol 203 20 W R 21 P C. 12 B L R 238, Srinivasa *v* Lakshmi, 1928 M 216
(t) *See post* Ch XVI, Sec 3, Sub-Sec 11, "Transfer of Property Act affects Hindu law as to gift", Hira *v* Aumol, 1928A 699

marriage is complete and binding, although it may not be followed by consummation at all (*u*)

Sec 9—JUDICIAL PROCEEDINGS

Validity of marriage can be impeached

Court's Jurisdiction —Although marriage itself is dealt with as the last of the sacramental rites in that part of the Hindu law which is *A'chára* as distinguished from *Vyávahára* or Litigation, still the marital rights and duties form a subject of litigation, and as this sacrament is preceded by, and founded on, the consent express or implied of either the parties to it or their guardians, the validity of a marriage may be impeached in the Civil Court, upon the ground of the absence of such consent, and of the use of fraud or force in bringing it about, and it may be declared null and void. (*v*)

Monetary consideration for marriage

Setting aside marriage —But the Madras High Court (*w*) has held that the marriage of a girl given by her mother, without the consent of the girl's father and falsely representing to the priest who officiated at the marriage that her father had consented to it, is valid

The Bombay High Court (*x*) goes further and holds that neither the absence of consent of the guardian, nor the fact that the marriage was effected in disobedience of an order of a competent Court, would render a marriage invalid. The decision was based on the doctrine of *factum valet*

The Allahabad High Court (*y*) holds the same view

The Calcutta High Court (*z*) however, applying the doctrine of *factum valet* has held that a marriage is to be held valid if all the necessary ceremonies were performed and if it was not procured by fraud or force.

Factum valet on marriage

Factum valet—If a marriage has been celebrated in the presence, and with the presumed assent, of the relatives and caste-people, it should not be set aside on the ground of being within prohibited degrees, (*a*) or on the ground of

(*u*) Administrator *v* Ananda, 9 M 466, Bhagat *v* Santi, 50 I C 654 5 P W R 1919 32 P L R 1919

(*v*) Anjona *v* Prolhadh, 14 W R 403 (*w*) Venkata *v* Ranga, 14 M 316

(*x*) Bai *v* Moti, 22 B 509, *see also* Mulchand *v* Bhudhia, 22 B 812

(*y*) Kasturi *v* Chiranji, 35 A 265 11 A L J 272 18 I C 927

(*z*) Brindaban *v* Chundra, 12 C 140, in this connection *see* Surjyamoni *v*. Kali, 28 C 37, 49 5 C W N 195

(*a*) *Supra pp* 103, 144

want of consent of the guardian (*b*) where no fraud or force is set up, (*c*) or because it is solemnized in contravention of an express order of the Court, (*d*) on the principle of *factum valet*.

Presumption of marriage:

Presumption of Marriage.—When it is proved (*e*) that a marriage has been solemnized there will be a presumption of its validity, (*f*) and of the performance of all the necessary ceremonies (*g*) So also it is to be presumed that a marriage was according to *Brahma* (*h*) or one of the approved forms. (*i*) A marriage in the *Bhaishnava* form by exchange of Kathis is to be established by legal evidence (*j*)

when recognised by people,

The strongest presumption in favour of marriage arises when a man and a woman are recognised as husband and wife by all persons concerned and are so described in important documents and on important occasions. (*k*) The habit and repute may be presumptive evidence of marriage, but no amount of such evidence can establish a marriage, where no valid marriage is possible (*l*) The evidence of treatment is

repute,

treatment,

(*b*) Ramplayar *v* Devi, I R 129; See *foot note* (*n*) p 165

(*c*) Kasturi *v* Chiranji, 35 A 265 11 A L J 272 18 I C 927

(*d*) Gajjanand *v* Crown, 2 L 288 (4 I C 500, see *foot note* (*p*) p 166

(*e*) As to proof of marriage, see Section 50 of the Evidence Act (Act I of 1892), Luchmi Koer *v* Roghunath, 27 C 971 27 I A 142 4 C W N 685; *see also* Mathusami *v* Masilamani, 33 M 342 5 I C 42

(*f*) Inderun Valungypooly Taver *v* Ramasawmy, 13 M I A 141, 158 3 B L R, P C 1, 3, 4 12 W R, P C 41, 42, Mouji *v* Chandrabati, 38 C 700 38 I A 122 15 C W N 790 13 Bom L R 534 11 I C 502 21 M L J 933, Fakirgauda *v* Gangi, 22 B 277, 279, Bai Kashi *v* Jamna, 14 Bom L R 547 16 I C 133

(*g*) Brindabon *v* Chandra, 12 C 140, 142, 143, Administrator-General *v* Anandachari, 9 M 466, 469, 470, Diwali *v* Moti, 22 B 509, 512

(*h*) Maghli *v* Ladli, 13 I C 644 (A), Gabrielnathaswami *v* Valliammi, 53 I. C 423 26 M L T 384

(*i*) Thakoor Deyhee *v* Rai Baluk, 11 M I A 139, 175 10 W R, P C 3, 9, Jagannath *v* Ranjit, 25 C 354, 360, Jadunath *v* Bussunt, 11 B L R 286 288 16 W R, C R 105, 106, Authikesavulu Chetty *v* Ramanujam, 32 M 512, Chandrabhaga *v* Vishwanath, 20 I C 557 9 N L R 102, Jagannath *v* Narayan, 34 B 553, 559, Kolhapur, Maharaja of *v* Sundaram, 48 M 1 1925 M 497, Umrao *v* Sarabjit, 85 I C 618 1925 O 620, see page 123 *supra* Bhagwandas *v* Gujadhar, 1927 N 1927

(*j*) Gopal *v* Brojo, 34 C W N 944

(*k*) Mouji *v* Chandrabatti, 38 C 700 38 I A 122 15 C W N 790 13 Bom L R 534 11 I C 502 21 M L J 933, Chellammal *v* Ranganatham, 34 M 277 12 I C 247, Section 50 of Evidence Act (Act I of 1872), Bepin Behary *v* Atul Krishna, 17 C W. N 494 15 I C 328

(*l*) Chellammal *v* Ranganatham, *supra*, Indar *v* Thakar, 2 L 207 63 I C 387

of no great value when it is known that there was no marriage in due form. (m)

Conflicting opinion on

But there is a conflict of opinions about the application of the rules for presumption of marriage According to one view (n) it is applicable to questions of inheritance but does not apply to suits for restitution of conjugal rights, but according to another view (o) it is equally applicable to both cases.

Proof of marriage.

The fact (p) and validity (q) of marriage must be strictly proved when the question arises in criminal cases under Sections 494, 495, 497 and 498 of the Indian Penal Code.(r)

Marriage and Legitimacy of Child. – A child born in lawful wedlock is the legitimate issue of its parents and is entitled to all the legal incidents with which the law has clothed a son or a daughter. A child born even after the death of his father, will be his legitimate child, if born within 280 days after the death of his father, the mother remaining unmarried, and it will be presumed that the aforesaid issues are legitimate.(s) The Privy Council in the case of *Pedda Amani* v. *Zemindar of Marungapuri* (t) has held, that a child, born in wedlock of a husband and wife, is not rendered illegitimate by the circumstance that he was begotten before their marriage. The learned Counsel who appeared on behalf of the Appellants could not cite any authority to the effect that in order to render a child legitimate the procreation as well as the birth must take place after marriage, and hence, their Lordships held that the Hindu law is the same in that respect as the English law It is to be noted that the English law on this question has been more relaxed since this decision.

Legitimacy of child,

during marriage,

after husband's death

P.C on birth before marriage,

P C's view against Hindu law

It is a matter of great regret that such an eminent judge as Sir Barnes Peacock, having a vast experience of Indian law and custom, being the first Chief Justice of the Calcutta High Court, was led to such a conclusion, due to the ignor-

(m) Vishvanathaswami v Kamu, 24 M L J 271 21 I C 724
(n) Surjyamoni v Kalikanta, 28 C 37, 50 5 C W N 195, 204, 205
(o) Brindabon v Chandra, 12 C 140, 142, 143
(p) Empress v Pitambur, 5 C 566 5 C L R 597
(q) Danesh Sheikh v Tafir, 7 C W N 143 (r) Act XLV of 1860.
(s) Sec 112 of Evidence Act, (Act I of 1872)
(t) 1 I A 282, this case begins at p 287, decision at p 293

ance of the learned Counsel for the Appellant. The question involved in the above case was about the legitimacy of a natural son who was begotten by his parents before their marriage. The only natural son who is now recognised by law and custom is the *aurasa* son. The *aurasa* son is defined by *Yajnavalkya* as the one begotten by the man himself on his lawfully wedded wife. (*u*) It is said "on the lawfully wedded wife," and not on the woman who was subsequently married by the begetter. Moreover, such a son is never recognised as a legitimate son even by custom.

Monetary considera-tion marriage

Marriage Brokerage and consideration for marriage — An agreement to pay money to the parent or guardian in consideration of giving in marriage the son or daughter or ward, is not valid and cannot be enforced by a suit. (*v*) But when the money is paid it cannot be recovered back. (*w*)

Baldeo v. Mahamaya.

In *Baldeo Das* v. *Mahamaya (x)* a learned judge of the Calcutta High Court has held that a mother cannot recover a sum of money which the defendant had agreed to pay to her in consideration of her consenting to give her daughter in marriage to his son. In the case of *Gobind Rani Dasi* v. *Radha Ballav* (*y*) a Division Bench of the same High Court lays down that a father-in-law or his representative cannot resile from an ante-nuptial agreement entered into by the father-in-law with the son-in-law whereby the former agreed to maintain the latter and his children. In the case of *Gobinda Rani* the claim for maintenance of the *Gharjamai* (domesticated son-in-law) was allowed on two grounds. *First*, it was held that the system of *Gharjamai* was of recent origin and owed its origin to the institution of *Putrika-putra*, one of the twelve kinds of sons, and there was no reason why a Court of Justice should refuse to recognize it. *Secondly*, it was held that the text of Manu by

Gobind Rani v Radha Ballav.

(*u*) Yajnavalkya 2, 128, see Text No 3 in Sec 1, Ch IV *post*

(*v*) Baldeo Das *v* Mahamaya, 15 C W N 447, 453, Ramchand *v* Audoito, 10 C 1054 (observation of Garth, C J), Dholidas *v* Fulchand, 22 B 658, 663, Kulavagunta Venkata *v* Kulavagunta, 32 M 185 F B, Devarayan *v* Muthuraman, 24 M L J 310, Baldeo Sahaiv *v* Jumna, 23 A 495 (*held* each case depends on its merits).

(*w*) 32 M 185, 190 F. B, Shambhu *v* Nand, 23 O C 284 58 I. C 963

(*x*) 15 C W N 447, 453 (*y*) 15 C W N 205: 12 C L J. 173. 7 I C. 118.

which "a poor dependant" is declared as a person entitled to be maintained, was comprehensive enough to cover the case of a *Gharjamai.* (*y1*) The decision of this case did not rest on the general ground that all ante-nuptial agreements as such are valid. But in a recent case another Bench (*z*) of the same High Court has, following the above decision, held that ante-nuptial agreements followed by marriage are valid and binding, though the ruling relied upon did not lay down, as has already been said, any such general rule. This observation is, however, an *obiter dictum* as, it seems, the dicision rests on the principle of part performance

Recent case.

It seems from the report of the case that the attentions of their Lordships were not drawn to all the cases on the point. Their Lordships, however, distinguished the decision of the Madras High Court in *Kalavagunta Venkata* v. *Kalavagunta* (*a*) and that of the Bombay High Court in *Gulabchand* v. *Fulbai* (*b*) holding that these cases were what may be called marriage brokerage contiacts for procurement of the marriage.

Madras.

Bombay.

From a careful perusal of these cases it seems that an agreement to pay any consideration to the parent or guardian of the parties to a marriage is invalid and unenforceable. These may, properly, be held as marriage brokage contiacts and hence illegal and opposed to public policy.

Marriage brokerage.

In England marriage brokage contract is illegal and opposed to public policy as it interferes with the free consent of the parties which is the essence of marriage contracts, and in India such marriage brokage contracts should be still more so, inasmuch as in almost all cases the parents or guardians enter into marriage contracts for the parties to the marriage, and if they are allowed to make any personal gain, they may disregard the interests of the parties to the marriage

In England.

In India.

But the question is whether such contracts for payment of some consideration or other, besides the dress and orna-

(y1) For *Gharjamai*, see pp 170-171

(z) Pran Mohon Das v Hari, 52 C 425 29 C W N 889

(a) 32 M 185, F B

(b) 11 Bom L. R 649. 3 I C 748

ments, to one party by the other, or his or her parent or guardian, in consideration of the marriage, is valid? The Hindu law condemns the payment of any consideration for a marriage. In the *Brahma* form of marriage the bride adorned with dress and ornaments is given to the bridegroom and accepted by him, but still all these and the nuptial presents belong to the bride (*c*) In the *A'rsha* form of marriage, however, the bridegroom makes a present of a pair of kine to the bride's father and accepted by the latter for religious purpose only. In neither of these two forms it can be called that these gifts of dress or ornaments or the gift of a pair of kine can be called the consideration for the marriage In the *A'sura* form the moving consideration for the marriage is the payment of *Sulka* or bride's price This form of marriage is condemned by Hindu law, (*d*) but as Hindu law always lays down high ideals for chastity of women, it approves even of such a marriage when solemnized for a monetary consideration. In both the approved forms of marriage, namely, the *Brahma* and the *A'rsha* forms, the dress or ornaments or the pair of kine are *presents* and given out of free will and cannot be called the considerations for the marriage.

Payment of consideration

Gift of dress and ornament,

of pair of kine,

are not considerations

Restitution of Conjugal rights.—If either party is guilty of a breach of the marital duties, the other party may institute a suit against the former for the restitution of conjugal rights. (*e*)

Suit for restitution of conjugal rights

There may be circumstances which though short of legal cruelty, may nevertheless bar a suit for restitution of conjugal rights (*f*) The court should be certain that there are no reasonable apprehensions of cruelty before a decree for restitution is made (*g*) But mis-construing this decision, it has been held that the court cannot compel an unwilling wife to

Cruelty,

(*c*) Vyàsa cited in D B iv, I, 17 *vide* Text No 10, Ch XII *infra*
(*d*) Manu Sec 24 or Sir William Jone's Translation Ch III, para 25
(*e*) Surjyamoni *v* Kali, 28 C 37 5 C W N 195, Tekait Monmohini *v.* Basanta, 28 C 751 5 C W N 673
(*f*) Dular *v* Dwarka, 34 C 971 9 C W N 510 1 C L J 283, Chilha *v.* Chedi, 1929 O 121
(*g*) Bai Jivi *v* Narsingh, 51 B 329, 342 (Madgavar J., sitting with C J) 1927 B 264.

return to her husband (*h*) But in a suit by the husband against the wife for restitution of conjugal rights, the plea by the wife that sexual intercourse with her is impossible owing to her incurable disease or physical defect is not in itself a good defence (*i*) But a previous decision of the same High Court holds almost a contrary view (*j*) Ill-health or inability to afford he husband the marital rights is no ground for husband's refusal to give her protection, nor the refusal by parents of the wife to give him the custody of the wife, is a ground for refusing the restitution of conjugal rights. (*k*)

disease, physical defect.

Position of husband and wife after marriage

Unity of husband and wife.—According to Hindu law as well as to many other systems of law, the husband and wife become one person by marriage Many legal consequences are annexed to this theory of unity of person Amongst the Hindus this unity is now confined to religious purposes, and does not generally extend to civil matters The wife can hold separate property, she may enter into a contract with any person and even with her husband, and may sue and be sued in her own name. But the theory that the wife is half the body of her husband, has an important bearing on several points of Hindu law.

Harbouring each other no offence

According to the Penal Code the husband or the wife does not become guilty of the offence of harbouring an offender by screening each other

Sec. 10 -RE-MARRIAGE

Men.—Under Hindu law a man can marry as many times as he likes even during the presence of another wife though this latter custom is extremely rare now. But a Hindu by his marriage under the Special Marriage Act cannot exercise the latter right even if he likes (*l*)

A man, having married according to Hindu rites, cannot, after embracing Christianity, take to himself another wife while his wife is alive. (*m*) Similarly, he cannot marry another

(*h*) Gurmukh v Harbans, 1928 L 902
(*i*) Purshotamdas v Bai Mani, 21 B 610
(*j*) Bai Premkuvar v Bhika, 5 Bom H C, A C J 209
(*k*) Kuppammal v Kuppanachari, 24 I C 380 26 M L J 363
(*l*) Sec 15, Spl Marg Act
(*m*) Thapita v. Thapita, 17 M 235, 244-245

wife under the Special Marriage Act while his wife married under Hindu rites (*n*) or under the Special Marriage Act is living. (*o*)

Women.—The Hindu sages provide single-husbandedness as the most approved mode of life for women women that seek religious merit, must not, according to them, ever think of a second husband. But while the Hindu lawgivers thrust into prominence the said high ideal of conjugal duty for women influenced by religious and spiritual aspirations, they do, at the same time, recognize, under certain circumstances, remarriage of women that are impelled by inclination.

Remarriage of women,

Even when her first husband is alive, a woman is allowed to remarry, should she be abandoned by her first husband for adultery or any other cause, or he be not heard of for a certain period, or adopt a religious order, or be impotent or become outcasted. Thus Nárada (xii,97) and Parásara (iv,27) say,—

when allowed;

नष्टे मृते प्रव्रजिते क्लीबे च पतिते पतौ ।
पञ्चस्वापत्सु नारीणां पतिरन्यो विधियते ॥

which means,—"Another husband is ordained for women in five calamities, namely, if the husband be unheard of, or be dead, or adopt a religious order, or be impotent, or become outcasted" The usage of remarriage of women during the lifetime of their first husband is found to be observed by some low castes, amongst whom the first marriage is dissolved either by a decision of the caste *Punchayet* (a congregation of the caste people), or by the husband's *chhár chithi* or letter of release granted to the wife, who may then contract *sagai* or *niká* marriage with another man (*p*) The remarriage of a divorced *Koli* woman is valid. (*q*) In this connection *See* Sec 12 "Divorce" below.

during husband's life-time

In the absence of a custom to the contrary a married woman cannot contract a second marriage during her husband's lifetime (*r*) In this connection *see* Sec. 11 "Polyandry" below.

All H C on above

(*n*) Sec. 15 (*o*) Sec 16
(*p*) Jukni *v* Empress, 19 C 627
(*q*) Hira *v* Hansji, 37 B 295 14 Bom L R 1182 17 I C. 949.
(*r*) Sri Ram *v* Inchi, 11 A L J 711 21 I C 313.

Alternatives provided for widows

Widows.—The Smṛtis appear to provide three alternative conditions for widows, namely (1) *sutteeism* or concremation with the deceased husband's body, (2) life of asceticism; or (3) re-marriage. The first has been abolished by legislation. The ascetic life is the alternative adopted by women of respectable castes, so that amongst them re-marriage of women has come to be regarded as illegal, although it has all along prevailed among the lowest castes. It did accordingly become necessary to pass the Act XV of 1856 for legalizing the remarriage of Hindu widows belonging to the higher castes, among whom it had become, and still is, obsolete This statute should properly be called after the name of the late Pundit Iswara Chandra Vidyàsàgara to whom it owed its origin and who framed its provisions.

The re-marriage of a widow is valid among *Kunhis* of Berar by the *Pat* form, (*s*) but a widow of the *Bissajuga Brahmin* caste cannot remarry by custom (*t*)

By custom a widow may re-marry her deceased husband's brother (*u*)

Right of inheritance of remarried widow.

Although the Remarriage of Hindu Widows Act validates the re-marriage of Hindu widows yet it expressly lays down that the rights which any widow may have, in her husband's or his lineal successor's property, shall upon re-marriage cease, (*v*) even if there be any custom of re-marriage (*w*) But in the United Provinces and Oudh a different view has been taken and held that where there is a custom of re-marriage, a Hindu widow does not forfeit her rights to the property of her first husband, (*x*) nor does she forfeit such right if the widow was permitted to re-marry prior to 1856.(*y*) But it has been held that if succession opens after her

(*s*) Sitaram *v* Laxman, 8 N L R 128 17 I. C 133
(*t*) Asharfi *v* Ishri, 11 A L J 683 20 I C 398
(*u*) Nagar *v* Khase, 86 I C 893 1925 A 440 (*v*) Sec 2 of Act XV of 1856
(*w*) Rasul *v* Ram, 22 C 589, Gouri *v* Sita, 14 C W N 345 5 I C 710, Nitya *v* Srinath, 8 C L J 542, Vithu *v* Govinda, 22 B 321 F B, Murugayi *v* Viramakali, 1 M 226, Santala *v* Badaswari, 50 C 727 27 C W N 669
(*x*) Har Saran *v* Nandi, 11 A 330 9 A W N 77, Ranjit *v* Radha, 20 A 476 18 A W N 121, Khuddo *v* Durga, 29 A 122 3 A L J 729, Gajadhar *v* Kaunsilla, 31 A 161 1 I C 761, Bal Krishna *v* Paij, 1930 A 593, Ram Lall *v* Jawala, 3 Luc 610 1928 O 338, *see* Mula *v* Partab, 32 A 489
(*y*) Mangat *v* Bharto, 49 A 203

re-marriage her right of inheritance to the property of her husband's lineal successor is not affected by Section 2 of the Act, and she will inherit such property (z)

Guardianship of a remarried widow over children by deceased husband

The Act also provides that a Hindu widow on re-marriage can be deprived of the right of guardianship of her children by her late husband, by a petition to a proper Court by a member of the family of her deceased husband. (a) The Calcutta High Court, however, has held that "the Court has a discretion in the matter, though ordinarily, unless good cause were shown to the contrary, the Court would appoint a relation as guardian under Section 3 in the place of the mother." "The exercise of such discretion must be regulated from the point of view of the welfare of the infant concerned." (b)

Right of childless widow on remarriage

It has also been enacted that no widow will be rendered capable of inheriting any property by reason of her re-marriage under the Act, if, before the passing of the Act, she would have been incapable of inheriting the same by reason of her being a childless widow (c) There is a reported case of the Calcutta High Court (d) which held that there is no ground of exclusion of a childless Hindu widow from claiming her father's property for she may re-marry, under the provisions of Act XV of 1856, and have issue. This wrong view of the law has been vacated by a review of judgment. (e)

Justification against widow re-marriage.

Justification of rule against widow-marriage—The Hindu sages recommend that the widows should live a life of austerities, and they disapprove of remarriage of women This recommendation has been adopted as a rule of conduct by the women of the higher castes, and the rule is justified on the following grounds (1) Women as constituted by nature, can control and repress the sexual propensity, but men cannot, (2) the number of women is larger than men, (3) there are, no doubt, young widows in Hindu society, but there are not old maids, such as there are in European society, (4) the Hindu system is characterized by justice and equity to women, all of whom

(z) Okhora v Bheden, 10 W R 34 affirmed in 11 W R 82, Lakshmana v Siva, 28 M 425 15 M L J 245, Basappa v Rayava, 29 B 91 (F B) 6 Bom L R 779, Chamar v Kashi, 20 B 388 4 Bom L R 73, but see the contrary view held on the mis-conception of the right of inheritance of a widow from her deceased husband's lineal successors, as a contingent right Basorey v Ballabhdas, 6 N L R 171 (190) 8 I C 1146

(a) Sec 3 of Act XV of 1856

(b) Ganga v Jhalo, 38 C 862, 873, 875 10 I C 69 ; 13 C L J 558. 15 C. W N 579

(c) Sec 4 of Act XV of 1856

(d) Bimola v Dangoo, 19 W R 189 (e) See Order No. 467 dated 28th March 1874 in connection with Spl Appeal No 223 of 1872

are *once* married, and they must blame their ill-luck but not society should they lose their husband, for, they cannot justly claim to have another husband, as in that case so many maidens would be compelled to remain unprovided with husbands, (5) the boasted liberty of widows in European society in this respect, is accompanied by grave injustice to other women who are on that account compelled to live as lifelong spinsters, whose compulsory single condition moves not the vain philanthropists weeping for Hindu widows, (6) remarriage of women undermines the foundation of female chastity, which is the *sine qua non* of the bond, peace and happiness of home, (7) the utility of the institution should be tested by the good secured to the whole society, for the well-being and welfare of which, individual interests are often sacrificed

Sec 11—POLYGAMY and POLYANDRY

Polygamy allowed

Polygamy —Hindu law permits a man to have more wives than one at the same time, (*f*) although it recommends monogamy as the best form of conjugal life This recommendation has practically been adopted by the Hindus, and monogamy is the general rule, though there are solitary instances of polygamy. This usage, however, cannot but be held just, if the number of women is really larger than that of men. There are various reasons for and against polygamy which is sought to be interdicted by legislation deemed by some as the *panacea* for all evils in India The Hindu institutions are founded on the requirements of the diversified human nature and condition, and ought not to be lightly interfered with, at the instance of persons distinguished by egotistic sentimentalism and spirit of intolerance It is far better that those men of property, that are impelled by inclination, should take the responsibility of openly having several wives than that they should secretly contract as many left-handed marriages as they please. The modern legal distinction between public and private character lends only an external whitewash to the social structure of modern times. As to feelings of women, evidence is not wanting that there are women enjoying the liberty conferred on them by Western civilization, who would rather have a half or a quarter of a husband than none at all.

Provision for first wife

Among the particular class of *Nuttukottai Chetties* of several villages in the Madura District there is a custom of

(*f*) Dayabhaga, Ch. IX, 5, 6 and Srikrishna on same Thapita *v* Thapita, 17 M, 235, 239 F B.

setting aside some property by the husband in favour of the first wife when he marries a second wife. (*g*)

Polyandry not legal, but by custom

Polyandry*—or the marriage of a woman with several men is not lawful except to some tribes where it is allowed by custom. Instances of such marriages are to be found among the non-Aryans, but not among Aryans, except the solitary instance in the epic poem, the *Mahábhárata* of the marriage of *Draupadì* with the five brothers of the *Pándavas*. The various explanations and discussions contained in that great poem regarding this marriage, go to show the exceptional nature of the marriage not approved by Hindu law.

Sec 12 -DIVORCE *

Divorce not legal, unless allowed by custom.

Marriage in Hindu law is regarded as an indissoluble union of the husband and the wife (*h*) extending to the next world. But though Hindu law does not contemplate divorce, yet it has been held that where it is recognized as an established custom, it would have the force of law, (*i*) in such cases, it is very common if not an universal custom for the wife to return to her first husband all the ornaments given by him, and the second husband to pay the first husband the cost of the marriage (*j*) But even if the existence of a custom, allowing a Hindu woman to leave her husband and contract a second marriage without the husband's consent, is proved, it is entirely opposed to the spirit of Hindu law and will not validate the second marriage, (*k*) the payment of money to the caste people and to the unwilling husband will not improve the ca e of the woman. (*l*) There are cases in which Hindu law allows separation, or desertion (*tyága*). It cannot have the effect, like divorce, of dissolving the marriage-tie completely (*m*)

(*g*) Palaniappa *v* Alagam, 44 M 740 48 I A 539 1922 P C 228
* See *ante* p 181
(*h*) Munshi *v* Bhrgwani, 13 P L R 1922 64 I C 356 1922 L. 79.
(*i*) Kudomee *v* Joteeram, 3 C. 305, Hira *v* Hansji, 37 B 295 14 Bom L R 1182 17 I C 949, Janglia *v* Jhingnya, 63 I C 594 (N), see also Abdul *v* Abdul, 28 I C 201 2 O L J 101, see also Budansa *v* Fatima, 22 I C. 697 26 M L J 260 15 M L T 107
(*j*) Kshamadhar *v* Saraswati, 1928 N 196
(*k*) Reg *v* Karsan and Reg *v* Bai, (1864) Bom H C R 124 Cr, Budansa *v*. Fatma, 26 M L J 260, 265 22 I C. 697
(*l*) Keshav *v* Bai, 39 B 538 17 Bom L R 584 29 I. C 952.
(*m*) Manu ix 46

An apostasy or conversion to another faith (*n*) or desertion (*o*) does not effect the dissolution of marriage in Hindu law. But the Calcutta High Court has held that a wife who embraced Mohammedan faith and she having asked her husband to do so and the latter having refused, is entitled to a decree for dissolution of her marriage. (*p*)

Under Section 17 of the Special Marriage Act the provisions of the Indian Divorce Act are made applicable to the Hindus married under the provisions of the Special Marriage Act.

(*n*) Budansa *v* Fatma, 26 M L J 260, 264 22 I C 697, Abdul Karim *v* Abdul, 2 O L J 101 28 I C 201, *see* Ram Kumari, *In the matter of*, 18 C 264

(*o*) Pachai *v* Gopal, 42 M L J 276 15 L W 15 70 I C 122, Nandi *v* Emperor I L 440 59 I C 33 22 Cr. L. J 1

(*p*) Ayesha Bibi *v* Bireshwar, 33 C W N clxxix (Notes), Chalimut nessa Bibi *v* Surendra, decision of Buckland J, of Cal H C 1924

CHAPTER IV

ADOPTION

Sec 1—ORIGINAL TEXTS

१। जायमानो ह वै ब्राह्मण-स्त्रिभिर्ऋणै-र्ऋणवान् जायते। ब्रह्मचर्येण ऋषिभ्यो, यज्ञेन देवेभ्य, प्रजया पितृभ्य.। एष वा अनृणो य पुत्री, यज्वा, ब्रह्मचारी च॥ श्रुति।

1 A Brahmana on being born becomes a debtor in three obligations, to the Rishis (who are propounders of the sacred books) for Studentship (to peruse the same), to the Gods, for Sacrifices, to the Paternal Ancestors, for Progeny he is free from the debts, who has son, who has performed sacrifices, and who has studied the Vedas Revelation

Three-fold duty of Brahmana

२। शुक्रशोणितसम्भव पुत्रो मातापितृनिमित्तक' तस्य प्रदानविक्रयत्यागेषु मातापितरौ प्रभवत। न त्वेकं पुत्र दद्यात् प्रतिगृह्णीयात् वा स हि सन्तानाय पूर्वेषाम। न स्त्री पुत्र' दद्यात् प्रतिगृह्णीयात् वा अन्यत्रानुज्ञानात् भर्त्तुः। पुत्र' परिग्रहीष्यन् बन्धुन् आहूय राजनि चावेद्य निवेशनस्य मध्ये व्याहृतिभि र्हुत्वा अदूरबान्धव बन्धुसन्निकृष्टम् एव प्रतिगृह्णीयात्, सन्देहे चोत्पन्ने दूरबान्धव शूद्रम् इव स्थापयेत्, विज्ञायो हि एकेन बहूंस्त्रायते इति॥ तस्मिंश्चेत् प्रतिगृहीते औरस उत्पद्येत चतुर्थभागभागी स्यात् दत्तक॥ वशिष्ठ।

2 A son sprung from the virile seed and the uterine blood is in effect whereof the mother and the father are the cause, the mother and the father are, therefore, competent to give, sell or disown him, but an only son should neither be given nor accepted, for, he is intended for continuing the lineage of the ancestors, but a woman should neither give nor accept a son without the permission of the husband One desirous of adopting a son should after having invited his relations, informed the king, and performed in the dwelling house the *Vydhriti-Homa*, take one whose kinsmen are not unknown or one who is a near kinsman But if a doubt arises (as to the caste), then the adopted son whose kinsmen are unknown, should be set apart like a Sudra, for it is well known that by one many are saved If after he has been adopted an *aurasa* or real legitimate son be born, then the Dattaka shall be participator of a fourth share —Vasistha.

Vasistha's rules relating adoption,

३। औरसो धर्मपत्नीजस्तत्समः पुत्रिकासुतः।
क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेण वा॥
गृहे प्रच्छन्न उत्पन्नो गूढजस्तु सुतः स्मृतः।
कानीनः कन्यकाजातो मातामह-सुतो मतः।
अक्षतायां क्षतायां वा जातः पौनर्भव सुत।
दद्यान्माता पिता वा य स पुत्रो दत्तको भवेत्॥

क्रीतश्च ताभ्यां विक्रीत: कृत्रिम: स्यात् स्वयं कृत: ।
दत्तात्मा तु स्वयं दत्तो गर्भे विन्न: सहोढज: ।
उत्सृष्टो गृह्यते यस्तु सोऽपविद्धो भवेत् सुत: ॥
पिण्डदोऽंशहरश्चैषां पूर्वाभावे पर: पर: ॥

याज्ञवल्क्य:, २, १२८-१३२ ॥

Yajnavalkya's enumeration of sons

3 The *aurasa* or real legitimate son is one begotten (by the man himself) on the lawfully wedded wife equal to him is the appointed daughter's son, the Kshetraja or appointed wife's son is one begotten on a wife by a kinsman or any other (appointed to raise issue) Gudhhaja or adulterous wife's son is a son secretly begotten on a wife the Kanina or damsel's son is a son born of an unmarried daughter, and deemed the son of his maternal grandfather the Paunarbhava or twice married woman's son is one born of a twice married woman, whether her first marriage was consummated or not the Dattaka son is a son whom the mother or the father gives in adoption the Krita or purchased son is one who is sold (for adoption) by the mother and the father the Kritrima or son made is one who is adopted by the man himself the Svayamdatta or self-given son is one who gives himself the Sahodhaja or pregnant bride's son is one who is in the womb of his mother when she is married, and the Apaviddha or deserted son is one who is abandoned (by his parents) and adopted as a son In default of the first among these the next in order is the giver of the *Pinda* and the taker of the share —Yajnavalkya, 2,128-132.

४ । माता पिता वा दद्यातां यमद्भि: पुत्रम् आपदि ।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्त्रिम सुत: ॥
सदृशं तु प्रकुर्यात् यं गुणदोषविचक्षणम् ।
पुत्रं पुत्रगुणैर्युक्तं स विज्ञेयश्च कृत्रिम: ।

मनु:, ९, १६८ १६९ ।

Manu on Dattaka and Kritrima sons

4 A son equal in caste and affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as the Dattrima (Dattaka) son A son equal in caste, competent to discriminate between merit and demerit, and endued with filial virtues, who is adopted (by the man himself), is known as the Kritrima son. Manu, ix, 168-169

५ । अपुत्रेणैव कर्त्तव्य: पुत्रप्रतिनिधि: सदा ।
पिण्डोदकक्रियाहेतोर्यस्मात् तस्मात् प्रयत्नत: ॥
पिता पुत्रस्य जातस्य पश्येत् चेत् जीवतो मुखम् ।
ऋणम् अस्मिन् सनयति अमृतत्वञ्च गच्छति ॥
जातमात्रेण पुत्रेण पितॄणाम् अनृणी पिता ।
तदह्नि शुद्धिम् आप्नोति नरकात् त्रायते हि स: ॥
एष्टव्या बहव: पुत्रा यद्येकोऽपि गयां व्रजेत् ।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत् ॥ अत्रि: ।

5 By a sonless person only, should always a substitute of a son be anxiously made, for the sake of funeral oblations, libations of water and obsequial rite. If the father sees the face of a living son after birth, he transfers the debts to him, and attains immortality. As soon as a son is born, the father becomes absolved from the debts to paternal ancestors, on that day he acquires purity, since the son saves from the infernal regions. Many sons are to be secured, if even one may go to Gayà, or celebrate the horse-sacrifice or dedicate a Nila bull.—Atri

Who should adopt

Father's debt to ancestors absolved on birth of son

६। देशान्तरेषु विशेषेण भवेत् पुण्यम् अनन्तकं।
गयायाम् अक्षय श्राद्धं प्रयागे मरणादिषु॥
गायन्ति गाथां ते सर्व्वे कीर्त्तयन्ति मनीषिणः।
एष्टव्या बहव पुत्रा शीलवन्तो गुणान्विताः॥
तेषां तु समवेतानां यद्येकोऽपि गयां व्रजेत्।
गयां प्राप्यानुषङ्गेन यदि श्राद्धं समाचरेत्॥
तारिता पितरस्तेन प्रयान्ति परमां गतिं॥ उशना।

6 But in particular places the religious merit is endless, it is inexhaustible in a Sradha at Gaya, and in death and the like at Prayaga (or concourse of the Ganges and the Jumna). All those sages sing and proclaim the following verse,—"Many sons should be secured, possessed of good character and endowed with virtue if amongst them all, even one goes to Gaya, and if having arrived at Gaya performs the Sràdha, the paternal ancestors being saved by the same, attain the highest state."—Usanas

Religious merit on Sradha at Gaya and Prayaga

७। काङ्क्षन्ति पितर सर्व्वे नरकाद् भय-भीरव।
गयां यास्यति य पुत्र स न स्त्राता भविष्यति।
एष्टव्या-बहव पुत्रा यद्येकोऽपि गयां व्रजेत्।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ बृहस्पति।

7 All the paternal ancestors apprehending fear of the infernal regions are desirous that that son who will go to Gayà will become our saviour. Many sons should be secured if even one may go to Gaya, or perform the horse sacrifice, or dedicate the Nila bull.—Vrihaspati

Many sons should be secured

८। एष्टव्या बहव. पुत्रा यद्यप्येको गयां व्रजेत्।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ लिखित।

8 This is almost the same as the second verse of Vrihaspati

९। अपुत्रेण सुत कार्य्यो यादृक् तादृक् प्रयत्नत।
पिण्डोदकक्रियाहेतोर्नामसङ्कीर्त्तनाय च॥

दत्तकमीमांसाधृतमनुवचनं।

9 By a sonless person, should any description of sons be anxiously made, for the sake of funeral oblations, libations of water, and obsequial rite, as well as for the celebrity of name.—Cited in the Dattaka-mimánsà as a text of Manu.

Who should adopt and why.

१० । ऋणम् अस्मिन् सन्नयति अमृतत्वञ्च गच्छति ।
पिता पुत्रस्य जातस्य पश्येच्चेत् जीवतो मुखम् ।
अनन्ता पुत्रिणां लोका नापुत्रस्य लोकोऽस्तीति श्रूयते ।
वशिष्ठ ।

Son's birth and religious merit

10 If the father sees the face of the living son on birth, he transfers the debt to the son, and attains immortality It has been revealed that endless are the heavenly regions for those having male issue but there is no heavenly region for a sonless man —Vasishtha

११ । गोत्ररिक्थे जनयितुर्न हरेद् दत्रिम सुत ।
गोत्ररिक्थानुगा पिण्डो व्यपैति ददत स्वधा ॥
मनु, ९ । १४२ ।

Effect of adoption

11. The adopted son is not to take away (with him when he is passing from the family of his birth to that of adoption), the *Gotra* and the *Rik'ha* of the progenitor the *Pinda* is follower of the *Gotra* and the *Riktha*, the Swadhâ (or spiritual food) goes away absolutely from the giver —Manu, IX, 142

Meaning of *gotra* and *riktha*

Gotra is generally rendered into family, but it means here, "the status of being the son " *Riktha* means wealth, but it means here patrimony or family property, *i e*, property to which the right of the male issue arises by birth, or to which the right of the boy has already arisen

Jones' translation of the passage misleading.

Sir William Jones, however, translated the first line of this text thus,—"A given son must never *claim* the family and estate of his natural father," and this version has been accepted by the translator of Sanskrit works on law, in which this text is cited But this version is misleading, if not inaccurate, implying as it does *future* and not vested right

१२ । पुत्रान् द्वादश यान् आह नृणा स्वायम्भुवो मनु ।
तेषा षड् बन्धुदायादा षड् अदायादबान्धवा: ॥
औरस. क्षेत्रजश्चैव दत्त. कृत्रिम एव च ।
गूढोत्पन्नोऽपविद्धश्च दायादा बान्धवाश्च षट् ॥
कानीनश्च सहोढश्च क्रीत. पौनर्भवस्तथा ।
स्वयन्दत्तश्च शौद्रश्च षड् अदायादबान्धवा. ॥
मनु, ९ । १५८ १६० ।

Manu on twelve kinds of sons

12 Manu sprung from the Self-existent has declared twelve sons of men of these six become *affiliated* or members of the *Gotra* and *Co parceners* and six become *affiliated* or members of the *Gotra* but not *Co-parceners* The *aurasa* or true legitimate son, the appointed wife's son, the Dattaka, the Kritrima or son made, the secretly begotten son of the wife, and the deserted son—these six become *co-parceners* and *affiliated* or members of the *Gotra* the maiden daughter's son, the pregnant bride's son, the purchased son,

likewise the twice married woman's son, the self-given son, and the son by a Sûdra wife,—these six become *affiliated* or members of the *Gotra* but not *co pareeners* —Manu, ix, 158-160

Sec. 2—GENERAL TOPICS

Sub-Sec i—SONS AND SPIRITUAL BENEFIT

Sons in ancient law.—The usage of adoption is the survival of an archaic institution based upon the principle of slavery, whereby a man might be the subject of dominion or proprietary right, and might be bought and sold, or given and accepted, or relinquished, like the lower animals The above text of Vasishtha shows that children were absolutely under the power of the father who could give, sell or disown them. The *patria potestas* of the Roman law in its earlier stage furnishes us with a true conception of the father's unlimited power over children in primitive society. Marriage in ancient law, consisted in transfer of the father's dominion over the damsel to the husband Lifelong subjection was the condition of women who were under the dominion of either the father or the husband or their relations Male children, however, became *sui juris* on the death of the father and the like paternal ancestors.

Father's power over children,

patria potestas.

Twelve kinds of sons.—A careful consideration of the descriptions of the twelve kinds of sons will give an idea of the primitive conception of family relationship The *Aurasa* or a son begotten by a man on his own wife is what is now understood by the term son But the *Kshetraja* or appointed wife's son was a son begotten on one man's wife by another man who was appointed by the husband or his kinsmen for that purpose. This resembles the usage of Levirate prevalent among the Jews. (*a*) The son so produced became the son of the woman's husband. So also was a son whom a wife secretly brought forth by adultery, this son called *Gudhaja* became the son of the woman's husband. A son born of an unmarried daughter called *Kanina* became the son of the maternal grandfather. The pervading principle appears to have been that a wife and a maiden daughter belonged respectively to the husband and the father, and a son born of

Twelve kinds of sons

1 *Aurasa*

2 *Kshetraja*

3 *Gudhhaja*

4 *Kanina.*

(*a*) Bible Book of Ruth, and Deuteronomy xxv, 5-8

them belonged to their owner, in the same way as a calf produced by a cow becomes the property of the owner of that cow So was the *Putrikà-putra* or a son of an appointed daughter who was given in marriage to the bridegroom, with the condition that the son born of her would belong to her father, the marriage in such a case did not operate as a transfer of dominion over the damsel, from the father to the husband Similarly the child in the womb of the pregnant bride called *Sahodhaja* was transferred by marriage to the bridegroom The son of a twice-married woman called *Paunarbhava* is now deemed *aurasa* or real legitimate son, but he is enumerated among secondary sons, as re-marriage of women was disapproved by the sages A man became the father of these seven descriptions of child by the operation of ancient law. It should be observed here that although the Smritis purport to give the above classification of *sons*, it must necessarily include *daughters* as well

5 *Putrika-putra*

6 *Sahodhaja*

7 *Paunarbhava*

Then come the five descriptions of sons by adoption, *viz.*, the *Dattaka* and the *Krita* are sons given or sold respectively by their parents to a man who takes the boy for affiliating him as a son The *Kritrima* and the *Svayandatta* are the sons made and self-given, they are destitute of parents and therefore *sui juris* and free to dispose of themselves, they become the sons of the adopter with their own consent, the difference between them being that in the case of the *Kritrima* or son made, the offer comes from the adopter, while in the case of the self-given son the offer is made by him. An *Apaviddha* or deserted son is one who is abandoned or disowned by his parents and is adopted by a person as his son, this is like the appropriation by the finder of a thing without an owner.

Five kinds of sons by adoption

8 *Dattaka*
9 *Krita*
10 *Kritrima*
11 *Svayan datta*
12 *Apaviddha.*

The above descriptions of the divers kinds of sons recognized in ancient times, disclose that sexual relation was very loose, and chastity of women was not valued The relation of husband and wife, of father and son, and of master and slave, appears to have involved the idea of absolute power on the one hand, and abject subjection on the other, or of the one being the property of the other. Procreation by the

Sexual relation loose amongst

father was not a necessary element in the conception of sonship.

The hankering after sons, proved by the recognition of the different kinds of sons, appears to have owed its origin to the exigencies of primitive society composed of families governed by patriarchal chiefs. In the unsettled state of tribal Government in early times, the number of male members capable of bearing arms was of special importance, and the same cause that enhanced the value of sons operated to lower the position of women as well as of men labouring under bodily disability or infirmity such as blindness

Necessity of different kinds of sons

Doctrine of spiritual benefit —The Hindu society appears to have been civilized by means of religious influence, India is the land of religion, where all conceivable systems of theological doctrines arose and are still prevalent, ranging from polytheism to monotheism and from Sânkhya atheism to Vedântic pantheism. It has no place in the political history of the world, but holds the most prominent position in its intellectual and religious history.

India a religious country.

It is erroneous to suppose that the law of adoption owed its origin to the doctrine of spiritual benefit conferred by sons One cannot associate the sacred name of religion with practices based upon immorality and looseness of sexual relation there is no system of religion known, that countenances an institution partly founded on adultery, seduction and lust. The Hindu religion which is moulded on asceticism, is least likely to sanction the immoral usages relating to several descriptions of sons recognized by ancient society As regards ancestor-worship upon which the erroneous view is founded, its ritual shows that that ceremony is performed not so much for the purpose of conferring any benefits on the ancestors, as for the purpose of receiving benefits from them.

Adoption does not owe its origin to spiritual benefit

On the contrary, the doctrine of spiritual benefit seems to have been invoked for the purpose of discouraging the institution of subsidiary sons. The Hindu sages who are the propounders of the Smritis or Codes of Hindu law, appear to have introduced the doctrine of spritual benefit

Subsidiary sons discouraged,

derived from male issue, with the view of suppressing the laxity of marriage union, the looseness of sexual morality, the institution of subsidiary sons, and the improper exercise of *patria potestas*. They endeavoured to impart a sacred character to marriage, to impress the importance of female chastity, to discourage the immoral usages of affiliation, and to ameliorate the condition of sons and wives over whom the *pater familias* have absolute dominion extending to the power of life and death.

Order of various kinds of sons

3 groups : (1) (2) (3)

If one carefully reads the passages of the Smritis, extolling the importance of sons in a spiritual point of view, he will find that they all relate primarily to the real legitimate sons, and not to the secondary sons. In fact the sages divide sons into primary and secondary, with a view to mark the superiority of the Aurasa or real legitimate son—the primary son They also divide the sons into two or three groups to show their relative rank the real legitimate son and the appointed daughter's son are declared to hold the highest position in a spiritual point of view, to the sons by adoption is assigned a middle rank while the sons by operation of law, owing their origin to adultery, unchastity and looseness of sexual relation, are condemned and pronounced to be useless in a spiritual point of view.

Sub-Sec ii—LAW OF ADOPTION

Law of adoption simple

Nanda Pandita's innovations in his Dattaka-Mimansa,

Law of adoption simple—The law of adoption, as propounded in the Smritis and explained in the Mitàkshàra, the Dàyabhàga and similar commentaries respected by the different schools, is very simple. But many useless and arbitrary innovations were, for the first time, introduced by Nanda Pandita in his treatise on adoption, entitled the Dattaka-Mìmànsa, composed sometime after his Vaijayantì,* a commentary on the Institutes of Vishnu, which was completed in Sambat 1679=1623 A. D., or a little over a century and a quarter before the establishment of British rule in India. There is no cogent reason why the position of the Legislator should be accorded to Nanda Pandita, a mere Sanskri-

* See *ante* pp 41, 45

tist without law, who had nothing whatever to do with the then government of the country, and the novel rules unfairly deduced by him from a few texts unnoticed by, if not unknown to, all the authoritative commentators most of whom appear to have compiled their works under the auspices of reigning Hindu kings—should be inflicted upon the Hindus as binding rules of conduct. The adventitious circumstance of the work being translated into English at an early period mainly contributed to the notion that it was an authoritative work on adoption, respected all over India ; and this erroneous view originating with the learned translator who assumed it to be an ancient work, has been often repeated without question, though there is abundant evidence in the reports of cases and records of customs that its peculiar doctrines are not respected in most places The character of the work has been judicially considered by a Full Bench of the Allahabad High Court presided by Sir John Edge, the Chief Justice, who has in an elaborate and exhaustive judgment dealt with the matter and come to the conclusion that the innovations introduced by Nanda Pandita should not be followed as binding rules. The majority of the judges have concurred in that view, but the minority would follow the maxim *Communis error facit jus*, and hold that the Dattaka-Mimansa is binding, because it has several times been erroneously asserted to be a work of paramount authority on questions of adoption, although there is neither reason nor rhyme why it should be so regarded. (*b*) The Judicial Committe, however, have set aside the view of the majority, and upheld that of the minority, for reasons already quoted at page 53 of this book (*c*)

the work when translated.

All H C, on innovation

Dattaka-Mimansa now authority

Works on adoption.—The *Dattaka-Mímánasá* and the *Dattaka-Chandriká* are two treatises on adoption, which have come to be regarded as authority by reason of their being translated into English at an early period of British rule, and of the mistaken view of their being works of authoritative commentators : and it is said that where they differ,

(*b*) Bhagwan Singh *v* Bhagwan Singh, 17 A 294 15 A W N 167
(*c*) 21 A 412 ; 26 I. A 153 3 C. W N 454 . 1 Bom. L. R. 311.

the latter is accepted as an authority in Bengal (*d*) and in Madras, (*e*) while the former is respected in the other schools But the truth is that the first purports to be written by a Benares Pundit in the middle of the seventeeth century, and the second appears to be a literary forgery, and the innovations introduced by them were nowhere followed by the people in practice, nor is there any cogent reason why they should be

About these two works, Sir William Macnaghten says, that they are respected all over India, but that when they differ, the doctrine of the Dattaka-Chandrika of Devnanda Bhatta, is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares. (*f*) And this view has been adopted in the case of the *Collector of Madura*.(*g*)

Dattaka-Chandrika a forgery.

Dattaka-Chandrika a literary forgery—There is a great dispute regarding the authorship of the Dattaka-Chandrika The work professes to have been written by Mahamahopadhyaya Kuvera But notwithstanding, Sutherland, the learned translator, came to the conclusion that it was composed by the author of the Smriti-Chandrika, apparently from a misconception of the meaning of the sloka with which the book opens The style of the two works are so different that they cannot be held to have been written by the same author In Bengal, however, there is a tradition that it was a literary forgery by Raghumani Vidyabhushana who was the Pundit of Colebrooke There are only two slokas in the book, composed by the author, the opening one misled the learned translator of the work into the opinion mentioned above, and the concluding one which is an acrostic, supports the Bengal tradition It runs as follows —

र—म्यैषा चन्द्रिका कृत-पवते दंश्रिका क—बु ।

म -नोरमा सन्निवेशै रक्रियां धर्मैतार—षि ॥

motive for forgery

The tradition furnishes us with the account of the circumstances under which the book was written, and the internal evidence afforded by the book itself lends considerable support to it The circumstances under which it was composed may shortly be stated thus - There was a well-known titular Raja of Bengal, who had adopted a son before a son was born to him. After his death a dispute arose between the real and the adopted sons regarding succession to the estate left by the titular Raja. The estate left by the Raja

(*d*) Asita v Nirorde, 20 C W N 901 35 I C 127 (P C appeal in 24 C W N 794)

(*e*) Arumilli Perrazee v Subbarayadu, 44 M 656 48 I A 280 34 C. L. J 56 61 I C 690 26 C W N 1 41 M L J 33 30 M L T. 1 23 Bom. L R. 920, Nagammal v Sankarappa, 54 M 576, 579

(*f*) Gopi v Kishni, 1927 A 67

(*g*) 12 M I. A 397, 435 10 W. R P C. 17.

was supposed to be a Raj, and one of the questions raised was whether the adopted son could take a share of the Raj, and the other question was whether the adopted son could take an equal share with the real legitimate son, regard being had to the fact that the parties were *Kâyasthas* of Bengal, who were taken to be Sudras Both these questions were to be answered in the affirmative according to the exposition of law contained in this book, and the book itself is believed to have been written at the instance of the party claiming by virtue of adoption

Evidence of forgery

Evidence as to Dattaka-chandrika' being a forgery—The same tradition is also stated in the Tagore Lectures on Adoption (*h*) But with respect to it, a learned Judge of the Allahabad High Court has made the disparaging remark, that "he is not prepared to place any value on," what he erroneously imagines to be, "the story which" the Tagore Professor "has stated" (*i*) Had the learned Judge glanced at the reference given at the bottom of page 124 of the Tagore Lectures, and procured the book therein, referred to, he would have found that the tradition was stated in 1855 A D, by the greatest Bengali of the nineteenth century However, it has, therefore, become necessary to set forth the evidence supporting the conclusion that the Dattaka-chandrikà is a literary forgery The evidence consists of the following —

Reasons for such conclusion

(1) Sutherland, the learned translator, believed that this treatise was not really composed by Kuvera by whom it purports to be written, though he was not informed of the real author

(2) In 1855 A D, Pandit Iswara Chandra Vidyâsâgara published his Disquisition on the Legality of the Re-marriage of Hindu Widows, in both the English and the Bengali languages, and succeeded in inducing the Legislature to pass the Act XV of 1856 for legalizing the re-marriage of Hindu widows In a note appended to the Bengali version of that work he states to the effect,—that Raghumani Vidyâbhushana composed the Dattaka-chandrikà under the false name of Kuvera, and did at the same time, make it known by the acrostic in the last sloka that he was the real author (*j*)

(3) In 1858 A D., Pandit Bharat Chandra Siromani published in the Bengali character the original Dattaka-mîmânsà and Dattaka chandrika with his own Sanskrit commentary thereon He had been a Hindu law-officer attached to the District Court of Burdwan, and after the abolition of that post, became the Professor of Hindu law in the Government Sanskrit College of Calcutta While commenting on the last sloka of the Dattaka-chandrikà he says as follows —

श्रीरघुमणिविद्याभूषणकृतिरियम् इति प्रसिद्धि अस्मिन् श्लोके तन्नामोत्कीर्त्तनमपि स्थितम्। प्रथमचरणस्य प्रथमाक्षरं द्वितीयशेषाक्षरं तृतीय प्रथम चतुर्थ-शेषाक्षरैः रघुमणिरिति नामोद्धृतम्। (*k*) which means,—"It is a widely known tradition

(*h*) Adoption 2nd Ed p 124

(*i*) 17 A 313 (*j*) See sixth edition of the Disquisition, page 182

(*k*) See second edition of those works in Deva nagari character, page 41 of the Dattaka Chandrika.

that this is the work of Raghumani Vidyabhushana, it is also a widely known tradition that his name is made known in this sloka, the name Raghumani is given out by the first syllable of the first foot, the last of the second foot, and the first of the third foot, and the last of the fourth foot."

The venerable Pandit, however, adds इदम् अस्मभ्यं न रोचते which means literally,—"This to us is distasteful" The idea is undoubtedly most painful and humiliating that a learned man like Raghumani was guilty of a literary forgery committed for the purpose of perpetrating a fraud upon the Court of Justice Assuming that the Pandit means to say that "it is not acceptable to me," yet that does not affect the tradition at all

(4) The tradition is well-known to all Bengali Pandits professing to be *Smartas* or Hindu lawyers It is curious that the tradition which has all along been so well-known to the Smarta Pandits is unknown to the English-educated Indian lawyers without Sanskrit

(5) In 1863 A D, when the author was a student of the Smriti class in the Sanskrit College, he heard it from Pandit Bharat Chandra Siromani who also told the names of the parties to the law suit for which the book was fabricated, and other details including the objects

(6) The tradition is well-known to the descendants of the litigant parties, of whom the claimant by adoption was to be benefited by the book And the author heard it from that claimant's son's daughter's son who was a Vakil of the Calcutta High Court

(7) The tradition is well-known to the descendants of the family to which Raghumani belonged, and the author heard it from his brother's great-grand-son who also told that Raghumani was the Pandit of Colebrooke and was an inhabitant of Bahirgachi in the District of Nuddea

(8) The case for which the book was fabricated is referred to in Sir Francis Macnaghten's Considerations on Hindu Law, he was the counsel for the adopted son, and as he said that from the law as it was understood at that day, he was certain that his client would have been entitled to *one third* of the estate, had the cause been not settled by the parties themselves,—therefore it is clear that his attention was not drawn to the book, according to which his client would have been entitled to *one half*, instead of *one-third*, of the estate Had the book been in existence at the commencement of the litigation, the counsel for the adopted son, the plaintiff, should undoubtedly have known it which was so favourable to his client The book appears to have been forged subsequently, and it did not become necessary to invite the counsel's attention to it as the case was settled out of Court. The book appears to have been written in the year 1800 A D

(9) The book is said to be of special authority in Bengal and yet it was altogether unknown to Pandit Jagannath Tarkapanchànana, whose digest of Hindu law published in 1796 A D, does nowhere refer to it

This is not the only instance of literary forgery of the kind Subsequently in 1832 A D, some Pandits of the Calcutta Sanskrit College gave a Vyavasthà supported by the authority of certain Manuscript books, in a case between

Jainas (*l*) Those books were really fabricated by the Pandits, but the Librarian of the College was bribed and the books were placed in the Library, and their names entered in the list of books contained therein The plan was well designed, but unfortunately for them, Dr H H Wilson the then Secretary of the Sanskrit College had in his possession another list of the Library books, and the fraud was detected As the Pandits confessed their guilt to Dr Wilson, the only punishment inflicted on them was, that they were deprived of the source of income derived from giving Vyavasthâs, by an imperative rule to the effect that the Pandits of the Sanskrit College shall not, on pain of dismissal, give any Vyavasthâ intended to be used in a law-suit The rule has ever since been in force and followed Similar fabrications seem to have been made later on, but became unsuccessful (*m*)

Its authority upheld by P C

But inspite of such convincing proofs of the book being a forgery it has, been finally settled by judicial decisions, that, so far as the questions relating to adoption are concerned the Dattaka-Chandrikâ is an authority, inasmuch as it has been followed for a long time (*n*)

Dattaka-Mimansa, its suspicious origin

The Dattaka-Mima'nsa'*— appears to have been written on purpose to invalidate the affiliation of a daughter's son. It is doubtful whether it was really written by Nanda Pandita. The biassed and forced arguments advanced by its author in support of the innovations introduced by him, especially in the second Section, give rise to a suspicion that it is similar to the Dattaka-Chandrikâ as regards its origin.

There is no cogent reason for regarding this treatise as authority. But the adventitious circumstance of being translated into English at a comparatively early period, and the ignorance of their age, led the judges to treat them as authority. Justice Knox who was a Sanskrit scholar held that their authority was open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. But the Judicial Committee observe that their Lordships cannot concur with that learned judge, because, "such treatment would not allow for the effect which long acceptance of written opinions has upon

(*l*) See 5 Bengal Select Reports, page 326, new edition
(*m*) Dey *v* Dey, 2 Indian Jurist N S 24
(*n*) Arumilly Perrazu *v* A Subbarayadu, 44 M 656 48 I A 280 26 C W N 1 34 C L J 56 44 M 656 61 I C 690 23 Bom L R 920, Asita *v* Nirode, 20 C W N 901 35 I C 127, Lingayya *v*. Chengalammal, 48 M 407 47 M L J 776 20 L W 959 1925 M 272, *see also* Karutury *v*. Karutury, 40 M 632 29 M L J 710 31 I C. 574
* *See ante* p 195 "Works on adoption"

social customs, and it would probably disturb recognised law and settled arragements." Their Lordships, however, add,—"But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned judge" (*o*)

Object of adoption: (1) spiritual (2) secular

The object of adoption—is twofold, the one is spiritual and the other, secular: (*p*) a son is necessary for the attainment of a particular region of heaven, for the performance of exequial rites, and for offering periodically the funeral cakes and the libations of water, as well as for the celebrity of name, and for prepetuation of lineage. Most of the spiritual objects may be attained by a man destitute of male issue through the instrumentality of other relations, such as the brother's son. But the secular object may be gained only by means of a son real or subsidiary. A man again that aims at *moksha* or liberation from transmigration of the soul, does not require a son and cannot adopt one.

Sub-Sec iii—FORMS OF ADOPTION

Dattaka and Kritrima recognized

Dattaka and Kritrima.*—The Dattaka and the Kritrima are the only forms of adoption which are now recognized by the Courts Of these the Dattaka is said to be in force everywhere, and the Kritrima, confined to Mithila only. But an adoption in Mithila in the Dattaka form is not invalid (*q*) The Kritrima form, however, appears to be prevalent in many districts in Northern India if not also in the Deccan.

Putrika-putra obsolete,

Putrika-putra.**—It is most natural that a person destitute of male issue, should desire to give to a grandson by daughter the position of male issue. The appointed daughter's son is not regarded by Manu as a secondary son, but is deemed by him as a kind of real son But the custom has become obso-

(*o*) Sri Balusu *v* Sri Balusu, 26 I A 113, 132 22 M 398 3 C W N 422, *see* Puttu *v* Parbati, 37 A 359, 367 19 C W N 841 22 C L J 190 13 A L J 721 29 M L J. 63 18 M L T 61 17 Bom L R 549 29 I C 617 42 I A 155

(*p*) (With Agarwallas, it is Temporal) Dhanraj *v* Soni Bai, 52 C 482 52 I A 231 49 M L J 173 27 Bom L R 837 23 A L J 273 21 N L R 50 87 I C 357

* *See post* Sec 10 "Dattaka and Kritrima"

(*q*) Chandreshwar *v* Bisheshwar, 1927 P 61.

** *See post* Sec 10 "Kritrima and Putrika Putra"

lete. (r) This form of adoption appears still to prevail in Malabar and in the North-Western Provinces, and the neighbouring districts. (s) The Talukdars of Oudh submitted a petition to the Government for recognising the appointed daughter's son, and accordingly in the Oudh Estates Act "son of a dauhgter treated in all respects as one's own son", is declared to be heir, in default of male issue. This sort of affiliation appears to be most desirabale and perfectly consistent with Hindu feelings and sentiments, there is no reason why it should not be held valid when actually made by a Hindu. The Dattaka-Mimansa appears to have been written on purpose to invalidate the affiliation of a daughter's son for the benefit of agnate relations.

except in some places.

As to the burden of proof, the Judicial Committee has held, that "inasmuch as it breaks in upon general rules of succession, whenever an heir claims to succeed by virtue of that rule, he must bring himself very clearly within it." (t)

Sahodha and Paunarbhava.

Sahodha and Paunarbhava.—The pregnant bride's son and the twice-married woman's son are both recognised at the present day, but they are deemed as *aurasa* or real legitimate sons and not as secondary or subsidiary sons However, it is thus clear that the opinion of the authors of the two treatises on adoption is not respected in this respect.

Dvyamushyayana. *See post, Sec. 9.*

Adoption by Custom.—In the districts of old Delhi territory, a person whose adoption, though prohibited by Hindu law, is valid by custom so as to invest him with all the rights of an adopted son. (u)

Sec 3—WHO MAY ADOPT

Sub-Sec i -CAPACITY OF MEN

Capacity of males to adopt

When son exists.—A consideration of the definitions of the twelve kinds of sons, will show that there could not be any restriction as to the number of subsidiary sons in early

(r) Babue Rita v Babu, 1 Pat L J 581 38 I C 44, Venkata N. v. Suraneni, 31 M 310; *see* Thakoor Jeebnath v. Court, 2 I A 163 (the point was not actually decided)
(s) In Oudh—Lal Tribhawn v Deputy, 5 O L J 294 47 I C 225
(t) 2 I A 163, 166
(u) Sabha v Piare, 11 L '481 F B

times, for a man could have a subsidiary son even against his will. There are passages of law, however, which recommend that a man who is destitute of son should make a substitute of son, which evidently discourages adoption by a man having an *aurasa* or real legitimate son While commenting on these, Nanda Pandita concedes that a man may adopt a son with the consent of an existing *aurasa* son. This recommendation has now been converted into an imperative rule, and its operation has been extended by the Privy Council in the case of *Rungama* v *Atchma*, (v) holding that a man having an *adopted* son cannot adopt another. If the attention of their Lordships had been drawn to the injunction for securing many sons, laid down in Texts Nos. 5-8 and in passages to the same effect in other Codes, the decision would have been different Bearing in mind that in Hindu law a son's son's son holds the same position as a son, the result is that a man having a real legitimate or an adopted (w) son, grandson or great-grandson, cannot adopt

when son exists,

But the existence of a son in *embryo* at the time of adoption would not invalidate it. (x)

child in embryo.

Existence of male issue.—So also the existence of a male descendant who is, by reason of any physical, moral, or intellectual defect, excluded from inheritance and incapable of conferring spiritual benefit, is no bar to adoption. (y)

For, the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit a child who is destitute of these capacities has not the status of a son in the eye of Hindu law.

Existence of male issue, incapable of performing spiritual benefit, no bar to adoption

Existence of son incompetent to offer spiritual benefit—It would seem therefore that the existence of a son who has renounced Hinduism or has, by becoming a *sannyási* or otherwise, rendered himself incapable of conferring spiritual

(v) 4 M I A 1 7 W R P. C. 57
(w) Shanti v. Dhan, 50 I C 113 42 P W R 1919
(x) Hanmant v Bhima, 12 B 105, Daulat v Ram, 29 A. 310
(y) Dattaka Mimansa, 2, 62, Adoption 2nd Ed p 196, Strange's H L Vol 77 in this connection *see* Bharmappa v Ujjangauda, 23 Bom L R. 1320 65 I C. 216', Raija v Bhimroo, 57 I C. 647 (N)

service, (z) is no bar to adoption. According to Hindu law such a son loses both the capacities constituting sonship, although the *Lex loci* Act has conferred on such a son the capacity to inherit, yet it cannot be so construed as to deprive the father, of the power of adoption he has in the circumstances under Hindu law

Simultaneous adoptions—A man having no son by his first wife, marries another in the hope of getting a son by the latter.

It often happens that the first wife herself, who has failed to become the mother of a son, makes arrangements for her husband's second marriage and induces him to take another wife for the purpose of continuing the lineage and securing spiritual benefit Such noble self sacrifice can only be found among Hindu women

However, this second marriage also often proves barren, and then the man has recourse to adoption The most natural and reasonable course for him to follow is, to adopt and give a son to each of his two wives, and there are many cases of such double adoption in Bengal After *Rangama's* case in which successive adoption of two sons was held invalid, the expedient hit upon to evade that ruling was to make simultaneous adoption of two sons for two wives, and there have been many instances of such adoption in Bengal. But simultaneous adoption was pronounced invalid in several cases, though the decision turned upon other grounds and was favourable to the adopted sons. But it has, at last, been judicially held invalid in the case of *Doorga* v. *Surendra.* (a)

Adoption of more than one son

Simultaneous adoptions invalid,

It is, however, worthy of special remark that notwithstanding the declaration by the Courts of Justice, that such adoptions were invalid, the adopted sons have been and are treated by Hindu society as sons of their adoptive fathers This anomaly is the effect either of ignorance of the sentiments and usages of the people, or want of sympathy with the same It is also partly due to the absence of English translation of the texts of law bearing on the subject, which appear not only to permit but to enjoin plurality of adopted sons (b)

though enjoined by Hindu law

(z) *See* Nagammal *v* Sankarappa, 54 M 576, 582

(a) 12 C 686, affirmed on appeal by the Privy Council, *see* Surendro *v* Doorga, 19 C 513 19 I A 108, *see also* Tek *v* Gopal, 13 L C 482 (Punjab), Akhoy *v* Kalapahar, 12 C 406 12 I A 198

(b) Texts Nos 5 8.

Wife's consent.—The husband can adopt without the consent of his wife, but the son so adopted does not become the heir to such a wife (*c*).

Bachelor and widower.—It has been held that a bachelor (*d*) and a widower (*e*) may make a valid adoption. In these cases a difficulty arises as to who should be deemed the maternal grand-sires of the boy adopted.

Minor may adopt and give authority to adopt

Minor.—It has also been held that a minor may adopt and give authority to his wife to adopt (*f*). It is not clear from these decisions whether it is sufficient for the competency of a minor that he should attain the age of discretion or that he should attain the age of majority according to Hindu law, *i. e.*, complete the fifteenth year (*g*). The validity of adoption by a minor is maintained solely on religious ground, and it is looked upon as a purely religious transaction, not affecting the civil rights of the adopter. This view may be quite true in Bengal where it has been held that sons acquire no rights to even the ancestral property during the father's lifetime, but it is not so where the Mitâksharâ prevails, inasmuch as the adopter's civil rights are materially affected by adoption, for the adoptee becomes the adopter's co-sharer with co-equal rights as regards ancestral property.

Bengal,

Mit.

Why authority given by minor,

So strong, however, is the sentiment of the Hindus for the continuation of the family and lineage by adoption, especially in those instances in which the extinction of families has been prevented by adoptions, that they take the precaution of having authority to adopt executed by infants as soon as they attain the age of discretion, such as twelve or thirteen years, in favour of their infant wives. They are also made to give verbal permission to adopt, to their wives in the presence of witnesses.

(*c*) See Tagore Law Lectures on Adoption, p. 214-215, 2nd Ed., Narain *v* Gopal 18 O. C. 341 : 33 I. C. 361.

(*d*) Gopal, *v* Narayan, 12 B 329, Chandrasekhara *v* Bramhanna, 4 Mad H. C. 270.

(*e*) Nagappa *v* Subba, 2 M. H. C. R. 367, Chandrasekhara *v* Bramhanna, 4 M. H. C. R. 270.

(*f*) Rajendro *v* Saroda, 15 W. R. 548, and Jamoona *v* Bama, 1 C. 289.

(*g*) Mondakini *v* Adinath, 18 C. 69, 72. In this connection *see* Bassapa *v* Shidramappa, 43 B. 481, 486 : 50 I. C. 736 : 21 Bom. L. R. 217.

A minor in Bengal under the Court of Wards cannot validly adopt or give authority to adopt, except with the assent of the Lieutenant-Governor, (now Governor) obtained either previously or subsequently. (h) There are similar restrictions in Madras (i) the Central (j) and the United Provinces(k) and the Punjab (l)

but when under Court of Wards must take assent of Governor,

Lunatic.—A lunatic can adopt a son during the interval of sound mind (m)

Leper—A leper, whose disease was of such a nature as did not unfit him for performing both social and religious duties in company with others, was not disqualified from making an adoption. (n)

Special Marriage Act—A Hindu married under the provisions of this Act (III of 1872 and XXX of 1923) forfeits his right to adopt (o) But his father, if he has no other son living, shall have the right to adopt. (p)

Sub-Sec ii—CAPACITY OF WOMEN

History of women's position—According to the ancient Hindu law as well as to Roman law a woman was placed throughout her whole life under the tutelage of her husband or his agnates when she ceased to be under the paternal power. She was not permitted to be *sui juris* at any period of her life (q) But important rights were conferred on women by the Mitàksharà and the Dàyabhàga, so as to make their position almost equal to that of males, specially as regards the right to hold property. A great deal of misconception prejudicial to women often arises from not distinguishing the later development of law from its earlier stages.

Capacity of women to adopt

Her right to adopt.—The text of Vasistha (r) provides—"But a woman should neither give nor accept a son except

according to Vasistha

(h) Court of Wards Act (Act ix of 1879 B C) Sec 61
(i) Act i of 1902 (M C) Sec 34 (c)
(j) Act xxiv of 1899 (C P C) Sec 32
(k) Act iii of 1899 (U. P C) Sec 34 (b)
(l) Act ii of 1903 (Punj C) Sec 15,
(m) Amichi eSshamma v A Padmanava, 19 M L T 243 33 I C 578 3 L W 290
(n) Ramaba v Harnabai, 29 C W N 129 P C 48 B 363
(o) Section 25 (p) Section 26
(q) See Texts Nos 17 and 18 *ante* p 119
(r) *Ante*, p 187

with the permission of the husband" This text has been very differently construed by different schools *(s)*

Husband's assent,

This right differently construed —Some say that the husband's assent is absolutely necessary for an adoption by a woman Of these again, some assert that the husband's assent must be given at the very time of adoption, so that according to them a widow cannot adopt at all. While others say that the word "husband" in the above text is illustrative, it means the tutor or guardian of the woman for the time being, that is to say, when the husband is alive his assent is necessary, and after his death the assent of his agnates who are his widow's guardians is necessary and sufficient for enabling her to adopt

i, at adoption,

ii, his assent or kinsmen's,

iii, assent presumed.

There is a third view entertained by some who maintain that adoption by the widow being conducive to the spiritual benefit of the sonless husband, his assent is always to be presumed in the absence of express prohibition. The prohibition may be express or implied *(t)*

It should be observed that according to those who maintain that a widow can adopt with the assent of her husband's kinsmen, the husband's assent cannot be operative after his death, on the ground of his not being the guardian of his widow But this distinction is not practically observed.

Mithila,

Views of different schools —In *Mithila* it is absolutely necessary that the husband should give his assent at the time of adoption, therefore a widow cannot adopt a *dattaka* son there. *(u)*

Bengal,

In *Bengal* the husband's express assent is absolutely necessary and it is operative after his death, so as to enable a widow to make a valid adoption

Benares, Madras and the Punjab,

The *Benares* school follows the Bengal doctrine *(v)*

In *Madras* *(w)* including *Mysore*, *(x)* *Bombay*, *(y)* and the

(s) Collector of Madura v Mootoo, 12 M. I A 397, 435 10 W R P C 17
(t) Shiyali Subraya v Calve, 21 M L T 315 37 I C 404 5 L W 749
(u) Tulshi v Behari, 12 A 328 F B
(v) Bishwa Nath v Jugal, 50 I A 179 28 C W N 790 38 C L J 299 45 M L J 215 18 L W 88 26 O C 228 73 I C 244 1923 P C 90, Babu Motising v Durgabai, 53 B 242
(w) See pp 221-225 *post*
(x) Dodda v Narayana, 2 Mys L J 157
(y) See pp 225-226 *post*

Panjab (*z*) a woman may adopt either with the hasband's assent or with his kinsmen's assent if he died without giving any.

Bombay,

In *Bombay* (*a*) widows whose husbands were not members of joint family, may also adopt of their own accord without any assent of either the husband or his kinsmen It should be observed that in this case the hasband's estate is vested in the widow When the husband gave all his property by a Will to his daughters, the widow cannot validly adopt a son. (*b*) A widow succeeding to the estate not of her husband but of a *gotraja sapinda* under the rule established in *Lalloobhai's* case, (*c*) cannot make a valid adoption, (*d*) nor can a step-mother succeeding to the estate as *gotraja sapinda* adopt. (*e*)

Jaina widow,

A *Jaina* widow also can adopt of her own accord without any authority from either the husband or his kinsmen; the reason perhaps is that she becomes absolute owner of her deceased husband's self-acquired property inherited by her. (*f*) But the Jains living within a place governed by the Madras school, in the absense of special custom to the contrary which is to be proved by him who alleges it, are governed by that school of Hindu law and hence a widow can adopt only with the permission of her husband or *sapindas* (*g*)

Marwari widow

The widows of *Marwaris* of Bikanir can adopt without the consent of the kinsmen (*h*)

Woman's right to adopt

Nature of woman's right according to commentaries - According to what is stated in the commentaries, it would seem that the widow adopts in

(*z*) Gopi v Gopi, 27 I C 701 27 P W R 1915 57 P L R 1915
(*a*) Harigir v Anand, 1925 M W N 414 21 N L R 127 88 I C 343 1925 P C. 127, Kolhapur, Maharaja of v Sundaram, 48 M 1 (Mayukha)
(*b*) Malgauda v Babaji, 37 B 107 14 Bom L R 1121 17 I C 746
(*c*) 7 I A 211
(*d*) Dattatraya v Gangabai, 46 B 541 24 Bom L R 69, Datto v Pandurang, 32 B 499, 10 Bom L R 692, Yeknath v Laxmibai, 47 B 37 1922 B 347
(*e*) Basangowda v. Rudrappa, 52 B 393 1928 B 291
(*f*) Sheo v Dakho, 1 A 688, Manik v Jagat, 17 C 518, Jiwraj v Sheokuarbai, 56 I C 65 (Nag), Asharfi v Rup, 30 A 97, Manahar v Banarsi, 29 A 495
(*g*) Ammani v Krisnaswami, 16 M 182 3 M L J 109; Gateppa v Eramma, 1927 M 228
(*h*) Mathura v, Srikissen, 27 C L J 517 44 I C 5

her own right, but she being in a state of perpetual tutelage, the discretion which she is deemed to want is supplied by the *auctoritas* of her legal guardian According to some, the husband is the only guardian of a woman in the matter of having a son, while others regard adoption as an appointment of an heir and disposition of property, and therefore the assent of the husband's kinsmen whose interests are affected, is necessary and sufficient, there are some again who think that the widow inheriting the husband's estate is practically *sui juris* and is also competent to deal with the property for religious purposes, so she may, of her own accord, without the assent of anybody else make a valid adoption which is conducive to the husband's spiritual benefit, and which is an act of self-denial on her part, as by it she divests herself of the husband's estate which vests in the boy adopted

Modern view on woman's capacity to adopt

husband's agent.

Present view—But the modern view regarding woman's capacity to adopt is, that she has no right herself, (*i*) but that she is deemed to act merely as an agent, delegate or representative of her husband, or that she is only an instrument through whom the husband is supposed to act (*j*) It should, however, be observed that the wife is the only agent to whom authority for adoption may be delegated; a man cannot authorize any other person to adopt a son for him. (*k*) A widow is bound by the act of her husband in making an adoption and she must adopt according to all the implications of an adoption by him, valid or invalid. (*l*)

Accordingly the "assent of the husband" is looked upon as power It has been held that a man who has a son in existence, and is therefore himself incapable of adopting a son, may nevertheless give a conditional authority to his wife to adopt a son to be exercised in the event of the existing son dying without leaving male issue (*m*) So also a husband can authorize his wife to adopt after his death when he is a member of a joint family, and his widow on that authority can adopt after her husband's death even when the whole estate has passed to the other members of the family by survivorship. (*n*)

(*i*) Narendra *v* Dina, 36 C 824, Puttu Lal *v* Parbati, 37 A 359, 366, P C 19 C W N 841

(*j*) Collector of Madura, 12 M I A 435 10 W R P C 17, Puttu *v* Parbati, 37 A 359 19 C W N 841 22 C L J 190 13 A L J 721 29 M L J 63 17 Bom L R 549 29 I C 617

(*k*) Sri Raja (Narasimha) *v* Sri Raja, 29 M 437, 444

(*l*) Chimabai *v* Mallappa, 24 Bom L R 489

(*m*) Bykant *v* Kisto, 7 W R 392, 1 M 174, Ram *v* Surbanee, 22 W R 121

(*n*) Hira Lall *v* Piari, 51 A 54 1928 A 505

But a lunatic cannot give a valid assent to his wife to adopt, hence a wife of a lunatic cannot adopt during the lifetime of her husband. (*o*)

Lunatic cannot authorize

Power how construed.—It follows, therefore, that the widow's right of adoption depends entirely on the power, and must accordingly be strictly pursued, *i. e.*, be subject to the restrictions and limitations that the husband may choose to impose in that behalf, (*p*) but the father-in-law cannot control the widow's right to adopt by a Will. (*q*) If the widow is authorized to adopt one son, she cannot adopt a second, if the first adopted son dies; if her husband directs the adoption of a particular boy, she cannot adopt any other, (*r*) but it is held that the specified child being dead or his parents having refused to give him in adoption, the widow can exercise the power in favour of another, (*s*) unless she had been expressly prohibited from adopting any other boy. In this manner, the authority is strictly construed It would, however, be more consistent with the feelings of the Hindus, should the authority given by them be liberally construed, specially when it appears that they evince a general intention to be represented by a son, and a particular intention with respect to the mode of carrying out the same, in such a case, effect might be given to the former irrespective of the latter This principle has been acted upon (*t*) So also in the case of *Suryanaryana* v *Venkataramana* (*u*) where the husband granted to his widow a power to adopt, but placed no specific

Power subject to restriction: by husband, father-in-law

Particular boy named

What should be the rule

(*o*) Ramkrishna *v* Laxminarayan, 59 I C 458 22 Bom L R 1181

(*p*) Mustaddi *v* Kundan, 28 A 377 33 I A 55 16 M L J 174 8 Bom L R 371 3 A L J 246, *see* Pran Gopal *v* Chandra, 41 C L J 55 following Surendra *v* Durga, 19 I A 108, 122 19 C 313

(*q*) Natvarlal *v* Ranchhod, 55 I C 313 22 Bom L R. 71

(*r*) Sindigi Lingappa *v* S Sidda, 32 M L J 47 38 I C 164

(*s*) Shankar *v* Sawitri, 50 I C 599 (N)

(*t*) Lakshmi *v* Raja, 22 B 996, Suryanarayana *v* Venkataramana, 26 M 681 (confirmed by P C in 29 M 382 33 I A 145), Sarada *v* Ramapati, 17 C W N 319, *see also* Rani Dharma *v* Balwant, 39 I A 142 16 C L J 60 16 C W N 675 15 I C 673 33 A 398 14 Bom L R 485 9 A L J 730, (on appeal from 30 A 549), Bhagwant *v* Muranlal, 15 C W N 524 7 I C 427, Chenga *v* Vasudeva, 29 M L J 144, Madana *v*. Purushothma, 38 M 1105, 1111, this approved on other grounds 41 M 855 45 I A 156 35 M L J 138 28 C L J 403 20 Bom L R 1041 16 A L J 725 24 M L T 231 46 I C 481 : 23 C W N 177, Pran Gopal *v* Chandra, 41 C L J 55

(*u*) 33 I. A 145 29 M 382 confirmed 26 M 681,

limitation thereto and it was clear that he desired to be represented by a son, it is held that the power was not exhausted by the adoption of one son

Boy from particular family

When the authority was given to the widow to adopt a son from a particular family, and the widow adopted a daughter's son of that family, the Allahabad High Court held that it was a sufficient compliance of the direction.(v)

Particular wife named

Preferential right among widows.—If a person has more wives than one, and authorises one of them, she alone is entitled to adopt If any other particular direction is laid down, that must be followed, should a general authority to all the wives be given, then there might be some difficulty in case of disagreement and dispute, as only one of them shall be entitled to adopt. (w) It has been held that the senior widow has the preferential right to adopt, (x) even without the consent of the junior widow, (y) but not *vice versa*, it does not matter, even if she lived apart from her husband for twenty-five years (z) When joint authority is given to his two widows, both of them may jointly adopt a son, but in that case the senior widow shall be the mother of the boy and her co-widow shall be the boy's step-mother. (a) The senior widow's preferential right depends on her becoming the *patni* or indispensable associate for religious purposes since her marriage,—a position not affected by subsequent marriage of another wife (b)

otherwise the senior

Adoption by junior

The adoption by junior widow, though earlier in point of time, is void where she adopted without seeking the

(v) Brij v Basant, 1929 A 561

(w) *See* Narasimha v Parthasarathy, 37 M 199, 220 41 I A 51 : 18 C W N 554 19 C L J 369 26 M L J 411 23 I C 166, Yamuna v Jamuna, 1929 N 211

(x) Ranjit v Bijoy, 39 C 582 (on appeal from 38 C 694) 16 C W N 440 14 I C 17, Venkatappa v Damara, 39 M 772 29 M L J 18 30 I C 106, Kakerla v Kakerla, 28 M L J 72 27 I C 775 16 M L T 612, Basappa v Siddramappa, 43 B 481 21 Bom L R 217 50 I C 736

(y) Rukhmabai v Rudhabai, 5 Bom H C 181

(z) Muthusami v Pulavartal, 45 M 266 42 M L J 10' 30 M L T 60 15 L W 40, 66 I C 504

(a) Tiruvengalam v Butchayya, 52 M 373 1929 M 11

(b) Padaji v Ram, 13 B 160, Basappa v Shidramappa, 43 B 481 21 Bom L R 217 50 I C 736, *see* Ranjit v Bijoy, 39 C 582 16 C W N 440

senior widow's consent. (*c*) But the doctrine of the preferential right of the senior widow to adopt has not been extended to cases where the husband dies living jointly with his father and when the widow is to exercise her right with the consent of her father-in-law. (*d*) The Judicial Committee without determining whether a power given jointly to more than one wife is valid, have held that a power given to more than one wife jointly cannot be validly exercised by one on the death of the other co-widow. (*e*) But when permission is given to the widows severally, the younger widow, on the refusal of the elder widow can adopt (*f*) But if one is willing to loyally carry out the husband's wishes by adoption and the others are opposed for selfishness, then the former may adopt by giving notice to the latter. (*g*) But all of them may agree in ignoring the authority.

Joint power cannot be exercised on death of one

When junior widow can.

Widow may not adopt though enjoined—However solemnly a husband may enjoin his wife to adopt a son unto him, she is not legally bound to fulfil his dying request, her rights to the husband's estate are not in the least affected by her omission or refusal to adopt (*h*) But an agreement by the widow whereby she undertakes not to exercise her power to make adoption is void as being opposed to public policy. (*i*)

Widow may ignore power and may not adopt

Authority in excess of donor's power—An authority is void if it directs adoption under circumstances in which the man himself, if living, could not have adopted.

Power given to widow and others.—A joint power to the widow and other person or persons (*j*) or to the testator's

Power to widow and others

(*c*) 39 C 582, 28 M L J 72; Damara v. Damara, 39 M 772 · 29 M L J 18
(*d*) Dnyanu v Tanu, 44 B 508, 513 22 Bom L R 390 57 I C 113
(*e*) Narasimha (Sri Raja) v Parthasarathy, 41 I A 51, 69, 74 75 37 M 199 18 C W N 554 19 C L J 369 26 M L J 411 16 Bom L R. 328 12 A L J 315 23 I C 166, *see* also Lachhmi v Mst Parbati, 42 A 266
(*f*) Sankar v Saiwitri, 50 I C 599 (N)
(*g*) Mondakini v Adinath, 18 C 69
(*h*) Uma Sunduri v Sourobhinee, 7 C 288, Mitter v Data, 1926 A 194
(*i*) Jagannadha v. Kunja, 49 I C 929 (1919) M W N 52 25 M L T. 204 9 L W. 385
(*j*) Adoption, 2nd Edn *p* 233, in this connection *see* Narasimha v Parthasarathy, 37 M 109. 41 I A 51 18 C W N 554 19 C. L J 369 26 M. L J 411 : 23 I C. 166.

widow conjointly with his executors and trustees is invalid. (*k*) But the choice of the boy for adoption may be restricted by the husband requiring the consent of persons named by him (*l*) In such cases the consent of the majority will be sufficient (*m*)

P C on power to widow subject to permission of others

In a case where an authority is given to the testator's widow in a Will to be exercised " with the permission" of the testator's father, Sir Binod Chandra Mitter, who delivered the judgment of the Privy Council, following the well-established law in England that when a power is given to be executed with the consent of a person and that person dies before the power is executed, the power comes to an end, held that an adoption made after the death of the father of the testator without obtaining the permission of the former is invalid. The adoption was challenged forty years after the adoption when the adopting widow died, the estate being in the possession of the adopted son's son on the death of the adopted son. (*n*) His Lordship in support of his view relied on an earlier decision of the same Board (*o*) In that case the adoption was invalid because the power was given to the widow conjointly with other persons and it was held that joint power is invalid and "it (the Will) never gave any authority at all to the widow " But in the case of *Rajendra* v. *Gopal,* (*p*) the power was given to the widow but it was directed to be exercised "with the permission" of the father of the donor of the power. The result of this last decision of the Privy Council comes to this, that when a power is given to the widow to be exercised with the permission of another, the power will be extinguished if the other person dies before giving his permission, even when there is no provision in the power that it

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(*k*) Amrita *v* Surnomoyee, 27 C 996 : 27 I A 128 · 4 C W. N 549 on appeal from 24 C 589 1 C W N 345 and 25 C. W N 662 2 C W N. 389

(*l*) Amrita *v* Surnomoyee, *supra*, Pran Gopal *v* Chandra, 41 C L J 55, 60 1925 C 619

(*m*) *See* Bal Gongadhar Tilak *v* Shriniwas, 39 B 441 42 I A 135 19 C W N 729 22 C L J 1 · 29 M L J 34 29 I C 639 13 A L J 570 17 Bom L R 529. (Observation at the end of Judgment)

(*n*) Rajendra *v* Gopal, 10 P 187 34 C W N 1161 . 52 C L J 287 : 1930 P C 242 appeal from 4 P 67 . 1925 P 442 and 7 P 245 : 1929 P 51

(*o*) Amrita *v* Snrnomoyee, *supra*

(*p*) 10 P 187 : 34 C. W N 1161 . 52 C L J 287 : 1930 P C 242

will come to an end when that permission will be incapable of beingobtain ed. But this view of the law is against the spirit of Hindu law, and the opinion of the Patna High Court (*q*) which has been reversed, expressed the true spirit of the law.

Verbally, in writing,

Power how given.—An authority may be given either verbally, or by a Will, or by a writing (*r*) called *anumati-patra* which must now be engrossed on a stamp paper and must also be registered (*s*) A document though inoperative as a Will might nevertheless constitute a valid authority to adopt, requiring to be registered, under Section 40 of the Registration Act,(*t*) by the donor, or, after his death, by the donee of the power in the manner provided by Section 41, (*u*) it can be, in the absence of any guardian judicially appointed, presented for registration by the natural father of the adopted son (*v*)

Registration

Adoption by daughter-in-law.—In the Central Provinces where the exclusive estate of a person vests on his death in his predeceased son's widow, she can make a valid adoption to her husband so as to make the adopted son an heir to the last holder. (*w*)

Power incapable of execution when estate vests in son's widow and not in adopter,

Power incapable of execution—When a widow is authorized to adopt in the event of the death of an existing son, and the son dies, and the estate vests in the son's widow or any heir other than the first-named widow, then the first-named widowcannot adopt, as her power of adoption is then "incapable of execution and at an end", in other words, it is absolutely suspended so as to render an adoption then made

(*q*) 7 P 245 1929 P 51

(*r*) Mutsaddi *v* Kundan, 33 I A 55, Samsundara *v* Duriasimi, 27 M 30, Rustom *v* Dinkar, 55 I. C 38 N)

(*s*) Ananga *v* Kunja, 44 M 733 48 I A 482 26 C. W N. 374 41 M. L J 648 24 Bom L. R 600 64 I C 458 1922 P C 162.

(*t*) Act III of 1877

(*u*) Kondapalli *v* Mandapaka, 30 C W. N 193 P C. 49 M L J 247, *see* Ananga *v* Kunja, *above*.

(*v*) Venkatapayya *v* Venkata, 52 M. 175 33 C W N 261 49 C L J 148, in this connection *see* Narayana *v* Audilakshmi, 51 M 462.

(*w*) Baswantrao *v* Deorao, 1927 N. 2

absolutely void. (*x*) Even an adoption by the father's widow with the consent of the son's widow in whom the estate vested after son's death is invalid (*y*)

The power *should* revive when the estate reverts to, and becomes vested in her (*z*) But the Calcutta, Bombay and Madras High Courts have construed that expression of the Privy Council to mean, that the power is absolutely extinguished by the vesting of the estate in the son's widow and cannot revive on the estate reverting to the widow of the donor of the power, after the death of the daughter-in-law (*a*) These cases are in direct conflict with the decision of the Calcutta High Court, in which an adoption in similar circumstances was upheld as valid, as by making the same the widow divested her own estate only (*b*) The Calcutta High Court, in a recent case, (*c*) on a review of all the cases on the point, has said that "in all these cases the principle laid down appears to be that an adoption which would have the effect of divesting an estate already vested in a person other than the adopting mother, was not permissible" (*d*) It is further stated in the same judgment that "the object of adoption among Hindus is not merely the due perpetuation of lineage, but is also to secure for the adoptive father and his ancestors the spiritual blessings which only an heir male can confer * * * Moreover, the spiritual purposes of a son are not exhausted in the person of a son who though he attains maturity, yet dies without issue" The Madras High Court holds this view and rightly adds that the observation of the Privy Council in 41 M 855 is an *obiter* (*e*)

If, revives when estate ultimately vests in adopter

The Privy Council in a subsequent case (*f*) has stated the law in the following way "Unless there is a time limit imposed in the authority which empowers her to adopt, or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted The

(*x*) Pudma Kumari *v* Court of Wards, 8 I A 229 8 C 302, Thayamma *v* Venkatrama, 10 M 205 14 I A 67, Tara Charan *v* Suresh, 17 C 122 16 I A 166, Manikyamala *v* Nanda, 33 C 1306, Adivi *v* Nidamurty, 33 M 228, Madana *v* Purushothama, 38 M 1105 24 I C 999, affirmed by P C 41 M 856 45 I A 156 23 C W N 177 28 C L J 403 : 35 M L J 138 24 M L T 231 20 Bom L R 1041 16 A L J 725 46 I C 481, Venkataramier *v* Gopalan, 35 M L J 698 49 I C. 48 24 M L T 440, Amulya *v* Kali, 32 C 861, Uttamrao *v* Daulat, 1929 N 98 F B, *see* Amarendra *v* Banamali, 10 P 1 1930 P 417, *see* Lachmi *v* Durgai, 40 A 619 16 A L J 646 46 I C 566

(*y*) Sangangouda *v* Hanmantgouda, 55 B 699

(*z*) *See* Bhoobunmoyee *v* Ramkishore, 10 M I A 279, Manikchand *v*. Jagatsettani, 17 C 518

(*a*) Manikyamala *v* Nanda, 33 C 1306, Krishna *v* Shankar, 17 B 164, *see* also Adivi *v* Nidamurty, 33 M 228, Yeknath *v*. Laxmibai, 47 B 37 : 24 Bom L R 836

(*b*) Bykant *v* Kisto, 7 W R 392

(*c*) Kumud *v* Ramesh, 46 C 749, 758 23 C W N 358 · 29 C L J 214 · 49 I C 609, *See* Shivbasappa *v* Nilava, 47 B 110 24 Bom L R 1162

(*d*) *See* Bhimabai *v* Tayappa, 37 B 598 21 I C 107 15 Bom L R 783

(*e*) Tripuramba *v* Venkataratnam, 46 M 423 44 M L J 349

(*f*) Pratapsingh *v* Thakur, 43 B. 778. 46 I A 97 : 24 C W N 57, 67 : 50 I. C. 457 : 36 M L. J 511.

circumstances under which her power becomes extinguished is clearly pointed out by their Lordships in *Bhoobun Moyee's* case (g) and * * * in *Madan Mohan Deo* v *Purushothama*" (h)

It should, however, be observed that in such cases it must be owing to some accident that the son dies without making any provision for the continuation of the family Having regard to the intention of the son in such cases, that dies making provisions in this respect, and to their feelings on the subject, it is natural to presume the revival of the mother's power to be what the son would have assented to, had he expressed his views Such revival appears to be agreeable to the sentiments of the Hindus Besides, a Hindu widow inherits her husband's estate in the character of being the surviving half of her deceased husband as soon as she gives up that character by re-marriage, her estate comes to an end her life is deemed as a continuation of her husband's life Why then should the vesting of the son's estate, in the son's widow, or correctly speaking, the continuation of that estate in her, which had vested in her jointly with the husband since the time of their marriage extinguish the mother's power, when it is unaffected by the vesting in the son, otherwise than being merely suspended ? Moreover, the position of the mother is the same whether she inherits the son's estate just after his death, or after the death of his widow, the estate becomes vested in her as the son's heir in both cases, without any distinction whatever It is impossible to conceive any reason or principle for difference, with respect to the continuance of the power. Why should it revive in the one case, and be extinguished in the other ? It has been held that the son's marriage does not affect the mother's power, if his wife dies before him, and the mother succeeds on his death, she is competent to adopt (i) Would it not be arbitrary to hold that she is not competent to adopt, if she succeeds after the son's widow's death ?

Hindu sentiments in favour of revival of power of mother when estate vests in her, after son's widow

Hence, that expression must be taken to be used with reference to the actual facts of these cases The principle underlying their Lordship's decision appears to be that the adoption by a widow is the execution of the power of adoption which is a kind of power of appointment of the donor's estate (j) If that estate is not ready to drop down on the adopted son at the time of adoption by reason of the same being vested in a person other than the adopting widow, the power must be deemed *non est*, and the adoption void So, it has been held by the Privy Council, that though there is strong presumption that a Hindu likes to be represented by an adopted son if he dies sonless, still such presumption does not arise when a Hindu testator by his Will authorised his widow to adopt if no issue, male or female, should be born to him and when a posthumous daughter died shortly after her birth (k)

(g) 10 M I A 279
(h) 41 M 855 : 45 I A 156 on appeal from 38 M 1105
(i) Venkappa v Jivaji, 25 B 306
(j) Bhagwat v Dhanukdhari, 46 I A 259 1 Pat L T 1 53 I C 347 37 M L J 513 17 A L J 1036
(k) Bai Moti v Bai Mamu, 24 I A 93 : 21 B 709

Limit of time within which widow should exercise power

Limit to the exercise of power by widow.—Having regard to the religious belief and the feelings and sentiments of the Hindus that give to their widows power of adoption, to be exercised on failure of male issue by reason of a begotten or adopted son dying after the death of the donor of the power, the question as to the limit of time within which, and the conditions subject to which, the power should be exercised must be answered thus —The widow's death is the limit of time within which, and the failure of male issue in the male line and the vesting of the estate in the widow, are the only two conditions, subject to which, the power may be exercised

It makes no difference when the estate vests in the adopting widow just after the death of the son or after the death of his widow, or son, or even, grandson

The difference that has been laid down by judicial decisions (*l*) between the cases when the estate vests in the adopting widow after the death of the son, and after the death of the son's widow, son's son, son's grandson is not consonant with the feelings and sentiments of the Hindus There cannot be any doubt that the Hindu law on this subject should be enunciated in this manner, if the requirements of Hindu religion and the feelings of Hindus be respected Is there then "anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law" in allowing a Hindu widow to exercise the power of adoption subject to the said two conditions? The only difficulty in this matter is created by an observation of Lord Kingsdown, founded on an inaccurate view of the requirements of Hindu religion, expressed in these words,—"In this case, *Bhowani Kishore* (the son after whose death the adoption was made by his mother during his widow's life) had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father"

P C on the same

The law on the subject, could not have been enunciated in the way it was done on the basis of the above view, had it been brought to their Lordships' notice that the same was not the correct view, and that the service absolutely necessary in a religious point of view, which a Hindu son has to perform for his father, and which is ordained as the debt every man owes to his paternal ancestors, is, to leave behind him a male issue for continuing their lineage The religious belief of the Hindus that the continuation of male issue in this world is necessary for the spritual benefit of the whole series of the paternal ancestors from the father to the founder

(*l*) Manikyamala *v* Nanda, 33 C 1306, Adivi *v* Nidamurty, 33 M 228, Ramkrishna *v* Shamrao, 26 B 526, Krishna *v* Shankar, 17 B 164

of the *Gotra*,—is exemplified by the account of the interview of Jaratkaru, the bachelor ascetic and the *Pitris* or spirits of his paternal ancestors, in the Mahabharata, A'diparva, A'stika-parva, Chapter 13, and by the account of Ruchi in the Markandeya-Purana, Chapter 95 *et seq.* The Mahabharata is a work of the sacred literature embodying the ideals of conduct religious, moral and social, for the guidance of the Hindus, among whom the knowledge of its contents is disseminated in various ways, regarded as religious rites, such as recitation of the original Sanskrit, or impressive speech in vernacular explaining its contents, both made by learned Brahmanas It says that Jaratkaru in the course of his pilgrimage once met the spirits of his own ancestors in a large pit, suspended with their heads downwards and feet upwards, by one tiny root of a bamboo clump , seeing them in this plight, he was moved by sympathy and asked them who they were, and wherefore were they in that miserable position They said they were the ancestors of one Jaratkaru who was their only descendant on earth, and was leading a bache lor's life practising austerities, and was in consequence not likely to leave a son behind him , and therefore they must, for want of any male issue after him, fall down very soon from heaven to the earth, and that was the reason of their miserable state Thereupon Jaratkàru announced himself to them, who told him that he could save them by marrying and begetting male issue He promised to do so, and did marry and became the father of A'stika, and so the ancestors were saved

Story of Jaratkaru

Màrkandeya-Puràna—which contains the Devi-Màhàtmya also called Chandi, the recitation of which is regarded most auspicious,—is another sacred book of the Hindus It describes a discourse between the (*Pitris*) or spirits of ancestors and Ruchi who had fully subdued all appetites for pleasure, and controlled his senses and led a virtuous life of celibacy The *Pitris* en devoured to induce him to take a wife for getting male issue, and when Ruchi raised the objection that it was difficult and hard for a poor old man like himself to get or take a wife, they spoke to him thus —"Our downfall will assuredly come to pass, O son, and so also thy downward course, if thou dost not welcome our request," (and leave behind you a son) Ruchi was, however, induced at last to marry, and he became father of a renowned son (*m*) There are many other sacred books ordaining the necessity of the existence of male issue in this world for the continuance of the heavenly abode of the *Pitris* or paternal ancestors in the male line Thus it is clear that in a religious point of view, it is a spiritual necessity that the Hindu widow should be allowed to exercise the power of adoption when there is a failure of male issue , for it is the existence of male issue for the continuance of the lineage and not the performance by such issue of any religious rites, which is required for the spiritual welfare of the ancestors The widow is deemed the surviving half of her deceased husband, and her competency in this respect should be the same as that of her husband enjoining her to adopt on his behalf

Story of Ruchi

It is unreasonable to suppose that their Lordships of the Judicial Com mittee would adhere to their observations that partake of the character of *obiter dicta*, when the same were based upon an erroneous view of the religious

Result of decisions of Cal, Bom, & Mad

(*m*) Chapters 95-99, *see* Justice Pargiter's English Version, pp 526 et seq

belief of the Hindus All that has been held by their Lordships, is, that an adoption made by a widow is invalid, if at the time the estate is vested in the son's widow or some other person whose estate she cannot defeat by the exercise of the power Although there are expressions in the judgment appearing to restrict the widow's power within too narrow limits, such as that "the power is incapable of execution and at an end," when the estate is vested in the son's widow they are not to be taken literally as if their Lordships were legislating, but should be confined to the facts of the particular cases Their Lordships themselves observe that the fact of the descent being cast would make no difference "unless the case fell within the authority of that of *Bhobunmoyee* v *Ram Kishore*, (n) in which it was decided that the son having died leaving a widow in whom the inheritance had vested, *the mother could not defeat the estate which had so become vested by making an adoption*" (o) It has already been shown that there is no difference in the mother's succession, whether she gets the son's estate immediately after the son's death, or after the death of the son's widow who inherits first and after her the mother It would be arbitrary to say that the mother is competent to adopt in the former case, but not in the latter, it is absolutely impossible to find any rational principle for such a distinction excepting the view that a married son has exhausted the performance of all the religious services that a son may render to his father,—which must be discarded as being incorrect (p) In this case Mitter J held that the view taken by the Judicial Committee that a married son exhausted all the spiritual benefit that a son can confer on his father—is supported by no authority, and is contrary to the usages of Hindus and in the case of *Suryanaryana* (q) the Judicial Committee have approved of the observations made by Mitter J. on this question

Adoption made by widow when estate vests after son's widow is invalid.

But, even after the decision in the case of *Suryanarayana* the Calcutta High Court thought itself bound to follow the said *obiter dicta* of the Judicial Committee, and to set aside the adoption in a case where the estate had vested in the son's widow, and on her death passed to her mother-in-law who then made the adoption (r) This view of the law on widow's power to adopt, when the property vests in her after the death of the son's widow has been accepted by the Madras High Court (s)

(n) 10 M I A 279. 3 W R P C 15
(o) Raja Vellanki v Venkata, 4 I A at p 9 1 M 174 at p 186
(p) Ram v Surbanee, 22 W R 121, 123
(q) 33 I A 145, 154 29 M 382 10 C W N 921
(r) Manikyamala v Nanda, 33 C 1306 11 C W N 12, Kumud v Rai 46 C 749, 758 23 C W N 358 29 C L J 214. 49 I C 609,
(s) Adivi v Nidamurty, 33 M 228

That the attainment by a son, after the father's death, of ceremonial competency by marriage, investiture or otherwise before his death, is no bar to adoption, is held by Justice Ranade who explains that the real limitation on a mother's right to adopt is based by the whole current of recent decisions solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others (*t*) In a subsequent case in which a great number of authorities including this decision were cited, with respect to the effect of the attainment of ceremonial competency, the Judicial Committee observed that they appeared to their Lordships to be rather in favour of than against the validity of the adoption, but their Lordships did not express any opinion on the question excepting that it is open to controversy (*u*)

P C, on son's age and religious competency

In a later case, (*v*) however, in which a widow—whose husband had predeceased his father, and who succeeded to her father-in-law's estate which had devolved at first on her son, and then on her grandson who died unmarried, and lastly on herself as heiress of her grandson,—had adopted a son, three learned Judges of the Bombay High Court have held that the adoption was invalid, relying on the *obiter dicta* of the Privy Council in *Bhoobunmoyee's* case and also in other cases, in which what was actually decided, was, that an adoption made by the mother-in-law when the estate is vested in the daughter-in-law is invalid, and relying also on an earlier case of the same Court, (*w*) in which the adoption was made by the mother-in-law who succeeded to her son's estate after the death of the daughter-in-law who had inherited the same at first. But the same High Court has now held that a mother, who succeeds her son who died a widower, is competent to adopt a son even though the son had attained the age of ceremonial competency (*x*)

Bom H C on mother's power

(*t*) Venkappa *v* Jivaji, 25 B. 306, 312.
(*u*) Verabhai *v* Bai, 30 I A. 234, 237.
(*v*) Ramkrishna *v* Shamrao, 26 B 526.
(*w*) Krishna *v* Shankar, 17 B. 164.
(*x*) Anjirabai *v* Pandurang, 48 B. 492 : 26 Bom L R 326 80 I. C. 185 : 1924 B 441.

recent case

But in a recent case, the Bombay High Court has held that a grand-mother can adopt a son when the property on the death of her husband fell directly on her grandson and then on the death of the grandson it devolved on her as heiress of the grandson (y) The Madras High Court has held that a widow can adopt after the death of the wife and daughter of her son followed by the latter's death (z)

Madras

Discussion on the *obiter dicta*

It has already been said that the *obiter dicta* were made under the misconception of the religious ideas and sentiments of the Hindus There is no reason why the law should not be enunciated consistently with them, in the manner submitted above If the foundation, namely, the exhaustion of religious services by a son attaining a particular age,—fails, then the whole superstructure of the *obiter dicta* must necessarily fall And it would not be consistent with the true loyalty and respect due to the Lordships of the Judicial Committee to hold that their Lordships laid down an arbitrary rule founded on no principle, and that the same should be adhered to, notwithstanding the rejection of the limitation of ceremonial competency, by reason of the same being inaccurate, which alone did form the principle of the distinction It is a question of fact, not of law, and the inaccuracy of the view is due to the materials for the right view not being placed before their Lordships In this connection the following observations made by the Privy Council in an early case should be borne in mind, namely,—"The interest of Sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their Government, and no person can be happy whose religious feelings are not respected "(a)

No limit of time for the exercise of power

There is no limit of time—for the exercise by a widow in whom her husband's estate is vested, of the power of adoption , she may adopt at any time she pleases, when the estate is vested in her.(b) But it seems that there must be some limit when the husband's undivided coparcenary interest becomes vested on his death in the surviving male members of the family according to the Mitakshara.

Widow cannot adopt after re marriage

When widow cannot adopt.—As a widow adopts a son unto her husband, in her capacity of being his surviving half, she cannot adopt after re-marriage, nor when she is pregnant in adultery But in Bombay, a Sudra widow though unchaste

(y) Narhar v Balvant, 48 B 559 26 Bom L R 528 80 I C 435 1924 B 437

(z) Kolhapur, Maharaja v Sundaram, 48 M. 1 1925 M. 497.

(a) Ramtonoo v Ramgopaul, 1 Knapp 245 1 P C J 6.

(b) Mutsaddi v Kundon, 33 I A. 55 28 All. 377, Giriowa v. Bhimaji, 9 B. 58; Narayan v. Debidas, 47 I. C 41 (N)

can make a valid adoption (*c*) A widow cannot adopt a son when a son previously adopted by the husband is alive (*d*)

A widow after the death of her second husband cannot adopt to her second husband her son by the first husband, as in such case, the giving and taking must be by the same person (*e*)

Infant widow to be explained effect of adoption,

Adoption by infant widow—As an adoption by the widow divests her of her husband's estate, therefore in an adoption by a young widow, whether infant or not, the Court will expect clear evidence that at the time she adopted, she was informed of her rights and of the effect of the act of adoption upon them, and if it finds that coercion, fraud or cajolery was practised upon her to induce her to adopt, or that she was not a free agent, or that there was suppression or concealment of facts from her, it will refuse to uphold the adoption (*f*) The Court is to consider all the circumstances surrounding an adoption made by a minor when she disputes the same as not having been made by her of her free-will (*g*)

it invalid if fraud, coercion practised,

her age

It has been held that a minor girl of fifteen can make a valid adoption, (*h*) but a widow of twelve years of age (*i*) cannot, nor can a girl who has not attained sufficient maturity of understanding (*j*) to make a valid adoption

Sub-Sec iii KINSMEN'S ASSENT

Adoption by kinsmen's assent in Madras

Adoption by Kinsmen's assent in Madras—In the *Dravida* districts or the country governed by the Madras School of Hindu law a widow may, in the absence of prohibition, adopt with the assent of her deceased husband's kins-

(*c*) Basvant *v* Mallappa, 45 B 459 22 Bom L R 1400 59 I C 800

(*d*) Bhau *v* Narasagouda, 23 Bom L R 1272 64 I C 614, Bhujagouda *v* Babu Bala, 44 B 627 22 Bom L R 817 57 I C 573

(*e*) Fakirappa *v* Savitrewa, 23 Bom L R 482 (F B) 62 I C 318

(*f*) Somasekhara *v* Subhadra, 6 B 524 and Ranganayaki *v* Alwar, 13 M 214,

(*g*) Ganashamdas *v* Laxmibai, 24 Bom L R 726

(*h*) Basappa *v* Shidramadpa, 43 B 481, 486 50 I C 736 21 Bom L R. 217, *see* Parvatava *v* Fakirnaik, 46 B 307 23 Bom L R 1075

(*i*) Murgeppa *v* Kalawa, 44 B. 327 22 Bom L R 91, Parvatava *v* Fakirnaik, 46 B 307

(*j*) Ramachari *v*. Saraswati, 60 I.C. 246 (1920) M W N 721 12 L.W 544.

Whose assent necessary when husband was joint,

men (*k*) An implied prohibition is sufficient to prevent a widow adopting (*l*) Where adoption may be made by the widow with the assent of the kinsmen there if the husband was a member of an undivided family, the assent must be sought (*m*) from the surviving male members of the family. In such a case the assent of the senior and managing member may be sufficient, (*n*) but the assent of a divided kinsman will not be sufficient (*o*) It is not necessary that all the kinsmen should give their assent, the assent of the majority is sufficient in the absence of improper consideration, (*p*) such assent should be presumed to have been given on *bona fide* consideration (*q*) But there must be some reasonable justification for the omission to consult the other Sapindas otherwise, the adoption will be invalid (*r*) The consent of the husband's mother, in the absence of any other Sapinda, will validate an adoption (*s*) The proper person to give the requisite assent, is he, under whose guardianship the woman should remain according to the circumstances in each case. If there is the father-in-law, his assent (*t*) or that of the senior surviving co-parcener (*u*) is sufficient. The assent of the daughter's son who is a major and next heir and otherwise competent to advise is necessary (*v*)

(*k*) Veerabasavaraju v Balasurya, 41 M 998, 1007 45 I A 265 23 C. W N 251 36 M L J 40 48 I C 706 17 A L J 34 21 Bom L. R, 238 29 C L J 184 25 M L T 1 9 L W 243 Kristnayya v Lakshmipathi, 43 M 650, 653 47 I A 99 39 M L J 70 56 I C 391 24 C W N 905 39 M L J 70, *but see* Narasimha v Parthasarathy, 41 I A 51, 69 37 M 199, 220 18 C W N 554 19 C L J 369 26 M. L J 411 23 I C 166

(*l*) Krishnayya v Pittapur, Raja of, 51 M 893 1927 M 733

(*m*) Venkamma v Subrahmanyam, 34 I A 22 30 M 50 11 C W N 345 on appeal from 26 M 627

(*n*) Rama Rao v Narasimha, 28 M L J 363 28 I C 392 2 L W 286

(*o*) Varada v Brojo, 1 M 69 3 I A 154, Venkamma v Subrahmanyam, 34 I A 22 *see supra*

(*p*) Veerabasavaraju v Balasurya, 41 M 998, 1010 48 I C 706, Kristnayya v Lakshmipathi, 43 M 650, 654 47 I A 99 39 M L J 70 24 C W N 905 56 I C 391, Anne v Rattayya, 20 L W 503 83 I C 59 1925 M 67

(*q*) Venkata v Anna, 23 M 486, *see* Vadrevu v Rajah, 43 M 876, 881

(*r*) Subbamma v Adimoorthappa, 21 L W 85 1925 M W N 107 86 I C 269 1925 M 635

(*s*) Kolhapur, Maharaja v Sundaram, 48 M 1 1925 M 497

(*t*) Veerabasavaraju v Balasurya, 41 M 998, 1009, Collector of Madura v Mootoo, 12 M I A 397 10 W R 17, *see* Vithoba v Bapu, 15 B 110.

(*u*) *See* Rustom v Dinkar, 55 I. C 38 (N

(*v*) Anne v Rattayya, 20 L W 503. 83 I. C 59 1925 M 67

The assent of a son to an adoption by his mother, in case of his death, is sufficient assent to validate an adoption, where there has been no change in the circumstances and there are no other grounds to object to the adoption (*w*)

When husband was separate

If the husband was separate, the widow must *bona fide* apply (*x*) for the assent of the nearest Sapindas, and then it would seem that the consent of the presumptive reversionary heir must be taken (*y*) It is no excuse to say that the nearest Sapinda would have refused his assent without a just cause (*z*) But a nearest Sapinda who is incapable of forming a judgment, such as a minor, or a lunatic, or who is living in a distant country, may be ignored, so also the dissent of the nearest Sapinda who is clearly proved to be actuated by corrupt or malicious motives, may be disregarded (*a*)

Disqualification of Sapinda to give assent

Refusal of assent

But if the nearest reversioner refuses to give consent on the ground that by adoption he will forfeit his right to the property he expects to get, the widow can adopt with the consent of the remoter Sapinda (*b*)

Assent how long subsists

A general authority given to the widow by her husband's Sapindas "to adopt any boy at any time she liked" is not invalid if the adoption is made immediately and when all the Sapindas were alive. (*c*)

adoption after assenting Sapinda's death

But an assent previously obtained from a deceased Sapinda who was nearest at the time when the consent was obtained, cannot be efficacious to validate an adoption which is not approved by the nearest Sapinda at the time the adop-

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(*w*) Annapurnamma *v* Appayya, 52 M 620 F B 1929 M 577

(*x*) Chiravuri *v* Kallapalli, 48 I C 222 (1918) M W N 678 8 L W 413

(*y*) 34 I A 22 30 M 50 11 C W N 345 9 C L J 140 17 M L J 114 9 Bom L R 89 4 A L J 150 on appeal from 26 M 627, Krishnayya *v* Lakshmipathi, 30 M L J 265 32 I C 253 19 M L J 286 affirmed by P C 43 M 650 56 I C 391 *see also* Sohaj *v* Ram, 78 P L R 1914 69 P W R 1914 22 I C 542, There was a difference of opinion between two learned judges Anne *v* Rattayya, 20 L W 503 83 I C 59 1925 M 67

(*z*) Kristnayya *v* Lakshmipathi, 43 M 650, 654 *see above*, 41 M 998, 1011

(*a*) 43 M 650, Nagarampalli *v* Nagarampalli, 24 I C 257 (1914) M W N 620

(*b*) Venkatarama *v* Papamma, 39 M 77 27 M L J 638, Kristnayya *v* Lakshmipathi, 30 M L J 265 32 I C 253 affirmed by P C 43 M 650 56 I C 391, *see also foot note* (*j*) below

(*c*) Nagarampalli *v* Nagarampalli, 24 I C 257 (1914) M W N 620.

tion is actually made, (*d*) but a later decision seems to hold a contrary view. (*e*)

Assent how to be exercised,

The assent to be legally sufficient should be given after the exercise of discretion, not in exchange for valuable consideration (*f*) and not from any corrupt motive, (*g*) the assent must not be obtained by fraud, coercion or corruption (*h*) In giving or refusing his consent a Sapinda must act with the consideration of what is for the benefit of the family and not upon personal grounds (*i*) But a consent given by a Sapinda is not vitiated with fraud or corrupt motives, where he protects himself from loss that may be occasioned by such adoption (*j*) He is not bound to give reasons for his refusal to assent, but he cannot decline to state them in Court (*k*) But an assent validly given cannot be arbitrarily withdrawn, (*l*) but it can be revoked for a reasonable cause (*m*) Where a widow who, by representing to her husband's Sapindas that she had her husband's authority, induced them to give their consent to an adoption made by her, but who fails to prove her husband's authority, cannot support the validity of the adoption by the consent of Sapindas who thought they were only ratifying the husband's authority (*n*)

cannot be arbitrarily revoked,

how to be sought

A registered letter in a cover requesting assent to an adoption being returned unopened by the kinsmen competent to give assent, is not a valid consultation. (*o*) It should not be

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(*d*) Mamu *v* Subbaiyar, 35 M 145, 148 19 I. C 663 24 M L J 484, *see* Lakshmibai *v* Vishnu, 29 B 410 7 Bom L R 436

(*e*) Suryanarayana *v* Ramadass, 41 M 604, 610 34 M L J 87 22 M L T 501 43 I C 526

(*f*) Danakoti *v* Balasundara, 36 M 19 18 I C 989, Anne *v* Rattayya, *see above*

(*g*) Venkamma *v* Subramaniam, 30 M 50 34 I A 22 17 M L J 114 11 C W N 345 5 C L J 140 9 Bom L R 89 4 A L J 150 on appeal from 26 M 627

(*h*) Sri Vadrevu *v* Ryali, 43 M 876

(*i*) Krishnaiyya *v* Pittapur, Raja of 51 M 893 1927 M 733, Venkatapathi *v* Punnamma, 28 I C 373 17 M L T 218 (1915) M W N 236

(*j*) Srinivasa *v* Rangasami, 36 M 450, *see also foot note* (*b*) above

(*k*) Anne *v* Rattayya, *see infra foot note* (*o*)

(*l*) Suryanarayana *v* Sunkura, 41 M 604 34 M L J 87

(*m*) Suryanarayana *v* Ramdoss, 41 M 604, 610 34 M L J 87

(*n*) Venkamma *v* Subrahmanyam, 34 I A 22 30 M 50 appeal from 26 M 627

(*o*) Anne *v* Rattayya, 20 L W 503 83 I C 59, 1925 M 67

sought by false representation that there was husband's authority. (*p*)

Adoption without assent in Bombay.

Adoption without assent in Bombay—In Bombay a widow in whom her husband's property is vested, may adopt without any authority from her husband or assent of his kinsmen, in the absence of express prohibition (*q*) or direction(*r*) by her deceased husband, provided she does not act capriciously or from any corrupt motive. But a widow, whose husband at the time of his death was joint with his co-parceners, cannot adopt without the consent of the husband's co-parceners, (*s*) even when the co-parcener was in his mother's womb at the date of adoption (*t*) The consent of the co-parcener becomes inoperative after his death (*u*)

Husband's assent presumed.

The husband's assent is presumed from the absence of express prohibition, but no such presumption arises in the presence of a natural son. (*v*) But mere refusal to adopt by the husband during his life-time is not of itself tantamount to a prohibition to adoption by his widow. (*w*)

Widow's power when estate vests in relations.

But when the husband's estate is vested in other relations, she may adopt only with their assent, if the husband gave none (*x*) But acquiescence implied by mere presence at the ceremony and the absence of any objection is not equivalent to consent (*y*) When one or two undivided brothers died leaving a son, and this son, having separated from his uncle, died leaving his mother as heir, the adoption then

(*p*) Venkata *v* Venkamma, 1927 M. 706

(*q*) Ramji *v* Ghamau, 6 B 498, Shri Sitaram *v*. Shri Harihar, 35 B. 169.

(*r*) Sitabai *v* Bapu, 47 C 1012 25 C W N 97 39 M L J 106.

(*s*) Bachoo *v* Mankorebai, 31 B 373 34 I A 107, Lakshmibai *v* Vishnu, 29 B 410, Vithoba *v* Bapu, 15 B 110, Ramji *v* Ghamau, 6 B 498, Dinkar *v* Ganesh, 6 B 505, Yashodi *v* Chandradhan, 1929 N 367, Tani *v* Krishnappa, 1920 N 289, in this connection read "Adoption by Kinsmen's assent in Madras" above.

(*t*) Bala Anna *v* Akubai, 50 B 722 1926 B 584 99 I C 417

(*u*) Lakshmibai *v* Vishnu, *supra*

(*v*) Dalpatsingji *v* Raisingji, 39 B 528 17 Bom L R 566 29 I C 943

(*w*) Sitabai *v* Govindrao, 1927 B 151

(*x*) Bhimabai *v* Tayappa, 37 B 598 21 I C 107 15 Bom L R 783, Shidappa *v* Ningangauda, 38 B 724 16 Bom L R 663 27 I C 51, Payapa *v* Appanna, 23 B 327, Pandu *v* Dhondi, 22 Bom L R 1403 59 I C 783, Dattatraya *v* Gangabai, 46 B 541 : 24 Bom L R 69

(*y*) Vasudeo *v* Ram, 22 B 541, Bhimappa *v* Basawa, 29 B 400,

made by the mother without the assent of her husband's brother, is held valid (z)

P C on above,

But the Privy Council has held that in the Maharatta country of the Province of Bombay, however, a widow may, without the permission of her husband, and without the consent of his kindred, adopt a son to him, no matter, whether her husband at the time of his death was joint or separate and whether his property was or was not vested in her as his heir at the time when she made the adoption (a) A Full Bench of the Bombay High Court considered the effect of this Privy Council judgment on the decision in *Ramji* v *Ghamau* (b) and held that this decision is not overruled by the Privy Council and that in the Bombay Presidency, the widow of a deceased co-parcener, in the absence of an express authority from her husband, cannot make a valid adoption under her own inherent right, without the consent of the surviving co-parceners of her husband in whom the property passed by survivorship (c)

explained by F B.

Regarding the questions relating to assent, *see* "Adoption by kinsmen's assent in Madras" *above*.

Sec 4—WHO MAY GIVE IN ADOPTION

Who may give in adoption

Father and Mother—The father and the mother only of a boy are competent to give him away in adoption (d) The concurrence of both would be desirable But the father may act even against the will of the mother. The mother, however, cannot give without the assent of her husband while he is alive, but after his death she can give her son in adoption, in the absence of express prohibition by her husband (e)

(z) Mallappa v Hanmappa, 44 B 297, 302 22 Bom L R 203 55 I C 814
(a) Yadao v Namdeo, 49 C 1 17 N L R 145 48 I A 513 26 C W N 393, 403 20 A L J 481 24 Bom L R 609 4' M L J 291 64 I C 536
(b) 6 B 498
(c) Ishwar v Gajabai, 50 B 468 F B 28 Bom L R 782 96 I C 712 1926 B 435, see Bhimabai v Gurunathgauda, 1928 B 367, Babani v Parawa, 50 B 815, 828 1927 B 68
(d) Shrinivas v Balwant, 37 B 513 15 Bom L R 533 20 I C 162, Vaithilingam v Muruganan, 23 M L J 189 15 I C 299 37 M 529, *see also* Krishna v Paramshri, 25 B 537
(e) Jogesh v Nritya, 30 C 965 7 C W N 871, Tukaram v Babaji, 1 Bom L R 144, *See* Dhanraj v Soni Bai, 52 C 482 52 I A 231 49 M L J 173 27 Bom L R 837 23 A L J 273 21 N. L R 50 87 I C 357 1925 P C, 118.

There is a great distinction between the giving and the taking of a boy in adoption, as regards woman's capacity in that behalf Her power is almost unrestricted as regards *gift*, but not so as regards acceptance, though both seem to be dealt with in the same way, and the assent of the husband is required by Vasishtha, (*f*) as well to the *gift* by the wife of a son in adoption, as the *acceptance* by her of a boy for adoption as son unto the husband

Difference between giving and taking by woman

But as adoption is a kind of advancement of the boy who is to become entitled to a rich inheritance, and as such benificial to him, it may be safely left to the discretion of a mother to make a gift of her child for adoption, and the father's assent required by the text of Vasishtha may be presumed in the absence of express prohibition. (*g*)

Adoption, an advancement

Gift by Widow.—But a widow has no power, after her re-marriage, to give in adoption her son by her first husband. The Bombay High Court has held that the right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, but which is lost by re-marriage (*h*) The capacity to give may also be regarded as an incident of guardianship which she loses by re-marriage (*i*) But the Bombay High Court has held that where the husband authorized his widow to give their son in adoption, the widow can make a valid gift in adoption even after her re-marriage (*j*) But a re-married widow cannot give her son in adoption to her second husband after his death as the giver and taker would be the same person (*k*)

Power to give after re-marriage of widow

As regards the gift of an only son,* the effect of which would be the extinction of the family, and the cessation of spiritual benefit derived from the son, it is doubtful whether

Gift of only son by widow

(*f*) Text No 2
(*g*) *See* Mukund *v* Jagannath, 2 P 469 4 Pat L J 421 1 Pat L R 201
(*h*) Panchappa *v* Sanganbasawa, 24 B 89, Sheokabai *v* Ganpat, 20 N L R 57 79 I C 142 1925 N 1
(*i*) *See* Sheokabai *v* Ganpat, 1925 N 1 (F B
(*j*) Putlabai *v* Mahadu, 33 B 107
(*k*) Fakirappa *v* Savitrawa, 23 Bom L R 482 (F B) 62 I C 318
* *See post p* 230 "Only son"

this presumption of assent in the absence of express prohibition, can legitimately be made This appears to be the principle of the distinction, upon which Sir Michael Westropp's view is based, namely, "that assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law" But if the father was poor, he may be fairly presumed to have preferred the son's secular benefit by adoption, to the spiritual benefit of himself and his ancestors And the mother's action in this respect may be taken to be governed by the same considerations, as that of the father. The attention of the Judicial Committee seems to have not been directed to the principle underlying the distinction which is therefore pronounced by their Lordships to have been quite novel. And their Lordships approved of the view expressed by the Madras High Court that the wife's power, at least with the concurrence of *Sapindas* in cases when that is required, is co-extensive with that of the husband.(*l*) But it should be observed that in this case there was the requisite assent to enable the mother to make the gift, for, according to the guardianship theory adopted in Madras, the husband's kinsman's assent is sufficient.

Not even step mother.

No relation except parents.—Considering the consequences of adoption which appears to operate as civil death of the boy as regards the family of his birth, the law confers on the parents only, the power of making a gift in adoption. (*m*) A stepmother, or any other relation, cannot make such a gift. (*n*) But in a case where the question of the validity of adoption was raised after 38 years of adoption, the Calcutta High Court, not without considerable hesitation, has held that an adoption of an orphan given by his brother after the death of the parents is valid on the doctrine of *factum valet.* (*o*)

(*l*) Sri Balusu v. Sri Balusu, 26 I A 113, 128 3 C W N 427 22 M 398, Lakshmibai v Sarasvatibai, 23 B 789, 798
(*m*) Dhanraj v Soni Bai, 52 C 482, 488 52 I A 231 49 M L J 173 27 Bom L R 837 23 A L J 273 21 N L R 50 : 1925 P C 118 : 87 I C 357
(*n*) Papamma v Venkatadri, 16 M 384
(*o*) Bhagwant v Muranlal, 15 C L J 97, 109 . 15 C.W N 524 7 I C 427

The doctrine of *factum valet*, however, cannot be applied to validate an adpotion of an orphan. (*p*)

Delegation of Powers.—The parents cannot delegate this power to any other person, (*q*) but it has been held that the persence of the natural father at the time of adpotion and his direction to hand over the boy is sufficient compliance with the law (*r*) But the gift and acceptance form the essential part of the ceremony, if the parents have performed the same they may delegate the religious portion to any relation or to their priest for performance and completion of the adoption (*s*) When a Bráhmana died after having taken a boy in adoption but before the ceremony of the Datta-Homam was performed, and the same was performed by his widow, the adoption was held valid. (*t*)

Parents can not delegate this power.

Religious ceremony performed by others

Gift by convert—The power which the Hindu law confers on a father to give away his son in adoption is not lost by a Hindu pervert to Islamism If he thinks it beneficial to his son to remain a Hindu, and to be adopted as a son to a Hindu adopter, he is competent to give away the son in adoption. He may be a party to the secular gift and acceptance, and may delegate to a relation the performance of the religious portion of the ceremony of adoption In a case in which the natural father after having adopted the Mahomedan religion was desirous to give his son in adoption and authorized his Hindu brother to make the gift, and then died, and subsequently the boy was given by his said uncle, it has been held that the father was competent to delegate the authority, and the adoption was good (*u*) On the same principle it has been held that a Hindu becoming a *Brahma* may give his son in adoption, the religious ceremony being performed by a

Converted Mohommedan can give away

So also a *Brahma*.

(*p*) Sonibai *v* Dhanraj, 56 I C 620 (N), *see also* Mareyya *v* Ramalakshmi, 44 M 260 60 I C 141 39 M L J 495 28 M L T 428 1 (1920) M W N 708, *see also* 'Orphans' p 219 *infra*

(*q*) Dhanraj *v* Soni Bai, *see* above

(*r*) Chatibai *v* Shrimali, 88 I C 573 1925 S 223

(*s*) Lakshmi *v* Ram, 22 B 590

(*t*) Subba *v* Subba, 21 M 497

(*u*) Sam *v* Santa, 25 B 551

Hindu relation, the son is entitled to revert to Hinduism with the father's consent (v)

Consideration for giving —Though the parents have the power to give the boy in adoption, yet an agreement to pay an annuity in consideration of giving the boy in adoption is invalid and unenforceable. (w)

Sec. 5—WHO MAY BE GIVEN AND TAKEN IN

Sub-Sec 1—QUALITY OF SONS TO BE TAKEN

Adoption of only son valid

Only Son.*—With respect to eligibility for adoption, the only rule on the subject, propounded by the well-known legislators, is the prohibition contained in the above text No 2, (x) of Vasishtha, forbidding the adoption of an only son. This rule is merely recommendatory in character, and it was held to be so by all the superior Courts in India till 1868 A D., when for the first time, it was held by a Division Bench of the Calcutta High Court that the adoption of an only son is invalid One of the Judges was Justice Dwarka-nath Mitter, but being a "lawyer without Sanskrit" he was not in a better position than the European Judges holding the contrary view, as regards the interpretation of Hindu law. (y) The Bombay High Court also had, since that decision, been expressing their opinion against the adoption of an only son till a Full Bench of that Court did in 1889 A D, hold such adoption to be invalid (z) But such adoption has all along been held valid in Madras, N W. Provinces and the Punjab. In 1892, a Full Bench of the Allahabad High Court did, upon a reconsideration of the law and the previous cases, come to the conclusion that the adoption of an only son is valid (a) The very fact of there being so much difference of opinion, proves the rule to be of moral obligaiton only

P C., on above

But the controversy has been set at rest by the decision of the Judicial Committee holding the adoption of an only

(v) Kusum v Satya, 30 C 999 7 C W N 784
(w) Narayan v Gopal, 24 Bom L R 414 67 I C 850
* *See ante p 227*
(x) *Ante*, p 187
(y) Raja Opendur v Ranee Bromo, 10 W R 347, and Manik Chunder v Bhuggobutty, 3 C 443
(z) Woman v Krishnaji, 14 B 249
(a) Beni Prasad v Hardai Bibi, 14 A 67, see Dharam v Kalawati 50A 885 1928 A 459

son to be valid. (*b*) This view is perfectly consistent with what is deducible from the Sanskrit works on law, and it is due to misapprehension of their meaning, that some learned writers maintain the contrary view.

Joint adoption of same boy invalid.

Joint adoption of the same boy.—The adoption by two brothers (*c*) or by two widows even of two brothers, (*d*) of the same boy either at the same time or at different times is invaid.

Adoption of orphan invalid.

Orphan.—It has already been said, (*e*) that the law confers on the parents only the power of making a gift in adoption, without which no adoption can be valid (*f*) So it has been held that an orphan cannot be taken in adoption. (*g*)

factum valet

The principle of *factum valet* does not apply even if an adoption, as a matter of fact, has taken place, (*h*) nor will the adoptive father be estopped from questioning the validity of such adoption where both sides were aware of the full facts. (*i*)

Custom

The adoption among *Jains* is a mere temporal or secular arrangement and has no spiritual or religious significance and hence an adoption of an orphan is valid by custom among them (*j*) So adoption of orphans is customary among the *Dhusars* of Gurgaon, (*k*) and *Jats* of Ballabgarh district (*l*)

(*b*) Sri Balusu v Sri Balusu, 26 I A 113 22 M 398 *See also* Ganapati v Krishna, 73 I C 204

(*c*) Dhanraj v Soni Bai, 52 C 482, 488 P C 52 I A 231 49 M L J 173 27 Bom L R 837 23 A L J 273 21 N L R 50 87 I C 357 1925 P C 118

(*d*) Gopi Kishen v Gopi, 27 P W R 1915 57 P L R 1915 27 I C 701.

(*e*) *p* 226-227 *supra*

(*f*) Dhanraj v Soni Bai, *see above*

(*g*) Dhanraj v Soni Bai, 52 C 482, *see above*, Shrinivas v Balwant, 37 B 513 15 Bom L R 533 20 I C 162, Vaithilingam v Murugain, 37 M 529 23 M L J 189 15 I C 299, Bandiru, v Bandiru, 44 M 260 (1920) M W N 708 60 I C 141 12 L W 113 39 M L J 495, Ramkishore v Jainarayan, 48 I A 405 17 N L R 163 26 C W N 881 49 C 120 20 A L J 857 64 I C 782 42 M L J 80 1922 P C 2 (after remand 40 C 966), followed in Ramji v Durga, 6 P R 1918, Wiryam v Jiwan, 205 P L R 1913 19 I C 254, Chhinga v Jai, 6 L L J 174 1924 L 480 78 I C 161, Sukhbir v Mangeisar, 1927 A 252

(*h*) Sonibai v Dhanraj, 55 I C 620 (N), *see also* Mareyya v Ramalakshmi, 44 M 260 60 I C 141 39 M L J 495 28 M L T 428 (1920) M W N 708, *see also* Bhagwant v Murarilal, 15 C L J 97, 109 7 I C 427

(*i*) Rajambal v Shanmuga, (1922) M W N 481

(*j*) Parshottam v Venichand, 45 B 754 23 Bom L R 227 61 I C 492,

(*k*) Ramkishore v Jainarayan, *see above*

(*l*) Brij Raj v Basant, 1929 A 561

The person who sets up such a custom is to prove it. (m)

Prohibition of eldest son, one of two sons directory

Some other similar rules held admonitory—There are some commentators who say that a man should not give away his son in adoption when he is not in distress, and that he should not give in adoption his eldest son or one of two sons. But these are considered to be merely directory and not imperative.

Rule of preference recommendatory.

The Dattaka-Mìmànsà and still later commentaries say that a man should adopt his brother's son if available for adoption, in default of him he should adopt a *sapinda*, in his default a *samànodaka*, and in default of an agnate relation he should take one belonging to a different *gotra* or family. But this rule relating to preference in selection has been held by the Privy Council to be merely recommendatory. (n)

Sub-Sec ii—PROHIBITED RELATION

Prohibited relations amongst twice-born,

based on Saunaka

Prohibition of certian relations for adoption by twice-born classes—Nanda Pandita and his followers maintain that certain relations such as a brother or an uncle, or the son of a daughter, or of a sister, or of the mother's sister, or the like, should not be adopted by a twice-born person No such rule is laid down in any earlier commentary Nanda Pandita deduces the rule from two texts of doubtful import, which are not noticed by any commentator of note, and one of which is said to be a text of Saunaka and the other of Sàkala, neither of whom is recognized as a legislator, and whose names are not found in most of the commentaries on positive law. The texts are as follows —

(1) दौहित्रो भागिनेयश्च शूद्रैस्तु क्रियते सुतः ।
ब्राह्मणादि त्रये नास्ति भागिनेयः सुतः क्वचित् ॥ शौनकः ।

which means,—"A daughter's son and a sister's son are made sons by *Sùdras*. among the three tribes beginning with the Bráhmana, a sister's son is not (made) son somewhere (or anywhere)"—Saunaka

The second line of this couplet is not found in many copies This passage is found, in a book on ritual, the authorship of which is attributed to Saunaka, but which on perusal would appear to be a modern production It does not profess to deal with law, but while dealing with the ritual of *Jàta karma* or the natal ceremony, it professes to describe the ritual of adoption, and the above passage and some others relating to adoption are found after the description of the said ritual In the course of describing the ritual, it is said after the formal gift and acceptance have been completed, that the boy *bearing the reflection of a son* पुत्रच्छायावहं should be adorned &c, and brought within the house where *homa* should be performed

(m) Sukhbir v Mangeisar, 1927 A 252
(n) Wooma Dayee v Gokoolanund, 3 C 587 5 I A, 40,

(2) सपिण्डापत्यकञ्चैव सगोत्रजमथापि वा ।
अपुत्रको द्विजो यस्मात् पुत्रत्वे परिकल्पयेत् ।
समानगोत्रजाभावे पालयेत् अन्यगोत्रजं ।
दौहित्रं भागिनेयञ्च मातृस्वसृसुतं विना । शाकलः ।

and Sákala

which means,—"A sonless twice-born man *shall* or *should* adopt, a son of a *Sapinda* or also next to him a son of a *Sagotra*, and in default of the son of a *Sagotra*, *shall* or *should* adopt one born of a different *gotra*, except the daughter's son, the sister's son, and the mother's sister's son "—Sákala

From what book of Sákala's these lines are quoted by Nanda Pandita, or whether Sákala is the author of any book, no one can tell

Nanda Pandita's conclusions

From the above couplets of Saunaka and Sákala and the words "*bearing the reflection of a son*" qualifying the boy, Nanda Pandita deduces the rule that amongst the twice-born classes such a boy should be adopted, as could be begotten by the adopter on the boy's mother by appointment to raise issue in the Kshetraja form, and accordingly he prohibits the adoption of the relations mentioned above

Sutherland's Marriage theory

Sutherland, the learned translator of the Dattaka-Mimansa and the Dattaka-Chandrika, formulates the rules thus,—That a twice born man cannot adopt a boy when the relationship between the boy's mother and the adopter is such that there could have been no valid marriage between the adopter and the boy's mother, had she been unmarried This, however, does not correctly represent Nanda Pandita's view, for, this rule cannot exclude the relations whom he has expressly excluded

Nanda Pandita's rule not imperative because

Discussion as to there being any such binding rule —If what Nanda Pandita says be accepted as authoritative and imperative, then the utmost that can be said is, that the relations to be avoided are only those enumerated by him If on the other hand, it be open to us to examine the text with a view to see whether there is any binding rule prohibiting the adoption of any relation, then the question cannot but be answered in the negative, as has been done by the Full Bench of the Allahabad High Court (*o*) for the following reasons —

(1) Saunaka's texts not a command,

(1) The above text of Saunaka does not embody any command or चोदना in the language of the Mimansa but it is merely a statement of facts, or what is called in Sanskrit a ध्यातार्थवाद. । As regards the words "*bearing the reflection of a son*" forming an adjective of the boy who has already been formally given and accepted, they can fairly be taken to indicate only the effect of the ceremony already performed, but they can by no means imply the meaning forced upon them by Nanda Pandita, who has rather evolved it out of his inner consciousness, than from the natural import of the words

(2) Sakala merely enumerates the order,

(2) Then as to Sákala's text, it should be observed in the first place, that the object of the text is not to lay down who should or should not be adopted, but to declare who should be adopted first, who next, and who last or in other words the order of preference in the matter of selecting the boy to be adopted It says, you *shall* or *should* adopt from amongst the *Sapindas*, in

(*o*) Bhagwan Singh *v* Bhagwan, 17 A 294, See p 240 foot note (*g*)

their default, from amongst the distant *Sagotras* or agnates, and in default of agnates, from amongst those belonging to a different *gotra* such as cognates, then follows the exception, "except the daughter's son, the sister's son, and the mother's sister's son." Now the question arises, to what does the exception relate? It admits of two constructions, one of which is logical (अर्थविधया) and the other grammatical (शब्दविधया).

Logical construction

If the text be construed *logically* or having regard to its true intention, the rule may be put thus—"If a *sapinda* is available for adoption you *shall* or *should* not adopt a distant *sagotra* or agnate, and if an agnate is available for adoption you *shall* or *should* not adopt one belonging to a different *gotra* or family, except the daughter's son, the sister's son, or the mother's sister's son,"—that is to say, the daughter's son, the sister's son, and the mother's sister's son, though belonging to a different *gotra*, may be adopted although there may be an agnate available for adoption thus, the exception relates to the *order* which is the subject of the rule. And this construction is consistent with what is laid down by all the sages dealing with positive law. For, they recognize the twelve kinds of sons, therefore a daughter's son may according to them, be the son of the maternal grandfather, as *Putrikâ-putra* or appointed daughter's son, or as *Kanîna* or maiden daughter's son. Hence there is no reason why the same daughter's son cannot be his maternal grandfather's son as *Dattaka* or given son. Therefore, consistently with what is necessarily implied by these well-known legislators, Sâkala cannot be taken to prohibit the adoption of "the daughter's son" who has been declared to be most eligible as a subsidiary son under the name of *Putrikâ-putra* declared to be equal to the *Aurasa* or real legitimate son,—and consequently, of "the sister's son and the mother's sister's son."

Grammatical construction,

Next, if the text be construed *grammatically*, then the exception is to be connected with the verb "*shall* or *should* adopt," and the text must be put thus "In default of an agnate, he *shall* or *should* adopt one belonging to a different *gotra* except (or but not) the daughter's son, the sister's son, and the mother's sister's son,"—therefore the prohibitory proposition or sentence must *grammatically* be formed with the verb "*shall* or *should* adopt" as used in the text, and must stand thus,—"But he *shall* or *should* not adopt the daughter's son, the sister's son, and the mother's sister's son."

Same,

It should, however, be borne in mind in this connection, that the Privy Council have declared the rule propounded by Sakala relating to the order of preference, to be directory only (*p*). Therefore, although the word पालयेत in Sàkala's text may, having regard to its form, mean either *shall* or *should* adopt," it must now be taken to mean "*should* adopt" consequently, the very same word पालयेत् or "*should* adopt" being grammatically connected with the exception, the prohibitory sentence must mean, "But he *should* not adopt the daughter's son, the sister's son, and the mother's sister's son"—that is to say, the exception also must be a precept of moral obligation, like the rule. In this connection the following Sanskrit rule of construction

(*p*) Wooma Dayee *v* Gokoolanand, 3 C 587 5 I A 40

should be borne in mind, namely सकृदुच्चरित शब्द. सकृदर्थं गमयति or "a word once pronounced can convey only one meaning" hence, although the word पालयेत् may mean either "*shall* adopt" or "*should* adopt", it being authoritatively settled by the decision of the Privy Council that it means "*should* adopt" in connection with the rule, it cannot but bear the same meaning when grammatically connected with the exception

This interpretation appears to be unexceptionable and unassailable from a Sanskritist's as well as a lawyer's point of view its correctness, however, depends upon the view adopted by the Privy Council, of the rule relating to the order of preference for adoption And the view taken by the Judicial Committee appears to be supported by the Mimansa Those who feel curiosity to study the subject with details, are referred to Jaimini's Mimansa with Savara-svami's Bhashya, (*q*) and specially to विधिवन्निगदाधिकरणम or "the topic of recommendations in the form of imperative rules (*r*) In this topic is discussed the question, whether precepts like the following are imperative or only recommendatory, namely, उदुम्बरो यूपो भवति, &c, or "A sacrificial post is made of (the wood of) the Udumvara tree, &c" and the conclusion arrived at is, that it is merely recommendatory, one of the reason assigned being विध्युनग्राह्य स्तुतिसम्भवश्च "the improbability of the precept being imperative, and the probability of its being a recommendation" A sacrificial post is but a means to an end, it is necessary for tying the animal to be sacrificed any strong wood would be sufficient for the purpose, therefore the above precept is interpreted to be a recommendation only Similarly, an adopted son is only a means to an end, and the direction that a brother's son if available should be adopted, in his default a *sapinda*, and so on,—is, for similar reasons, merely recommendatory The truth is, that there are various reasons for considering a rule to be recommendatory only (अर्थवाद or प्रसज्यप्रतिषेध.) and not imperative विधि or पर्युदास)—हेतुवन्निगद or "a precept with the reason for it," being only one of the tests for discriminating it as directory and it is impossible for an unbiased and unprejudiced mind that is versed in Sanskrit law, to find fault with the rational view taken by the Privy Council, of the rule relating to the order of preference for adoption, and with its corollary that the exception to it is of the same character with the rule, having regard to the language of the text, and to the rules of construction

P C on same,

(3) It is conceded that the adoption of the daughter's and the sister's son is valid amongst the *sudras* (*s*) From this it may, according to Sanskrit rules of construction, be, very fairly inferred that such adoption amongst the twice-born classes is only censured and not absolutely interdicted But the Bombay High Court, relying on a hasty conclusion come to by Sir Raymond West, an eminent Judge and Sanskritist, gets rid of that circumstance by observing

(3) Such adoption valid amongst Sudras.

(*q*) Ch I, Pada or Section 2, and Ch XI

(*r*) Ch 1, 2, 19 et seq

(*s*) (*Sarin Khatris* of U P follow this) Makham *v* Kanhaiya, 86 I C 305 : 1925 A. 688.

that "the Hindu Law regarded the *sudras* as slaves, and their marriages as little better than concubinage" (*t*) With great deference to Sir Raymond, it must be said that the above proposition is entirely erroneous, for, the Smritis or Codes of Hindu law did not regard the *sudras* as slaves, and their marriages as concubinage

Who are twice-born and who are Sudras

According to the Smritis, every man is by birth a *sudra*, it is by learning the sacred literature, that a man becomes twice born The privilege of studying the sacred literature is, no doubt, denied to the *sudras* as well as to the females of the so-called twice born classes But the status of being *twice-born* depends on the acquisition of knowledge of the sacred literature Manu (*u*) ordains that a twice-born man shall abide with the preceptor, and study the the Vedas for thirty-six years or a half or a quarter of that period, or until knowledge of the same is acquired The consequence of omitting to do the same is thus declared by Manu (*v*)

योऽनधीत्य द्विजो वेदम् अन्यत्र कुरुते श्रमं ।

स जीवन्नेव शूद्रत्वम आशु गच्छति सान्वय ॥ मनु २, १६८ ।

which means,—"That twice born man, who without studying the Vedas, applies diligent attention to anything else, soon falls even when living, together with his descendants, to the condition of a *sudra*" Hence the males of the twice born classes, who have no knowledge of the sacred literature, are like their females, in the same category as *sudras*, *i e*, they remain such as they are by birth The majority of the so called twice born classes have accordingly become long since reduced to the position of *sudras* by reason of neglecting the study of the Vedas from generation to generation It follows, therefore, that according to the Smritis, the *sudra* law should be applicable to them who are twice born by courtesy only, and hold the position of *sudras* Our Courts of Justice are called upon, therefore, to enquire, in every such case, whether the so-called twice-born litigants are really so, before applying to them a rule different from that applicable to the *sudras*, and in ninety-nine cases out of a hundred, it will be found that the parties, though twice-born by courtesy, are really *sudras* by qualification There are, no doubt, some modern fabrications called *Upa Puranas*, and concocted for the purpose of avoiding the foregoing evil consequence propounded by the Smritis,—which say that the study of the Vedas for a long time is a practice which is to be eschewed in the Kali age(*w*) and accordingly a farce of the Vedic study for a day or two, is now made when the *upanayana* ceremony is nominally performed, and fittingly called investiture with the sacred cord, though it really meant commencement of the study of the Vedas, the literal import being *taking* (a boy and handing him over) *to* (a teacher of the Vedic literature) But these spurious books forged and thrust into prominence by the Pandits of the Mahomedan period for the benefit of the unlearned members of their class, cannot

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(*t*) Gopal v Hanmant, 3 B 273 (289)
(*u*) Ch III, verse 1
(*v*) Ch II, 168
(*w*) See *ante*, p 10

be regarded as any authority by a British Court of Justice The *Puranas* and specially the *Upa-Puranas* are no authority in law The Courts of Justice are to be guided by the Smritis and the ancient customs only, as is declared by Yajnavalkya (ii, 5) while defining a *cause of action*, thus—

> स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।
> आवेदयति चेद् राज्ञे व्यवहार पद हि तत् ॥ याज्ञवल्क्य. २, ५ ।

which means,—"If a person wronged by others in a way contrary to the Smritis or the customs, complains to the king, that is a topic of litigation (or cause of action)" Our Courts of Justice, if rightly advised, will not listen to an unreal distinction, although the degenerate Brahmanas by courtesy might be loudest in advancing their pretension to a false and artificial superiority

Sudras and slaves compared

A perusal of the Smritis will convince the reader that the *Sudras* as such were not regarded as slaves Any person whether *Brahmana* or *Sudra* might be a slave in the recognized modes such as capture in war, or sale by the father (x) While dealing with the modes of acquiring subsistence by the different classes, Manu says, that a *Sudra* is to subsist by serving the twice-born classes, or by the practice of mechanical arts But is this service the same thing as slavery? Not a word to that effect can be found in the Smritis, though no doubt the holders of service are compared to dogs, to whatever caste they may belong There is however, a passage in the *Brahma Purana*, which depicts the *Sudras* subsisting by service, as slaves, and that is the only slender basis on which is founded the conclusion that the Hindu law regards the *Sudras* as slaves But that passage does not apply at all to the *Sudras* practising the mechanical arts Besides, slavery has been abolished within living memory, although the importation of slaves into British India, and the recognition of slavery by Government officials, were prohibited by earlier Enactments slavery was abolished in 1860 A D by the Indian Penal Code Therefore if the position of *Sudras* had been that of slaves under the Hindu law, that state of things would have continued down to the abolition of slavery, but has any one ever heard that the general body of the *Sudras* or any section of them was *then* emancipated? The British Government has undoubtedly emancipated the people from moral thraldom But no particular caste of Hindus was under physical thraldom at the time slavery was abolished, though there were certainly some Hindu slaves whose caste is unknown, that were liberated by legislation

Illegitimate son of Sudra

The Hindu legislators were anxious to provide every man with a source of maintenance, accordingly they ordained that the illegitimate son of a twice-born man by a *Sudra* woman not married by him is entitled to maintenance from his estate and as regards *Sudra* they provide that an illegitimate son may, by the *Sudra* father's choice, get an equal share with a real legitimate son of his, and that after his death, he is to get a half share in comparison with what is obtained by his legitimate brothers, and that in default of legitimate heirs down to the daughter's son, he may get the whole property Now it should be observed that *Sudras* were all poor men at the time when the above rule was laid down the only property they might leave behind them would be a dwell-

(x) Manu viii, 415

ing house, and if he practised any mechanical art, also the tools of such art Consequently a *Sudra's* illegitimate son by getting even his whole property, obtained considerably less than a Brahmana's illegitimate son who was entitled to maintenance It is difficult to appreciate the process of reasoning by which, from the above provisions for the benefit of a *Sudra's* illegitimate son, any inference can be drawn that the marriages of *Sudras* are licensed concubinage Yet that is the only ground upon which that remark of Sir Raymond's is founded there is nothing else in Hindu law, which can even remotely lend any support to such a disparaging view as that If we turn our attention from the law books to the actual usage amongst the Hindus, we do not find anything peculiar to the *Sudras*, that may justify that contemptuous conclusion On the contrary, having regard to the actual practice, the disparaging remark might be applied to marriages among the Nair Brahmanas in the Deccan, and also among a certain section of Bengali Brâhmanas by courtesy, who used to pass through the ceremony of marriage with scores of women, sometimes exceeding a hundred, though they were too poor to provide even one of them with maintenance and residence

Sudra's marriage and adoption

Besides, it is difficult to understand the logical sequence between the adoption by *Sudras* of their daughter's and sister's sons, and the fact (even if admitted to be correct) of the Hindu law regarding *Sudra* marriages as concubinage If the Hindu law had provided no prohibited degrees for marriage amongst the *Sudras*, and had allowed them to marry their daughters and sisters, then and then only could the distinction have been accounted for in the manner attempted to be done For, in the prurient imagination of Nanda Pandita and the like, the adopted son is to be capable of being begotten by the adopter on the son's natural mother, by appointment to raise issue, merely for the purpose of justifying the prohibition propounded by him, for the first time

Fiction of adoption

For, even according to him, the fiction of adoption, is not, that the boy is begotten by the adopter on the boy's natural mother Because if that had been so, the boy ought to have retained his relationship to his natural mother and her relations On the contrary it is admitted on all hands, that the real fiction of adoption is, that the boy is begotten by the adopter on his own wife, and it is on that footing that the adopted son's right of inheritance from the adoptive mother and her relations has been recognized, and that from his natural mother and her relations, denied to him In performing the Parvana Sraddha he is to offer *Pindas* or oblations to his adoptive mother's sires, not to those of his natural mother (*y*) So the prohibition is utterly inconsistent with this theory of adoption, now universally accepted

(4) Yama's texts seem to approve of adoption of daughter's

(4) There is a text of Yama, which appears to support the adoption by a twice-born person, of his daughter's son —

(*y*) Dattaka-Mimânsâ, Sanskrit vi, 50

दौहित्रे भ्रातृपुत्रे च होमादिनियमो न हि।
वाग्दानादेव तत् सिद्धिरित्याह भगवान् यम. ॥

which means,—"The Homa or the like ceremony is not (necessary) in the case (of adoption) of the daughter's or the brother's son, by the verbal gift (and acceptance) alone, that is accomplished this is declared by the Lord Yama"—This text was relied on by some Sastris of Bombay in 1821 A D, who were consulted in the case of Huebut Rao (z) It is not to be found cited in any commentary of note, but Pandit Bharat Chandra Siromani used to repeat it to his pupils, and it is also cited in some unimportant works on adoption (a) This text, however, is not found in the Code of Yama, such as is now extant and published, it does not contain a single passage on positive law, nor do the published Codes of Vrihaspati and Katyayana, although numerous texts from them are cited by commentators on positive law, none of which are found in the published editions Another text of Yama, cited in the Dayabhaga,(b) was the subject for consideration by a Full Bench of the Calcutta High Court(c) and the learned judges were anxious to see the context for the purpose of ascertaining the true meaning of that text, (d) and the author of this treatise was consulted and asked by an eminent judge of that Bench to procure the Code of Yama The author saw Pandit Bharat Chandra Siromani on the subject, but he said that the complete Code of Yama containing the chapter on positive law he had never seen, and could not be found anywhere, so far as he was aware Hence the above text cannot be supposed to be spurious, simply because it is not found in the published incomplete Code of Yama, it seems to have been traditionally known in the Sanskrit law schools, when one finds it cited by the Bombay Sastris and a Bengali Pandit

The text can not be contended to apply to Sudras only

Nor can it be contended that this text of Yama should be construed to refer to the *Sudras* only, and not to the twice born classes Because, in construing passages of law, one must take into consideration the religious disability of the *Sudras* under the Codes, to whom the privilege of performing sacrifices was denied see Jaimini's Mimansa(e) under the topic of incompetency of *Sudras* to perform sacrifices or यागे शूद्रस्य अनधिकाराधिकरणम्। This view is entertained even now, with this difference only, that certain modern writers say that the *Homa* and the like ceremony may be performed by the *Sudras*, vicariously through the Brahmana priests But the Calcutta High Court and the Privy Council have held that this modern view, however beneficial and profitable it might be to the Brahmanical class subsisting by priest craft, is not binding on the *Sudras*, who may, therefore, validly adopt a son without performing the *Homa* ceremony (f)

(z) 2 Borrodaile, 75, (85)
(a) The Pandit's compilation, called Dattaka-Siromani, pp 45, 92, 244 and 246
(b) Ch XI, Sec 5, para 37
(c) Rajkisore v Gobind, 1 C 27
(d) 1 C 27, 38
(e) Jaimini's Mimansa, 6, 1, 25 et seq
(f) Behari Lal v Indur, 21 W R, 285, affirmed by Privy Council, Indromoni v Behari Lal, 5 C 770, Asita v Nirode, 20 C W N 901 35 I C 127

(5) Nanda Pandita not a lawyer.

(5) Nanda Pandita was neither a lawyer nor a judge, but merely a Sanskritist and teacher of the sacred literature, and the above prohibition may be fairly taken to be intended by him as directory only, and a rule of the Law of Honour Nor does he say that an adoption made in contravention of that prohibition is invalid, as he has done in respect of another rule see his Dattaka Mimansa v, 56

Nanda Pandita's view adopted by P C

Discussion academical—This discussion as to authority of Dattaka-Mimánsá is no longer of practical importance to lawyers, since the Judicial Committee has held that as Nanda Pandita's view has been adopted and acted upon by all the High Courts for 80 or 90 years, it is incompetent to a Court of Justice to treat the question now as an open one (g) The Judicial Committee has said that "the *Dattaka-Mimansa* is undoubtedly a high authority on the law of Hindu adoption and is treated with respect"(h)

Nanda Pandita's rule as taken by Courts.—The prohibition is not followed in the *Punjab*, (i) nor in *Madras* where the adoption of the daughter's and the sister's sons has been declared valid by custom amongst the Bráhmanas, (j) but the adoption of the son of the daughter of an agnate relative has been held invalid (k)

Punjab

Madras

Nor did the prohibition obtain in *Bombay* before 1879 A D., when, however, the adoption by a Brahmana, of his daughter's son was declared invalid, (l) but not the adoption of the father's first cousin, (m) nor of a half brother, (n) nor of father's sister's son (o) The prohibition is not respected by persons adopting in the Kritrima form in Mithila.

Bombay

Allahabad.

In the *North-West Provinces* the adoption by a Bohra Brahmana, of his sister's son has been held valid according to

(g) Bhagwan v Bhagwan, 26 I A, 153, 166 21 A 412

(h) Puttu Lal v Parbati, 37 A 359, 367 19 C W N 841

(i) See Lala Rup v Gopal, 13 C W N 920 10 C L J 58 19 M L J 548, Shona v Nanak, 9 I C 36 4 P W R 1911, see p 244 foot note (l)

(j) 9 M 44, Sri Vadrevu v Ryali, 43 M 876, in this connection see Kanhai v Brij, 40 A 487 45 I A 118 22 C W N 914 35 M L J 459 16 A L J 825 28 C L J 394 5 Pat L W 294 47 I C 207 20 Bom L R 1048, see p 244 foot note (l)

(k) Minakshi v Ramananda, 11 M 49

(l) Gopal v Hanmant, 3 B 273

(m) Mallappa v Gangava, 43 B 209 49 I C 517 21 Bom L R 17

(n) Gajanan v Kashinath, 39 B 410 28 I C 978 17 Bom L R 372, see also Biswanath v Kalicharan, 27 C L J 119, 125 46 I C 246 in which adoption of daughter's daughter's son is held valid

(o) Ram Krishna v Chimanji, 21 I C 34 15 Bom L R 824

custom (*p*) and in the Full Bench case of *Bhagwan Sing*, (*q*) it has been held by the Chief Justice Sir John Edge and the majority of the Judges of the Allahabad High Court that Nanda Pandita's rule ought not to be enforced, and that the adoption of the daughter's son and the like is valid amongst the regenerate classes. But this decision of the majority has been overruled by the Judicial Committee, as has already been noticed, according to the maxim—*Communis error facit jus.* (*r*) But the same High Court has held that adoption of sister's son is invalid. (*s*)

Privy Council

Bengal.

In *Bengal* there is no recent reported case on the point, but there were several early decisions in conflict with each other. Here a person's daughter's and sister's son being entitled to inherit his property even when he dies joint with his co-heirs, in preference to near agnates, the question would not arise in many cases, in which the daughter's and the sister's son as such would succeed, even if their adoption be invalid,—and this accounts for the paucity of cases. In a case which came up to the Calcutta High Court in second appeal, but ended in a compromise, a Bráhmana had adopted his sister's son and died leaving him and a widow and also a Will, and then the adopted son died during the widow's life-time leaving sons, and thence arose the litigation between the reversioner and the sister's son's son

Usages cor- trary to Nanda Pandita's view

The existence of usages to the contrary, proves that there was no restriction such as is propounded by Nanda Pandita If the works of Nanda Pandita and his followers be thrown out of consideration, there is nothing else that may suggest to a student of Hindu Law the existence of any such restriction.

Conclusion :

Conclusion as to prohibited relations for adoption — It should be observed that Nanda Pandita expressly prohibits a brother, an uncle, and a daughter's, a sister's, and a mother's sister's sons, of whom the last three only are to be excluded, according to the texts of Sákala and Saunaka , and Sutherland

(*p*) Chain *v* Parbati, 14 A 53
(*q*) Bhagwan *v* Bhagwan, 17 A 294.
(*r*) *See foot note* (*g*) p 240
(*s*) Raghunath *v* Kishen, 28 I C 854

lays down the rule that a boy whose mother is prohibited for marriage to a man by reason of relationship, cannot be adopted by him. It is very difficult to say what is the effect of the Judicial Committee's decision in *Bhagwan Sing's* case, on this rule, since the *ratio decidendi* of their Lordships' decision in that case may be contended to be applicable even to this wide rule enunciated by the learned translator, although it is not legitimately deducible from what Nanda Pandita says on the subject Because, right or wrong, Sutherland's rule has been reiterated by most text-writers on Hindu Law as well as by the Judges of the highest tribunals in many cases, though it appears that there is only one single case in which an adoption has been pronounced invalid by the application of this rule propounded by the learned translator. (*t*)

P C on Sutherland's rules,

The learned Judges appear to have rejected Sutherland's rule by refusing to accept the glosses adding to the Smritis of Sákala and Saunaka—agreeably to the observation of the Judicial Committee in the case of *Sri Balusu* v. *Sri Balusu,* namely, that although—"Their Lordships cannot concur with Knox J., in saying that their (of Dattaka-Mimánsá and Dattaka-Chandriká) authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence,"—yet,—"So far as saying that caution is required in accepting their glosses where they *deviate from or add to* the Smritis, their Lordships are prepared to concur with the learned Judge." (*u*)

later P. C case.

The Judicial Committee has subsequently laid down "that Nanda Pandita in the 'Dattaka-Mimansa' extended to adoption by females the rule of Hindu law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension by Nanda Pandita which is not based upon the authority of any of the *Smritis* or Institutes of sages" (*v*)

(*t*) Minakshi *v* Ramananda, 11 M 49. (F B)
(*u*) 26 I A 113, 132 22 M 398 3 C W N 427
(*v*) Puttu *v* Parbati, 37A 359, 367 19 C W N 841 22 C L J 190 42 I A 155 13 A L J 721 29 M L J 63 17 Bom L R 549 29 I C 617 *but see*, Krishna *v* Raj, 1929 O 469

The view of the Allahabad High Court has already been stated. (*w*)

In Bengal, as has already been stated (*x*) there are no recent decisions on the question of prohibited relationship for adoption. The Patna High Court, in a case in which the parties are governed by the Bengal School, has held that adoption of step-brother is invalid (*y*)

Bombay

But the Bombay High Court have, on a review of all the cases bearing on this subject, come to the conclusion that the rule that—"a man cannot adopt a boy whose mother he could not have legally married"—is confined to a *daughter's* son, a *sister's* son, and the *mother's sister's* son, who are specifically mentioned in the text of Sakala (*z*) But the adoption of a sister's son is valid among the Sudras (*a*) and hence, among the Leva Patidars of Gujrat who are Sudras (*b*) The *Viruddha Sambandha* rule is confined to the three cases, namely, of daughter's, sister's, and mother's sister's sons and hence the adoption of a wife's brother is valid among Brahmins governed by the Bombay school in the absence of any custom to the contrary. (*c*) In Bombay the adoption of daughter's husband is valid. (*d*).

sister's son, wife's brother daughter's husband,

brother

In a later case the Bombay High Court (*e*) has held that a widow can adopt her husband's brother It is curious how the most elementary principle of the law on adoption was not drawn to their Lordships' notice. The adoption by a widow is not for her benefit but for her husband and a boy adopted by the widow is to be deemed the son of her deceased husband. So the result of the decision is that abr other

(*w*) *Supra p* 241
(*x*) *Supra p* 241
(*y*) Rajendra *v* Gopal, 7 P 245 1929 P 51 *see* P C in 10 P 189.
(*z*) Ram *v* Gopal, 32 B 619, see also Yamnava *v* Laxman, 36 B 533 : 16 I C 180 14 Bom L R 543, Walbai *v* Heerbai, 34 B 491, in C P—Pralhad *v* Mahadeo, 21 I C 266 9 N L R 130, adoption of sister's son among Desbastha Brahmins—Bhau *v* Hari, 25 Bom L R 411, Subrao *v* Radha, 52 B 497 1928 B 295
(*a*) Subras *v* Radha, 52 B 497 1928 B 295
(*b*) Kahan Das *v* Jivan, 25 Bom L, R 510
(*c*) Prahlad *v* Mahadeo, 9 N L R 130 21 I C 266
(*d*) Sitabai *v* Parvatibai, 47 B 35 24 Bom L R 748
(*e*) Shripad *v* Vithal, 49 B 615 27 Bom L R. 674 : 89 I C. 197 : 1925 B. 399.

can adopt another brother as his son, a fiction most revolting to the sentiments perhaps of all nationality. The adoption of a brother is the first thing prohibited by Nanda Pandita. (*f*) Their Lordships have relied on a decision of the Privy Council and another decision of the Allahabad High Court which have no bearing on the adoption of a brother. The Bombay High Court, however, prohibits the adoption of *mother's sister's son*, (*g*) but the same High Court allows the adoption of *mother's son*

Nagpur : Sister's and daughter's son

The adoption of daughter's son and sister's son is valid by custom among the Maháráshtra Brahmins of Nagpur. (*h*)

Madras brother's daughter's son,

Among the Bráhmins of the Andhra portion of the Madras Presidency it is as in the southern districts. (*i*) The adoption of brother's daughter's son is valid by custom (*j*)

Patna view

The Patna High Court also has held that among the regenerate classes, the adoption of a daughter's, sister's or mother's sister's son is invalid (*k*)

Punjab : daughter's son

In the Punjab it has been held that adoption of daughter's son is invalid,(*l*) but it is permissible among the Káshmiri Bráhmans, (*m*) and among the Khatris of the town of Amritsar. (*n*) The adoption of a daughter's son cannot be taken in the *dattaka* and hence relationship does not, like *kritrima* form, extend beyond the personal relationship of the parties to the adoption (*o*)

Sister's son

An adoption of a sister's son is valid among the Sudras of the Punjab This applies to the Jats also (*p*) Among the *Sausi* Jats of the Gujranwala Tashil, a person may adopt his daugter's

(*f*) See p 232

(*g*) Ramchandra v Gopal 32 B 619 10 Bom L R 948

(*h*) Jogeshwar v Pandurang 7 N L J 82 78 I C 840 1924 N 73

(*i*) Viswasundara v Somasundara 43 M 876 59 I C. 609

(*j*) Sooratha v Kanoka 43 M 867 12 L. W 245 59 I C 585

(*k*) Ishwari v Rai Hari, 6 P 506 1927 P 145

(*l*) Baldes v. Ram, 13 L 126, Gopi v. Malan, 48 I C 373 106 P R, 1918, Parmanand v Shiv, 2 L 69 59 I C, 256 21 P L R. 1921 15 P W R 1921, Tansukh v Som, 1930 L 391

(*m*) Ikbal v Rajendra 21 O C 276 48 I C 767 5 O L J. 701

(*n*) 2 L 69, above

(*o*) Mela v. Gur, 3 L 362 F B 1922 L 433, Uggar v Khushi, 1929 L 53, Brij v. Shanbo, 113 P L.R 1908 53 P W R. 1908.

(*p*) Hira v. Shibu 6 L. L. J. 442.

son, only if the person adopted is a collateral or is of the same *Got* as the adopter. (q)

Sub-Sec iii—CASTE OF THE BOY

The adoption of a boy belonging to a caste different from that of the adopter is not forbidden by the Smritis There is, however, a passage in the alleged work of Saunaka, already referred to, recommending adoption within the caste , and providing that an adopted son belonging to a different caste is entitled to food and raiment only and not to a share of the property, as he cannot serve the spiritual purpose. The caste exclusiveness has become so rigid now, that an adoption of a son known to belong to a different caste, is impossible at the present day. (r) But it is held that a *Sudra* adopter belonging to one sub-division, can validly adopt a boy belonging to another sub-division of the same caste (s)

Caste of the boy may be different,

present law,

In an unreported case from Sylhet the Calcutta High Court upheld an adoption of a Káyastha boy by a man of the Shahoo caste, by reason of there being the usage of intermarriage between these castes.

custom in Sylhet

Sub-Sec iv—AGE AND INITIATORY CEREMONIES

Smritis do not limit.—Neither in the Smritis nor in the commentaries on general law is there any restriction either as to the age of, or as to the performance of any initiatory ceremony upon a person, which limits his capacity for being adopted.

Age and initiatory ceremony no bar

Nanda Pandita—But Nanda Pandita cites a passage of the Kalika-Purana, a modern production called Upa-Purana, laying down that a boy who has completed the fifth year, or one upon whom the tonsure has been performed, though he may be within the fifth year, cannot be adopted. Nanda Pandita, however, construes the passages to mean that a boy whose age exceeds five years cannot be adopted, and that one within that age may be adopted though the tonsure has been performed upon him, but in that case the additional sacrifice of Puttreshti must be performed

Nanda Pandita limits the age within five years

(q) Labha v Raman, 9 L. I
(r) *See* Narain v Shiam 25 I C. 45 : 17 O.C 185
(s) Girish v Mahomed 25 C W. N. 634 , Shib v Ram 46 A. 637 22 A L J. 690 : 1925 A. 79.

restriction an innovation

The above limitation is another innovation introduced for the first time by Nanda Pandita, uselessly fettering the freedom of action of persons in a matter which is, as it ought to be, left by the Smritis to their discretion

According to Dattaka-Chandrika

Dattaka-Chandrika —In the Dattaka-Chandrika, the passage cited from the Kalika-Purana is declared spurious, but a new restriction is laid down to the effect that the age should not exceed the primary period for the ceremony of investiture with the sacred thread, which is the eighth year for Brahmans, the eleventh for Kshatriyas and the twelfth for Vaisyas, and that a Sudra may be adopted if unmarried In case of adoption of an adult his assent should be taken (s1)

But it is worthy of remark, that for the purpose of affiliation an infant of tender age, whose mind and affection are yet unformed is preferable. There should also be such a difference in the age of the boy and the adoptive parents, that the former may look like the son of the latter But all this should be left to the discretion of the persons concerned, no rigid rule is desirable.

Before *upanayana*;

Case law —The Courts, however, are disposed to reject these rules, but at the same time they appear to lay down that a twice-born boy may be adopted if the ceremony of the investiture with the sacred thread has not actually been performed upon him, and a Sudra, before his marriage. (*t*)

Sudra before marriage

The performance of the *Upanayana* ceremony, of the boy is an absolute bar to the adoption in the *Benares* school. (*u*)

Benares,

The adoption after investiture of sacred thread among Kashmiri Brahmins domiciled in the *Punjab* is, however, held valid by custom. (*v*) But there is no such restriction in the Punjab, or in *Mithila* as regards Kritrima adoption.

Punjab,

Mithila,

Madras,

It is also held in *Madras* that according to custom amongst the Brahmanas the adoption of a boy of a same

(s1) Chandrika, Sutherland's Ed, Syn, and Note viii

(u) Gopi v Kishi, 1927 A 634 *see also foot note* (*t*) above

(v) Durga v Shambhu, 29 C W N. 106 P C.

gotra, after *upa-nayana* or investiture with the sacred cord, is valid. (*w*)

Bombay, adoptee older than adopter.

The *Bombay* High Court has expressed an opinion that the fact that an adopted son is older than the adopting mother does not invalidate adoption, (*x*) and it has now been held that he may be older than the adoptive father. (*y*)

Married boy.

But it has been held by the Punjab High Court that a married boy cannot be validly adopted among any class of Hindus. (*z*) The same view is observed in the Benares school, (*a*) the Madras High Court holds the same view, (*b*) but in Bombay, a married man with children may be adopted. (*c*)

Agarwallas.

It has been held that an adoption of an infant in arms is not illegal, (*d*) and that amongst Agarwallas the age of the boy for adoption extends even to thirty-two years. (*e*) It is held that, in the absence of any proof of custom, a married *Marwari* Brahmin cannot be validly adopted (*f*)

Jains.

Amongst the Jains there is no restriction of age or marriage of the boy. (*g*).

Sec. 6 – CEREMONIES NECESSARY

Actual giving and taking absolutely necessary

Giving and taking —The ceremonies of *giving* and *taking* are absolutely necessary in all cases. These ceremonies must be accompanied by the *actual delivery* of the child, symbolical or constructive delivery by the mere parol expression of

(*w*) Viraraghava v Ramalinga, 9 M 148 (F B)

(*x*) Gopal v Vishnu, 23 B 250

(*y*) Balabu v Mahadu, 48 B 387 80 I C 529 1924 B 349

(*z*) Hira v Hardit, 47 P L R (1923) 61 I C 763, 1923 L. 26

(*a*) Krishna v Deolia, 44 I C 928 (N)

(*b*) Somasekhara v Mahadeva, 53 M 297 1930 M 495, Lingayya v Chengalammal, 48 M 407 47 M L J 776 20 L W 959 1925 M 272, Janakiram v Venkiah, 11 I C 383 10 M L T 21

(*c*) Dharma v. Ramkrishna, 10 B 80, *see* Manikbai v Gokuldas 49 B. 520 87 I C 816 1925 B 363

(*d*) *See* Bejoy v Mathuriya, 56 I C 97 (C)

(*e*) Dhanraj v Soni Bai, 52 C 482 52 I A 231 49 M L J 173 27 Bom L R 837 23 A L J 273 21 N L R 50 87 I C 357 1925 P C 118

(*f*) Phul v Gobardhan, 1929 A 739

(*g*) Asharfi v Rup, 30 A 197, *on appeal* 32 A 247 6 I C 272 37 I A 93 14 C W N 545 · 11 C L J 454 20 M L J 439, Jamunabai v Juharmal, 56 I C 81 (N)

intention on the part of the giver and the taker, without the presence of the boy is not sufficient. (*h*) Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, nor acknowledgment, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery; (*i*) a formal ceremony being essential for that purpose. (*j*)

The formalities of giving and taking may be either what may be called ordinary and secular, or what may be designated religious and ceremonial, the latter are accompanied by the recital of Vedic texts, and therefore cannot be performed by Sudras and women, and so in an adoption by them, the acceptance of the boy would be secular, like their acceptance of a chattel.(*k*)

Among Sudras no other ceremony necessary.

Homa—In a Sudra adoption no other ceremoney is necessary, giving and taking being sufficient.(*l*) It is already said that *Homa* is not necessary for an adoption among Sudras, (*m*) it used, however, to be, and still is, oftener than not, performed by them vicariously through their Brahmana priests.

Punjab,

In the Punjab no specific ceremonies or formalities are provided under the customary law. (*n*) No *datta homa* is necessary here, but there must be the ceremony of gift and acceptance. (*o*)

Jains,

Among the Jains the giving and taking are essential but the religious ceremonies are not necessary, (*p*) but it has been

(*h*) Siddessory v Doorga, 2 Indian Jurist, N S 22
(*i*) Noggendro v Kishen, 19 W R 133 I A Sup 149, Gangi v Amir, 50 I C 355 (Punj), see Gopi v Malan, 48 I C 373 106 P R 1918, Krishna v Broja, 25 C W N 403 66 I C 38, Ishwari v. Rai Hari, 6 P 506 1927 P 145, Balak v Nanu, 11 L 503 1930 L 579
(*j*) Krisha v Sundara, 54 M 440, 444 P C
(*k*) D M 1, 17
(*l*) Kuppusami v Venkatalakshmi, 18 M L T 434 31 I C 855 (1915) M W N 960
(*m*) Asita v Nirode, 20 C W N 901 35 I C 127, Shankar v Sawitri, 50 I. C 599 (Nag), Indramoni v Beharilal, 5 C 770 7 I A 24 affirming 21 W R 285
(*n*) Waryaman v Kanshi, 3 L 17, Diwan v Dwarka, 20 I C 303 175 P W R 1913, Rattan v Muno, 48 I C 776 117 P R 1918 see also Gopi v Malan, 48 I C 373 106 P R 1918
(*o*) Daya v Hans, 1930 L 1915
(*p*) Jamunabai v Juharmal, 56 I C 81 (Nag), Jiwraj v Sheokuwarbai, 56 I C 65 (Nag), see also Sri Mandarji v Fateh, 20 I C 553 149 P W R. 1913, *Agarwala Benias*—Ganga v Gapal, 20 O C 356 43 I C 318.

held that there is no bar of their adopting in the *Dattaka* form. (*q*)

Agarwallas.

In matter of adoption the Agarwalla Benias of the Punjab do not follow the general rules of Hindu law and an unequivocal declaration of adoption followed by treatment of that boy as an adopted son is, though limited, sufficient evidence to constitute a valid adoption (*r*) Adoption with the Agarwallas is a mere temporal arrangement (*s*)

Datta Homa

Putreshti jag.

With respect to the three regenerate tribes the ceremony of *Datta Homa* or burnt offering is said to be necessary in addition to giving and taking (*t*) The Patna High Court has held that *Putreshti Jág* is not essential to the validity of an adoption even amongst the regenerate classes. (*u*)

Homa necessary among regenerate classes

But *Homa* is not necessary among twice-born classes when both the adopter and the adoptee belong to the same *gotra.* (*v*)

Homa in adoption by widows of regenerate classes

The females of the regenerate classes are, like Súdras, incompetent to study the sacred literature, so they cannot themselves recite the sacred texts and cannot consequently perform the sacrifices, although they may join their husbands as indispensable associates in the performance of sacrifices. Hence widows, like Súdras, can perform the *Homa* rite vicariously through the sacerdotal priests The sacred texts are omitted if women or Sudras, perform any religious ceremony, स्त्रीशूद्राणाम् अमन्त्रक। Vàchaspati Misra, however, maintains in his Vivàda-chintàmani that widows, and Súdras

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(*q*) Gopi *v* Panna, 72 I C 424 (L)
(*r*) Chiman *v* Hari, 40 C 879 40 I A 156 17 C W N 885 18 C.L J 70 14 M L T 83 15 Bom L R 646 19 I C 669
(*s*) Dhanaraj *v* Soni Bai, 52 C 482 52 I A 231 49 M L J 173 27 Bom L R 837 23 A L.J 273 21 N L R 50 87 I C 357 1925 P.C 118
(*t*) Goviddaprasad *v* Rindabai, 49 B 515 27 Bom L R 365 87 I C 472 1925 B 289, Mayne § 153, 7th edition
(*u*) Mukund (Raja) *v* Sri Jagannath, 2 P 469 1 P L R 201, Sheolotan *v* Bhirgun, 2 P L J 481 41 I C 375
(*v*) Bal Gangadhar Tilak *v* Shriniwas, 39 B 441 42 I A 135 22 C L J 1 19 C W N 729 29 M L J 34 29 I C 939, Retki *v* Lakpati, 20 C W N 19 20 C L J 319 27 I C 39, Sheolotan *v* Bhirgun, 2 Pat L J 481, Lakshmimali *v* Udit, 3 Pat L J 499 49 I C 215, Tribhawan *v* Deputy, 5 O L J 294 47 I C 225, Govindaprasad *v* Rindabai, 49 B 515 (*see above*), Chhotey *v*. Chandra, 45 A 59 80 I C 1041

cannot adopt at all, by reason of their incapacity to personally perform the *Homa* ceremony.

Homa may be dispensed with

It should, however, be remarked that the performance of the *Homa* ceremony might be dispensed with in the case of an adoption by a widow of the twice-born class, for the same reasons as in an adoption by a Sùdra Hence if *Homa* be not necessary in an adoption by a Bràhmanì widow, the result would be that it is not necessary in any case.

Adoption during impurity does not vitiate

During impurity—Pollution on account of death or birth of a relation does not vitiate an adoption made during it, (*w*) the secular formalities of gift and acceptance may be performed by a person under it, while the religious part of the ceremony may be delegated to a priest or a relation free from impurity (*x*)

Dattaka and Dattrima.—It is worthy of remark that according to Hindu law a boy could be given and taken as a slave and not as a son, such a slave was called *Dattrima* or *given*, hence, so long as slavery was in force, the *Homa* ceremony was of very great importance, conclusively proving that the boy was adopted as the *Dattaka* or *given* son, and not given and taken as a *Dattrima* or *given* slave. But now that slavery has been abolished, it is not of much value in that way.

Sec 7—STATUS AND RIGHTS

Sub-Sec i—STATUS AFTER ADOPTION

Relation with natural family ceases

In Natural Family—Except for the purpose of prohibited degrees in marriage, the connection of the adopted son with his relations by birth becomes extinguished unless they be also his relations by adoption, as in the case of the adopter and the adoptee being related before adoption. In such cases, however, the original relationship ceases, and a new relationship based on adoption arises as far as possible between the adoptee and the original relations, through the adoptive parents.

(*w*) Thangathanni *v* Ramu, 5 M 358, Asita *v* Nirode, 20 C W N 901 35 I C 127, Santappayya *v* Rangappayya, 18 M 397, 398 5 M L J 66 Lakshmimali *v* Udit, 3 P L J 499 49 I C 215

(*x*) Santappaya *v* Rangappaya, 18 M 397, Lakshmi *v* Ram, 22 B 590; Vedavalli *v* Mangamma, 27 M 538, 539

The consanguineal Sapinda relationship in the family of his birth continues even after adoption, and in consequence an adopted son cannot marry a damsel belonging to that family who is within the degree of Sapinda relationship

Adoption is civil death and new birth

Absolute adoption is civil death and new birth — An absolute adoption appears to operate as birth of the boy in the family of adoption, and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption He is deemed to be begotten by the adoptive father on his own wife who is the adoptive mother. His status as son of his real parents ceases in the same way as if he were dead at the time of adoption He cannot be born again without having been dead Manu's text Nos. 11 and 12 (y) as explained in the Dattaka-Mimansa and the Dattaka-Chandrikà, and by other Sanskrit commentators, are clear authority for the proposition that adoption is tantamount to civil death and fresh birth

Adopted son cannot take gotra and riktha of natural father.

The boy cannot take away with him the natural father's *gotra* and *riktha*, when he is passing from the family of his birth to that of adoption, or more properly speaking, when he becomes divested by adoption, of the status of being the son of his progenitor, and is invested with the status of being the son of the adopter His status of sonship to the real parents being extinguished, he ceases to be a member of the natural father's *gotra* or family, and his existing proprietary right in the progenitor's property also comes to an end, as well as his capacity to perform the exequial rites for the spiritual benefit of his natural father and other ancestors ceases, both secular and spiritual connection with the natural parents and their relations, ceases for ever At the same time the very same connection, arises with the adoptive parents and their relations, he acquires the status of sonship to the adoptive parents, and as such becomes a member of the adopter's *gotra*, becomes a coparcener of his family estate, and is invested with the capacity for offering *pinda* to him and his ancestors.

but gets adopter's gotra

(y) *Supra* pp 190.

Status of a Hindu determined by *gotra*, *riktha* and *pinda*,

According to ancient Hindu law the status of a person appears to have been determined by three things, namely, the *gotra*, the *riktha*, and the *pinda*. The joint family system was and still is the distinctive feature of Hindu society, the family and not the individual was the unit of society, and each family was possessed of the *riktha* or property forming the hereditary source of maintenance of its members, and it was an imperative duty of a person to provide with *pinda* or funeral oblations, the deceased ancestors of the family to which he belonged. The members of a family appear to have been divided into two classes, some were co-proprietors of the *riktha* or family estate, while the rest were not so, but entitled to maintenance only, out of the said estate.

Adoption, a civil death in natural family according to Manu

The two passages of Manu, one, (z) dealing with the extinction of the adopted son's status in the family of birth, and the other (a) with the accrual of the new status in the family of adoption, are illustrative, and are based on the principle and fiction of civil death and fresh birth. Accordingly the same legal consequences follow from adoption, as from retirement, or adoption of a religious order. The adopted son is to be deemed dead in the family of birth, and succession must therefore open to any property that may belong to him at the time of adoption, of which he becomes divested (*b*)

The law on the subject has been misunderstood, owing to the mis-translation of Manu's text, (c) which clearly implies that the adopted son's existing proprietary right in the natural father's property becomes extinguished, otherwise, why should he not take away with him such property or his share in the same when he is leaving the progenitor's family for joining the adopter's family? And the text has been so understood by all the Sanskrit commentators. The view expressed in the Tagore Law Lectures on adoption, that there is no authority for maintaining adoption to be tantamount to civil death,—is erroneous as being contrary to the said text of Manu, and to the commentaries on Hindu law, which do not appear to have been taken into consideration in the said Lectures, (c1) although the same view has also bee taken in the case of *Bihari* v *Kailas*, (*d*) in consequence of the proper

Contrary view expressed in Tagore Law Lectures is erroneous

(*z*) ix, 142
(*a*) ix, 158 160
(*b*) *See foot note* (*h*) p. 253 *infra*
(*c*) Ch ix, sloka 142 text No 11.
(*c1*) *See* end of Ch IV, Appx A & B
(*d*) 1 C W.N 121.

materials for a correct decision not being placed before the learned judge

Manu's text (*e*) is cited and explained in both the Treatises on Adoption (गोत्र-रिक्थे जनयितुर्न हरेत् दत्रिमः सुत. । गोत्र रिक्थानुग. पिण्ड व्यपैति ददत स्वधा ॥) Its correct translation is as follows, "The *Gotra* (=sonship) and the *Riktha*(=wealth) of the progenitor, the Dattrima (=dattaka) son is not to take away the *Pinda* (=oblation offered to deceased ancestors) is follower of the *Gotra* and the *Riktha*, (therefore) the *Swadhà* (=*Pinda*) goes away absolutely from the *Giver* (of the son in adoption)."

Correct translation of Manu's text

The author of the Dattaka-Mimansha (*f*) cites this text of Manu, and introduces it by saying,—"Manu declares also another rule," and explains the text thus,—

"The *given* son is not to partake of the progenitor's *gotra* and *riktha*, likewise of him who gives the son, *swadha*, *i. e.*, *sradha* performed by the *given* son goes away absolutely (*i e*, ceases) The author of the (Smriti)-Chandrika (says)—'By this (text of Manu) is declared that by the very act creating filial relation (to the adopter), the given son's proprietary right in the adopter's property and the status of being of the same *gotra* with him, arise, and on the other hand, through the extinction of the filial relation (to the *giver*) from the very act of *giving* (in adoption), the extinction of the *given* son's proprietary right in the *giver's* property, and the extinction of the *giver's gotra*, — take place

Dattaka-Mimansa on manu's text.

The author of the Dattaka-Chandrika also cites this text of Manu (*g*) and offers the following comment on it,—"By this (text) it is declared that through the extinction of the filial relation (to the *giver*), from the very act of giving (in adoption) the extinction of the *given* son's proprietary right in the giver's property, and the extinction of the *giver's gotra*,—take place"

Dattaka-Chandrika's comment on Manu's text

The commentators of Manu's Code and other commentators put the same meaning on this text of Manu, indicating that the *given* son's existing rights become extinguished by adoption. It should also be borne in mind that what is predicated with respect to the progenitor applies to all relations in the family of birth.

Commentators put the same meaning on Manu's text

The principle which underlies what is understood to be the meaning of this text of Manu appears to be that adoption operates as civil death as if the adopted person as son of his natural parents, becomes dead, and at the same time operates as new birth, as if he becomes again born as son of the adoptive parents. This principle is perfectly consistent with the principles of equity, justice and good conscience, and accordingly it has been adopted by the Calcutta High Court. (*h*)

The principle followed

(*e*) No. 11 *supra* p. 190. (*f*) vi, 6-9

(*g*) ii, 18-19. (*h*) Birbhadra *v.* Kalpataru, 1 C.L J. 388.

But the Madras High Court has held otherwise

But nevertheless, in the case of *Sri Raja Venkata Narasimha Appa Row* v. *Sri Raja Rangayya Appa Row*, *(i)* the Madras High Court refused to accept the doctrine that an adoption operates as civil death Curiously enough, the Judges refused to accept the correctness of the Sacred-Books-of-the-East-Series edition of the translation of Manu's Code with respect to the Sloka, (ix, 142), which was different from its translation by Sir William Jones, in fact that edition may be deemed to be a revised and corrected edition of Sir William Jones' work. It is difficult to understand how it is that the learned Judges say that an adopted son does not lose his right to property inherited before adoption, when both the Dattaka-Chandrikà and the Dattaka-Mìmànsà use the expressions *extinction* and *ceases* with respect to such property.

P C has settled the law

But the matter has now been finally settled by the Privy Council *(j)* agreeing to the doctrine, namely, "the theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it." The various decisions of different High Courts hold the same view. *(k)* So the daughter is entitled to inherit the property of her father, the sole owner of ancestral property acquired by him by survivorship on the death of his natural father before the former's adoption into another family *(l)*

(i) 29 M 437 *affirmed by* P C 37 M 199 : 41 I A. 51 25 M.L J. 411 18 C W N 554 16 Bom L R 328 12 A L J 315 23 I C 166, this followed in Mahableshwor *v* Suramany, 47 B 542 25 Bom L R 274 distinguishing Dattatraya *v* Gobinda, 40 B 429

(j) Nagindas *v* Bachoo, 40 B 270, 288 43 I A 56 20 C W N 702 30 M L J 193 18 Bom L R 172 : 14 A L J. 185 32 I C 403, Raghuraj *v.* Subhadra, 32 C W N 1009 P C 1928 P C 87, 55 I A 139 *see* Ram Chandra *v* Chaudhari, 29 A 184 34 I A 27 11 C W N 321 5 C L J 115 17 M L J 103

(k) Dattatraya *v* Gobind, 40 B 429 (but *see* 47 B. 542 25 Bom L R 274.) Lala *v* Nahar, 34 A 658 10 A.L J 299 16 I C. 181, Ramchandra *v.* Manubai, 43 B 774, 777 52 I C 695 21 Bom L R 776, Thamman *v* Dal, 37 A 7 27 I C 34 12 A L J 1231, Uma *v* Kali, 6 C 256, 259 F B apheld by P C 10 C 232 10 I A 138, Jughal *v* Jot, 11 L. 624, Dharma *v* Parmeshari, 1928 L 9 *see* Brij *v* Subhadra, 1926 O 449

(l) Manikvai *v.* Gokuldas, 49 B. 520. 27 Bom L R 414 87 I C. 816 1925 B. 363.

A contrary view has, however, been expressed that property once vested is not divested by his subsequent adoption into another family. (*m*)

Calcutta High Court—The Calcutta High Court in a recent case has held that under the Dayabhaga School of Hindu law, an heir, who has inherited any property from the family of his birth, is not subsequently divested of it on his adoption to another family. (*n*) In coming to the conclusion Mr. Justice Mitter practically relied on the translation of Manu's text as rendered by Sir William Jones, but his Lordship, however, did not point out wherein the translation given in this treatise is wrong. (*o*) The translation of the said text of Manu by Dr. G. Buhler which had been edited in 1886 by Professor Max Muller, both of whom require no commendation, runs thus "An adopted son shall never take the family (name) and the estate of his natural father ; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) ceases (as far as that son is concerned)." This translation and the one given in this work convey the same meaning. Unfortunately this translation of Dr Buhler as well as the remarks on Sir William's translation given above (*p*) was not drawn to his Lordship's notice Be it noted that Rao Saheb V. N. Mandlik in the introduction to his translation of Vyavahara Mayukha and Yajnavalkya remarked that Sir William Jones's translation is imperfect, as Sir William relied on only one of the commentators, namely, Kulluka. Dr Buhler, however, consulted Medhatithi as well as others. It should be added here that the above translation and the remarks of Rao Saheb are made long before this controversy

(*m*) Ramchandra *v* Harischandra, 1927 N 177, Maroti *v* Lai N L.R 58 65 I C. 362, Rulia *v* Sodhan, 1930 L 470, Chhanga *v* Jai, 6 L L. J. 174 78 I C 161 1924 L 480, *see*, Mahableshwar *v* Subramany, *supra*

(*n*) Shyma v. Sricharan, 56 C. 1135 33 C.W N. 583 49 C L J 298 1929 C. 337

(*o*) *Ante* P 253

(*p*) *Ante* P, 190, Text No. 11, and P 253.

arose, Dr Buhler in his note observed that *Medhatithi* has disapproved of the different reading for the word 'to take' so as to mean 'shall allow to be taken' just as a *Dvyamnshyayana* son remaining the son of both the natural and adoptive fathers. The explanation on this verse by Mr Hopkins throws considerable light on the question which runs thus : "The general meaning is that all connections with the first family ceases. Nevertheless, according to Katyayana and the later usage, if there is a special agreement to that effect, the son may belong to both fathers (*dvyamusyayana*)". (*q*)

The exposition of the Manu's text, made in the two well-known works on adoption, particularly, in the Dattaka-Chandrika, which, according to the decisions of highest tribunals, is an authority on the law of adoption in the Dayabhaga and Dravida Schools, clearly support the view expressed in this book. His Lordship, however, did not controvert the views of the Chandrika but merely followed the view of the law expressed by the Madras High Court as referred to above. (*r*) The reason why the Madras view is not in accordance with the Dattaka-Chandrika has already been explained, but still the Calcutta High Court has adopted the Madras view.

The circumstances under which the mistake crept into the first edition of the Tagore Lectures has been explained. (*s*) Had these been drawn to his Lordship's notice, the following passage would not have found place in his judgment : "But it is to be noticed that this view (refering to that expressed in the sixth edition of this treatise) is directly oppossed to Mr. Sarkar's earlier view, as stated in Tagore Lecture on Adoption, 1888, published in 1899, pages 389 and 390."

(*q*) Manu Smriti, Notes Part II Explanation, published by the Calcutta University, p 693 (1924)

(*r*) *Supra* 254, foot note (1)

(*s*) *See ante* p 252 and the Appendixes A & B at the end of this Chapter IV, wh ere the whole history is stated.

His Lordship relied also on the principle laid down in the Unchastity case. (*t*) From a certain observation in this judgment, his Lordship comes to the conclusion that nothing short of degradation can deprive a Dayabhaga son of property inherited from his father His Lordship at the beginning of his judgment reiterated the well-known maxim laid down in *Quinn* v *Leathem* (*u*) "that a case is authority for what it actually decides and not for what would seem to flow logically from it" His Lordship's judgment offends the rule he has himself indicated The question involved in the case of *Moniram Kolita* was, whether a widow by her subsequent unchastity after she inherited her husband's estate, forfeits her right to it, and their Lordships of the Judical Committee held that the property once vested cannot be divested. Their Lordships did not lay down a general rule for application in all cases. This very principle, that property once vested cannot be divested does not apply in the case of even an adopting widow : the widow is divested of the estate vested in her by adoption The following observation of the Bombay High Court (*v*) shall not be out of place here "The general rule stated by their Lordships of the Privy Council must be taken with reference to the point which had to be considered in the case see *Moniram Kolita* v. *Keri Kolitani* Its application in the Madras case seems to be far-fetched. Here we have to consider the case of an adoption, and a particular text bearing upon the point arising in the case" The Calcutta High Court disagreed with the Bombay case of *Dattatraya* v. *Gobind* (*w*) as it was governed by the Mitakshara law although the Madras decision though governed by the same law has been followed.

The fiction of adoption is a peculiar institution and should be given effect to, if at all, as given in the original text on the subject, otherwise, it will lead to inconsistencies. The

(*t*) Moniram Kolita *v* Keri, 5 C 776 7 I A 115
(*u*) (1901) A C 495
(*v*) Dattatrya *v* Govind, 40B 429, 438
(*w*) *Ibid*

Privy Council (*x*) in a number of decisions has given effect to the law of the original texts on this subject and this Calcutta view seems to be against these decisions. In the case of *Kali Komul Mazoomdar* v. *Uma Shankar Moitra* (*y*) their Lordships of the Judicial Committee accepted the principle of law laid down in the Full Bench (*z*) particularly by Romesh Chandra Mitter, J., namely, "The theory of adoption involves the principle of complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adoptive *family as if he were born in it.*" This view of the law has been reiterated by the Privy Council in all the aforesaid cases. The words, *as if he were born in it*, are very significant. In case of an adoption by widow, the adoption speaks from the moment of the death of the husband. Now, if a boy of four years be adopted by a widow whose husband died ten years ago, the boy shall be deemed to have born six years before his birth, in the family of adoption at the moment the adoptive father died. It is one of the important fictions which led the Privy Council to hold that he is to be deemed *as born in the family of adoption,* which pre-supposes the idea, namely *as if he had never been born in the natural family*, a fiction, which has rightly been adopted by the Bombay High Court. (*a*).

Punjab custom

An heir appointed under the customary law of the Punjab does not ordinarily lose his right to succeed to property in his natural family as against collaterals. (*b*) But in Karnal and Rohtak districts, in common with other parts of the old Delhi territory, the Hindu conception of adoption prevails, and by adoption the boy is completely severed from his natural family and becomes a member of the adoptive family(*c*)

(*x*) Kali Komul *v* Uma, 10 C 232 10 I A 138 Nagindas *v* Bachoo, *supra* Ram Chandra *v* Chandhari, *supra*, Raghuraj *v* Subhadra, *supra*
(*y*) 10 C 232 10 I A 138 (*z*) 6 C 256, the italics are not in the original
(*a*) Manikbai *v* Gokuldas, 49 B, 520 27 Bom L R 414 87 I C 815-1925 B 363
(*b*) Jug Lal *v* Jot, L 1624, gagal *v* Ishar, 11 L 615, *see* Gaisu *v* Har, 59 I C 82
(*c*) Jug Lal *v* Jot, *supra*, Mansa *v* Surta, 99 P R 1909, *see* Sabha *v*, Piare, 11 L, 481 F. B.

Adopted son's son's *gotra*, born before former's adoption

Though in some parts of India the adoption of married man with son is sanctioned, still by such adoption the adopted son's son born before adoption, does not forfeit, like his father, his rights and *gotra* acquired in the family to which his father was born, nor acquire new rights or *gotra* in the family to which his father is adopted, (*d*) but a son, in the mother's womb at the time of his father's adoption, is born into his father's adoptive family. (*e*)

Natural father, next friend of minor

Guardian of adopted son—The natural father is held to be the most suitable person to represent the minor adopted son's interest as next friend in a suit to assert the adopted son's rights against rival claimants, (*f*) as also for partition against adoptive father when the latter took a persistent hostile attitude against the minor adopted son (*g*)

Sub-Sec II—STATUS IN ADOPTIVE FAMILY

Son adopted cannot renounce his status

Adopted son cannot renounce status by adoption—The boy who is validly given away in adoption by his parents has no choice in the matter he cannot renounce the status as adopted son, he cannot question the power of his parents to cause the severance of his connection with his natural relations, he may give up his right of inheritance from the adopter, but he cannot give up his status as adopted son, and return to his family of birth (*h*)

Adopted son's right of inheriting adoptive father and his relations

Status and inheritance in the adoptive family—The adopted son's status and rights in the family of adoption are dealt with by commentators, as being based upon express texts, and according to them the adopted son stands in many respects on a footing very different from that of the real legitimate son As regards inheritance, there is a conflict between the Smritis, some of which are very favourable to the adopted son while others are not so, the latter admitting his right of inheriting from the adoptive father alone. The

(*d*) Kalgavda *v* Somappa, 33B 669, Dharam *v* Bakhshi, 1926 A 425
(*e*) Advi *Bin* *v* Fakirappa, 42 B 547 20 Bom L R 703 46 I C. 644
(*f*) Garimella *v* Venkatasubramanium, 49 M. L J 549 22 L W 560 1925 M 1285
(*g*) Jagadish *v* Sridhar, 1927 A 60
(*h*) Lukuru *v* Birji, 57 C 1312, Ruvee *v.* Roopshunkur, (1824) 2 Bov. 656; Mahadu *v* Bayaji, 19 B. 239.

commentators endeavour to reconcile the conflicting texts by holding that possession of good qualities will entitle the adopted son to inherit from the adoptive father as well as from his relations; otherwise, he will inherit from the adoptive father alone. There is, however, no express authority in Hindu law recognizing the adopted son's right of inheritance from the adoptive mother's relations.

Principle laid down by Courts

The Courts of justice have avoided the difficulty by laying down a rule based upon the principle of equity and justice, and so cutting the Gordian knot of conflicting texts,—the principle being that the adopted son should have the same rights in the family of his adoption, as he loses in the family of his birth, unless there be express texts curtailing the same: they have thus adopted a principle which appears to be quite contrary to that followed by the commentators, namely, that the adopted son cannot claim any right unless there be an express text giving him that right,—and have disregarded the above distinction drawn by the commentators, by tacitly assuming the adopted son to be endowed with good qualities in every case.

Adopted son's rights same as *aurasa's* unless denied,

Accordingly it is now settled by the decisions of the superior Courts that, as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son of the adoptive father and the adoptive mother, and is entitled to all the rights of a real son of the adoptive parents (*i*) with the exception of only such as has been *expressly* denied him (*j*).

An adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect. (*k*)

he inherits both father & mother and their relations,

The result is, that he will inherit from the adoptive father, the adoptive mother (*l*) and all their relations without

(*i*) Thirumal v Kangadami, 23 M L J 79, 97, Dattatriya v Gangabai, 46 B 541, 24 Bom L R 69.

(*j*) Gangadhar v Hira, 43 C 944, 20 C W N 489, 23 C L J 372, 34 I C 10, Nagindas v Bachoo, 43 I A 56, 40 B 270, 287, 32 I C 403, 23 C L J 395, 20 C W N 702, 30 M L J 193, 18 Bom L R 172, 14 A L J. 185 Pratapsing v Agarsingji, 43 B 778, 792, 46 I A 997, 24 C W N 57, 36 M L J 511, 50 I C 457, 21 Bom L R 496, 17 A L J 522, Kolhapur, Moharaji v Sundaram, 48 M 1, 1925 M 497.

(*k*) 43 B 778, 792 above.

(*l*) Teencowri v Denonath, 3 W R 49.

any distinction or restriction, subject only to one exception mentioned below the adopted son of a full brother will take in preference to the *Aurasa* son of a half brother, and one daughter's adopted son will inherit equally with another daughter's real son. (*m*) But when the adoption is not in the Dattaka form, he cannot inherit collaterally in the family of his adoption (*n*)

Exception

An adopted son, after the birth of a natural son, cannot perform the *àdya* or the first *shraddha* the twelve monthly *shràddhas* which follow, six monthly and the anniversary *shràddha* and the *sapindi-karana* But he can perform all the other *shràddhas* like the natural son (*o*)

Shraddha

Theory of adoption.—It has already been observed that the theory of adoption is complete affiliation, and consists in the fiction of new birth, the adopted boy being deemed to be begotten by the adoptive father on his own wife But it must not be supposed that the inequality of the *aurasa* and the *dattaka* sons as regards their rights, such as is found in commentaries, is inconsistent with this theory. For even among *aurasa* sons unequal distribution of property at partition, is laid down in the Smritis, and used to be made in former times

Adoption is complete affiliation

Sub-Sec iii—ADOPTIVE MOTHER

When the adopter has more wives than one, then the question may arise as to which of them will be the mother of the adopted son If the adopter allows any one of his wives to join him in the ceremony of taking the boy in adoption, in that case she will be his adoptive mother and her co-wives his step-mothers, (*p*) so that the adopting mother would succeed to him to the exclusion of the other wives of the

Adoptive mother is one who joins ceremony

(*m*) Padmakumari v Court of Wards, 8 C 302, Kalikomal v Umasunker, 10 C 232 (P C), see also Mokundo v Bykunt, 6 C 289, Sham v Gaya, I A 255, Sumbhoo v Narain, 3 Knapp, 55 W R, P C 100

(*n*) Tirath v Kahan, 1 L 583 60 I C 101 3 L L J 35, Jiwan v Jamuadas, 67 P L R 1911 10 I C 822

(*o*) Tagore Law Lectures 1889, p 388 2nd Ed, Asita v Nirode, 20 C W N 901, 922 (P C appeal in 24 C W N 794)

(*p*) See Gunamani v Devi Prasanna, 23 C W N 1038 54 I C 897

her rights against her co-wives

adoptive father. (q) On appeal against the Madras case (18 M 277), the Judicial Committee held these two cases to be rightly decided In this case a man selected one of his two wives to adopt a boy in conjunction with him, the boy inherited the adopter's estate and died an infant leaving the two widows of the adopter · the adopting widow was held entitled to succeed to the estate in preference to to the other (r) Similarly the adopted son cannot inherit the property of the relations of the wife of the adoptive father other than the wife who joined with her husband at the adoption (s)

Adoptive mother when all the wives join in adoption

But a difficulty arises if the adopter alone takes the boy, or when all his wives join with him, if the latter course be possible In either case all the wives might be taken to be his adoptive mothers But fiction would then surpass nature joint production of a single son by several females is a phenomenon unheard of, except in the story of Jarâsandha in the Mahâbhârata The Itihâsas and the Purânas, however, are books of precedents here, and one may rely upon them for drawing an argument by analogy in favour of the adopted son's rights. So the adopted son who is a favourite of law would have different sets of maternal relations to inherit from, if such an anomaly be permissible

One wife can receive boy to be mother

The following observations of the Judicial Committee are very important

"Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child To hold that a child could bear such a relationship to more than one mother would be contrary to settled law and would produce inextricable confusion in the law of inheritance "(t)

(q) See Kasheeshuree v Greesh, W R Gap No p 71 and Annapurni v Collector, 18 M 277 (r) Annapurni v Forbes, 23 M 1 26 I A 246 9 M L J 209, see Yamuna v Jamuna, 1929 N 211

(s) Venkatasubbier v Sundaramma, 48 M L J, 126 20 I W 925 85 I C 318 1925 M 340

(t) Narasimha v Parthasarathy, 41 I A 51, 69 37 M 199, 220 18 C W N 554 19 C L J 369 26 M L J 411 23 I C 166

"* * * But their Lordships are of opinion that the validity of a joint power of adoption and its interpretation are questions of far reaching importance in Hindu law and that in the present case the materials before them are very insufficient They would greatly regret to find themselves compelled to decide such questions on imperfect materials and inasmuch as in the view which their Lordships take of their case it is not necessary that these points should be decided they desire to express no opinion upon them, and will assure for the purposes of their decision that the Respondents are right in their contention that such a joint power of adoption given to two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption they could have validly executed the power"

Who mother when adopter a widower or bachelor

A greater difficulty presents itself when a widower or bachelor adopts. In the first case it might be said that the deceased wife of the adopter will be the adoptive mother, and her relations, the maternal relations of the adopted son, but it is held that the latter cannot inherit the property of the relations of the predeceased wife of the adopter who was a widower at the time of adoption. (u) The difficulty in the latter case, however, must remain unsolved.

Adopter's wife should join to become mother

But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son Even when a man has only one wife, and the man alone adopts, and the wife does not join in the act of adoption or concur in it, the legal relation of mother and son cannot arise between them. Nanda Pandita, no doubt, maintains that although the husband's assent is necessary for an adoption by the wife, yet the husband may adopt without the assent of the wife, and the son so adopted would belong to the wife, in the same manner as any property given to, and accepted by him. But as the wife's co-ownership in the husband's property, although it amounts to a legal interest therein, is neither co-equal nor similar to that of the husband, but is subordinate in quality and character, and is acknowledged to entitle her to use and enjoy the same, as wives usually do, similarly, there can be no actual and legal relation of mother and son between the wife taking no part in the adoption, and the husband's adopted son, any more

Nanda Pandita's view assent or no assent of wife, she becomes mother,

(u) 48 M L J 126 *above*

than between a wife and the husband's begotten son by her co-wife. That a stranger adopted by a man without the concurrence, or even against the will, of his wife, would become legally her son, is a proposition which must be established by authority, should there be none, the above *ipse dixit* of Nanda Pandita declaring the husband's independence of the wife as regards adoption, would not be sufficient for that purpose. It would be begging the question to say that the husband's adopted son becomes the son of his wife when he has only one wife, even without her consent. Nanda Pandita also, appears to indicate that acceptance by the wife is necessary to constitute her the legal mother of her husband's adopted son, by saying that the ancestors of the *mother that accepts* in adoption—प्रतिग्रहित्री या माता are the adoptee's maternal grandsires in the ceremony of Pàrvana Sràddha performed by him. Dattaka-Mìmànsà, vi, 50. Hence the term, 'adoptive mother' must be taken in its primary meaning of *adopting* mother, and not in the figurative sense of the adopter's wife. The Sanskrit rule of legal construction is that every word should be taken in its ordinary primary meaning न विधौ पर शब्द् । The incidents of Kritrima adoption in *Mithilà*, throw considerable light on the point.

not sound proposition

Sub Sec iv—ANTE-ADOPTION AGREEMENT

Ante-adoption agreement.

Such agreement how far binding.—It has already been noticed that a widow is not legally bound to execute the power of adoption, however solemnly she might be enjoined by the husband. Her interest in the husband's estate is not affected by her omission to adopt. Her interest is opposed to her duty to carry out the husband's wishes; these are sought to be reconciled by an agreement before adoption, between the widow and the natural father of the boy whereby the widow retains some interest in the husband's estate for her life. Such arrangement does not appear to be open to any valid objection, if the right retained does not exceed the widow's estate which she is entitled to enjoy notwithstanding an authority to adopt, which she may ignore. It cannot be deemed to be a fraudulent execution of the power. When the

donee of the power derives a benefit from the execution of the power in a particular manner, but for which he could not have got the benefit, then and then only the execution may be regarded a fraud upon the power. But the power of adoption is a peculiar one, the like of which is not found in the English law.

P C on such agreement

Privy Council against such agreements —The Judicial Committee has expressed an opinion against such agreement, in a case in which it was made *after* adoption. Their Lordships observed,—

"No conditions were attached to the adoption Had it been otherwise, the analogy, such as it is, presented by the doctrine of Courts of Equity in this country relating to the execution of powers of appointment would rather suggest that even in that case, the adoption would have been valid and the conditions void "(v)

Madras H C's former view

Relying on this *obiter dictum* of the Privy Council the Madras High Court held that the adopted son's rights cannot be curtailed by any ante-adoption agreement of the natural father. (w) But the attention of the Court appears to have not been drawn to the decision of the Privy Council in the case of *Ramasami* v. *Venkatarama*, (x) in which their Lordships observed that the question how far the natural father can by agreement before adoption renounce his son's rights is not unattended with difficulty; and then after referring to the Bombay case of *Chitko* v. *Janaki*, (y) in which such agreement was declared valid and binding,—went on to say, —"In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was *not void*, but was at the least, capable of ratification when his son became of age."

A still later decision of the Privy Council, (z) setting aside the decision of the Madras High Court, has held "that the consent of the natural father shows that it is for the advantage of the boy, and that mere postponement of his interest to the

(v) Bhaiya v Indar, 16 I A. 53, 59 16 C. 556.
(w) Jagannadha v. Papamma, 16 M 400 (x) 6 I A 196, 208 : 2 M. 91, 101
(y) 11 B.H.C. 199.
(z) Krishnamurthi v. Krishnamurthi, 50 M. 508 : 54 I A. 248 : 45 C.L J 620 : 31 C W N 910 : 101 I C. 779 1927 P C. 139

widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son" And "as soon, however, as the arrangements go beyond that, i e., either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of Hindu law". Their Lordships further added that they "are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that half a loaf being better than no bread, he is better with an adoption with transcated rights than with no adoption at all, are valid".

Evil effect when not binding on adoptee

Effect of P C dicision —The effect of such a view as expressed in the above Privy Council case (*a*) and the one taken in the above Madras case (*b*) would be, that adoption by widows will not take place at all in most cases, that is to say, a greater fraud will be perpetrated on the power, which the Courts are powerless to prevent It is doubtful whether this result is desirable, and the Courts should consider whether it is not preferable that the lesser fraud, if fraud it be, should be permitted Besides it would be no less a fraud on the *Purdanashin* widow who is induced to adopt upon the understanding, that the conditions subject to which she adopts are valid and binding on the adopted son, if the conditions be declared void and the adoption good.

Madras View on P C —The Madras High Court,(*b1*) with its past experience in connection with *Sahu Ram Chandra's* case, (*c*) has tried to explain away the above Privy Council decision in *Krishnamurthi's* case (*d*) in the light of true Hindu feelings and sentiments, though it is too apparent to be a respectful mode of dissenting by a subordinate Court from

(*a*) Krishnamurthi v. Krishnamurthi, *above.*
(*b*) Jagannadha v Papamma, 16 M 400
(*b1*) Raju *v.* Nagammal, 52 M 128 113 I C 449 1928 M 1289.
(*c*) 93 A 437 44 I A 12)
(*d*) *See foot note* (*z*) *above*

the decision of a higher tribunal, not allowed by law. In the absence of fraud or other similar causes, the parents are the best persons to look after the interests of their son and to judge what is beneficial to the boy given in adoption. It is hoped that the noble Lords of the Privy Council, as in the case of *Brij Narain*, (e) will reopen the question and lay down the law according to the real Hindu view and save the institution of adoption by widows from its burial.

Other Madras cases—In the case of *Visalakshi* v. *Sivaramien*, (f)—in which an adoption was made by a widow in consequence of the consent of the natural father to the terms of a registered deed executed by her in favour of the adopted son before adoption, whereby it was provided that in case of disagreement between the adopted son and the widow, she should enjoy for her life about a moiety of the husband's estate, which would devolve after her death on the adopted son,—a Full Bench of the Madras High Court has held that the provison in favour of the widow is binding on the adopted son. The previous ruling in the above Madras case is overruled by the Full Bench, the view taken therein being such that cannot be maintained as just and equitable The real test is, whether the arrangement is fair and resonable, and is necessary for safe-guarding the interest of the *Purdanashin* ladies who like the infants that are adopted are entitled to the protection (g). The above Madras case (g1) has held that this Full Bench has not been overruled by the decision in *Krishnamurthi's* case

Now held binding in Madras

Case-law

test if agreement binding

Bombay and Allahabad views—The Bombay High Court has held that an agreement by the natural father consenting to the retention by the adopting widow of a certain interest in the husband's estate is binding on the adopted son (h) A contract by the adult adopted son agreeing at the time of his adoption to a family settlement whereby the adopting widow bequeathed certain properties to the daughter of the predeceased son of her husband, is binding on the

Keeping some interest for widow

Family settlemet,

(e) 46 A 95 51 I A 129.
(f) 27 M 577
(g) See Mitter v Datta, 1927 A 194
(g1) Raju v Nagammal, *supra*.
(h) Ravji v Lakshmi, 11 B 381, 398.

adopted son. (*i*) But the Allahabad High Court, in an appeal under the Letters Patent arising out of differences of opinion, has, in a similar case, held that mere fact that an agreement is entered into by persons who are relations of each other does not make such an agreement a family settlement so as to be enforceable by persons who are not even parties to the agreement on the ground that a family settlement is one arrived at by members of the same family in settlement of doubtful claims. (*j*)

explained.

Rights postponed, curtailed.

Conclusion.—So it has been held that an agreement, between the adoptive father or mother and the natural father or mother of the adopted boy, by which the latter's rights are either wholly or partially postponed after the death of the adoptive mother, (*k*) or are curtailed by reasonable conditions, (*l*) is binding on the adopted son, provided the agreement was for the benefit of the boy. But if a widow in whom the property is vested in her by virtue of her husband's Will, enter into a contract with the natural father of the boy before adoption, that does not violate the rule laid down by the Privy Council in *Krishnamurthi's* case. (*m*)

absolute reservation

Nature of this right—The rights thus reserved for the adopted son is a vested interest and is transferable. (*n*) But reservation of absolute right of disposal of property by the adoptive father in any way he pleased, (*o*) or reservation of any property or right in favour of charities or religious endowments, is not binding on the adopted son. (*p*) A condi-

(*i*) Kashibai *v* Tatya, 40 B 668

(*j*) Mitter *v* Data, 1926 A 194 appeal from 1926 A 7

(*k*) Krishnamurthi *v* Krishnamurthi, *see foot note* (*r*) above, Panchanon *v.* Binoy, 27 C L J 274 44 I C 538, Balwant *v* Joti, 40 A 692 47 I C 559 16 A L J 765, Shanti *v* Dhan, 50 I C 113 42 P W R 1919, Keshobati *v* Satya, 47 I C 55, Goverdhandas *v* Laloomal, 53 I C 546 13 S L R 155, but see Purshottam *v* Rakh, 16 Bom L R 57 23 I C 599

(*l*) Raju *v* Nagammal, 52 M 128 113 I C 449 1928 M 1289 if the interpretation given in this case of P C case of Krishnamurthi be correct; Korat *v* Panchanon, 12 N L R 29 33 I C 780, for what is proper or improper motive, *see* Krishnayya *v* Raja of Pillapur, 51 M 898

(*m*) Parashram *v* Shriram, 1929 N 321

(*n*) Balwant *v* Joti, 40 A 692

(*o*) Parbatibai *v* Vishwanath, 27 Bom L.R 1509 1926 B 90

(*p*) Balkrishna *v* Shri, 43 B 542 50 I C. 912 21 Bom L.R 225.

tion postponing the vesting of the estate in the adopted son beyond two lives in existence is held valid. (q)

vesting postponed.

Compromise by widow before adoption—is sometimes binding on the boy subsequently adopted, and the decree for money obtained against the widow on the strength of a compromise whereby she agreed to pay an ascertained sum for the maintenance of the widow of the person from whom the husband of the former widow alleged to have inherited, but failed to pay the sum, is binding on the estate and consequently the adopted son is bound by it. (r)

Conditional gift and gift for valuable consideration—The gift of a son in adoption for valuable consideration or for an agreement executed by the adopter stipulating that the natural father is to get a maintenance allowance out of the adopter's property does not seem to be objectionable. A gift of a child in return for any benefit is not contrary to Hindu law. (s)

Gift of son for consideration

Sub-Sec. v—SHARE OF ADOPTED SON

Adopted and after-born sons—The only exception, agreeably to the principle mentioned above, (t) is as to the amount of share to be obtained by the adopted son when a real son becomes subsequently born to the adoptive father, there being express texts giving to the adopted son, a lesser share in that event. In this respect too, there are conflicting texts, some giving him a third share, some a fourth share, while there is a text of Vriddha-Gautama, cited in the Dattaka-Mìmànsà, v. 43, which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers.

Share of adopted and after born natural sons,

according to Vriddha-Gautama,

In dealing with the adopted son's heritable right, the Courts have assumed him to be endowed with excellent qualities in all cases, if the same assumption be made with respect to the question as to the amount of his share, when

(q) Kolhi v Mt Chottibai, 68 I C 294 (N)

(r) Raj Narayan v Bejoy, 34 C W N 754

(s) Murugappa v Nagappa, 29 M 161, Tribhuvan v Deputy, 5 O L J 294 47 I C 225.

(t) p. 261

an *aurasa* son is subsequently born, then he should get an equal share in all cases, according to the above text of Vriddha-Gautama. But the question has not been considered from this point of view, in the cases on the subject.

Vasishtha and Devala.

Vasishtha (*u*) lays down that if an *aurasa* son be born after adoption, then the Dattaka son gets a fourth share. But Devala (*v*) says that he partakes of a third share.

Share is what *aurasa* son gets and not of estate

The expressions one-third share and one-fourth share appear to be used in the texts, as having reference to the share of the *aurasa* son, and not as being so much part of the estate, for if that had been the case, then if many real sons be born, the adopted son would have got a larger share than each of them The conflict has not been reconciled, nor are the terms satisfactorily explained. But the rule adopted is, that in Bengal the adopted son would get half of what a begotten son gets (*w*) and in other places one-third of the same (*x*) But it has subsequently been held by the Privy Council (*y*) and Bombay (*z*) and Madras (*a*) High Courts that he is entitled to a fifth share instead of a fourth share, in other words, to one-fourth of what a legitimate son gets. And the Calcutta High Court also has taken the same view (*b*)

Adopted son's share as held by courts

Share how calculated

Calculation—But the quarter share to which a maiden sister is entitled on partition made by her brothers of the joint family property is thus explained in the Mitâkshara, (*c*) —at first allot to each of the maiden sisters a share equal to that of a brother and a wife of the father, if any, and then assign one-fourth of such a share to each of the maiden

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(*u*) Text No 2, p 185 *ante*
(*v*) Cited in the Dâyabhâga, Ch x para, 7
(*w*) Raghubanand *v* Sadhu, 4 C 425
(*x*) Ayyavu *v* Nelayadatchi, 1 Mad H C R 45, Rukhab *v* Chunilal, 16 B 347, Permanand *v* Sheo, 2 L 69 59 I C 256 21 P L R 1921 15 F W R 1921
(*y*) Nagindas *v* Bachoo, 40 B 270 43 I A 56 20 C W N 702 30 M L J 193 18 Bom L R 172 14 A L J 185 32 I C 403
(*z*) Tukaram *v* Ramchandra, 49 B 672, Giriapa *v* Ningapa, 17 B 100
(*a*) Karuturi Gopalam *v* K Venkataraghavulu, 40 M 632 29 M L J 710 31 I C 574, *see* Venkamamidi *v* Venkata, 43 M 398 38 M L J 86 27 M L T 142 11 L W 379 55 I C 371, Narasimappa *v.* Chiwna, 38 I C 244
(*b*) Bir *v* Kalpa, 1 C L J 388
(*c*) Ch 1, sec. vii paras, 5-7

sisters, and then distribute the residue equally among the brothers and the mother and step-mother, if any.

If the Dattaka son's one-third or one-fourth share be explained in this way then he is to get $\frac{1}{6}$ or $\frac{1}{5}$, if only one son be born after adoption—and $\frac{1}{9}$ or $\frac{1}{7}$ if two sons be born

Shares of adoptee and father's relations.—There is no other express authority in the Smritis for curtailing the rights of the adopted son But the author of the Dattaka-Chandrikà extends this rule of difference in shares, to cases of partition between male descendants in the male line down to the great-grandson, where there is competition between an adopted and a real descendant. He does so by analogy which would make the rule applicable to all cases in which there is competition between a real and an adopted relation

Shares on partition between adopted son and father's relations.

The extended rule has been followed by the Calcutta High Court in a case in which the adopted son of one brother brought a suit for partition against the sons of two other brothers, (*d*) they formed members of a joint family governed by the Mitàksharà. The Madras High Court doubts the correctness of this decision. (*e*) In a subsequent case, the Calcutta High Court expressly observed that there is nothing in the text of Dattaka-Chandrikà to prevent the adopted son taking the father's full share though the question was not actually decided (*f*)

Calcutta

Madras.

The rule was not applied to a case in which the adopted son of one daughter was a claimant together with the real legitimate son of another daughter, both of whom were held to be equal sharers. (*g*)

Share among Sudras—Another novel rule enunciated for the first time by the Dattaka-Chandrikà, is that a Sùdra's adopted son should share *equally* with his begotten son, on the ground that a Sùdra's illegitimate son may by the father's choice get an equal share with his legitimate sons It is difficult to understand the cogency of this argument. This

Share of adopted son of Sudra

(*d*) Raghub v Sadhu, 4 C 425
(*e*) Raja v Subbaraya, 7 M 253
(*f*) Baramamund v Chowdhury, 14 C L J. 183, 187 (1884). 18 I C 6.
(*g*) Surjo v. Mohes, 9 C. 70.

rule, however, has been followed by the Calcutta (*h*) and Madras (*i*) High Courts, for, this book is said to be of special authority in Bengal and Madras. But the Madras High Court, after a careful consideration of all the authorities on the subject, came to the conclusion, following an earlier decision of the same Court, (*j*) that an adopted son of a Sūdra was entitled to only a fifth share in a competition with a natural born son (*k*) But in the case of *Arumilli Periasu* v. *A. Subbarayadu* (*l*) the above decision has been overruled and it has been finally settled by the Privy Council that an adopted son shares equally on partition with an after-born natural son of a Sūdra

Arumilli v Subbarayadu

The Privy Council, however, did not attribute sufficient reasons for meeting the arguments on which the Chief Justice Sir John Wallis and Mr Justice Sheshagiri Ayyar based their decision Their Lordships of the Judicial Committee decided the case mainly on the ground that "The rule of the Dattaka Chandrikā, that on a partition of the joint family property of Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption, had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras until the law on that subject was disturbed in 1915 by the decision of the High Court at Madras in *Gopalan* v *Venkataraghavulu* "(*m*) In the last mentioned case Chief Justice Sir John Wallis and Mr Justice Sheshagiri Ayyar following the earlier decision of the same Court, (*n*) refused to accept the *obiter* expressed by Turner, C J, and Mathuswami Ayyar, J, in *Raja* v *Subbaraya* (*o*) and discussed the law on the subject carefully But their Lordships of the Judicial Committee overruled the decision of a Chief Justice and a Brāhmin Judge and followed the *obiter* of a similarly constituted Bench, namely, a Chief Justice and a Brāhmin Judge saying: "Nevertheless it was the opinion of the Chief Justice of Madras, who was an able and careful lawyer, and of Mr Justice Mattuswami Ayyar, who was a member of Brāhmin family of the Madras Presidency, and who earned for himself the well-deserved reputation of being one of the most accomplished and reliable lawyers in India in cases involving a knowledge of Hindu Law"

Karuturi v Karuturi.

(*h*) Asita v Nirode, 20 C W N 901 on appeal to P C 24 C W N 794.
(*i*) Raja v Subbaraya, 7 M 253
(*j*) Ayyavu v Nelayadatchi, 1 M H C R 45
(*k*) Karuturi Gopalm v K Venkataghavulu, 40 M 632 29 M L J 710.
(*l*) 44 M 656 48 I A 280 26 C W N 1 34 C L J 56 41 M L J 33 23 Bom L R 920 61 I C 690
(*m*) 40 M 630
(*n*) Ayyavu v. Nelayadatchi, 1 M.H.C R 45
(*o*) 10 M. 632.

Their Lodrships went on to add that, "it is to be observed that the learned Hindu Subordinate Judge who tried that suit (*Gopalan* v *Venkataraghavulu*) in or after 1911, must have believed that in the Presidency of Madras the rule of the Dattaka Chandrikà, that amongst Sudras an adopted son was entitled to share equally on a partition with the subsequently born legitimate son of the adoptive father, was the rule to be applied in the Presidency of Madras in cases in which the parties were Sudras" (*p*) It is to be noticed in this connection that the Privy Council, in more instances than one, in deciding important questions of Hindu law has relied on the experiences of the trying Hindu Judges, (*q*) whose decisions were seriously challenged before their Lordships But it is not very clear whether their Lordships intended that the principle should be adopted by all Courts of appeal.

Sub Sec vi—ADOPTEE'S RIGHT AGAINST ADOPTER

Adopter's position under Mitàkshara,

Under Mitakshara—The position of an adopted son is secure under the Mitàksharà for as he is entitled to all the rights of a real legitimate son, he acquires from the moment of adoption, a right to the ancestral property, so as to become the co-owner of the adoptive father with co-equal rights So his rights cannot be affected by an attempted alienation so far as the ancestral property is concerned (*r*)

Dayabhaga

Under Dayabhaga—But if his position be not better than that of a real legitimate son, then under the Dàyabhàga, and also under the Mitàksharà so far as regards the self-acquired property, the adopted son would be left completely at the mercy of the adoptive father. The proposition that an adopted son is entitled to the same rights as a real legitimate son of the adoptive parents, confers on him in Bengal the contingent and uncertain right of inheriting from them and all their relations

Protection to adoptee needed,

Protection needed by adopted son—But the certain right of inheriting the adopter's property ought to be secured to him by curtailing the adopter's power of giving away his property to the detriment of the adopted son, seeing that the moving consideration inducing the parents to give their son in adoption is, his advancement by his appointment as heir

(*p*) 48 I A 280, 294
(*q*) 48 I A 280, 296, Ramchandra *v* Vinayak, 41 I A 290, 310
(*r*) Bhyri Appamma *v* Chinnammi, 58 I C 511 12 L W 17, *see* Parmanand *v* Sheo, 2 L. 69 59 I C 256 21 P.L R. 1921 15 P W.R 1921.

to the adopter's property. According to the principle of equity and justice, therefore, the Courts are competent to protect an adopted son against the capricious and whimsical disposition of his property by the adoptive father under the Dàyabhàga school, made with a view to deprive the son, of the right of inheriting the same, when the protection afforded by natural love and affection to real legitimate sons is wanting in his case There are, however, some cases governed by the Mitàksharà, in which it has been held that an adoptive father is competent to make a gift of his self-acquired immovable property either by an act *inter vivos* (s) or by a Will (t) so as to deprive the adopted son But in these cases, the principle of equity could not be invoked, inasmuch as the adopted sons became entitled to large ancestral estates

Its reason,

In Hindu law adoptions took the place of Wills which were unknown and unrecognized Adoption is regarded by the Hindus as an appointment of the heir and successor to the adopter The moving consideration influencing the natural parents to give away their son in adoption is the belief that it is an advancement of the child who is sure to get the rich inheritance of the adoptive father They would not have parted with their son, if they had believed that the adopter could disinherit him, according to his pleasure had they thought such disinherison possible they would have required the adopter to settle his property on the boy before making the gift But this course has now become absolutely necessary, inasmuch as the Privy Council has held that in adoption there is no implied contract with the natural father that in consideration of the gift of his son, the adopter will not make a Will depriving the adopted son of his estate. (u) It is so held even in a case where there was an express agreement in which it was said that the adopter constituted the boy his heir to his estate, their Lordships remarked that

P C held no implied contract

(s) Rungama v Atchama, 4 M I A 1 7 W R P C 57

(t) Purushotam v Vasudev, 8 Bom H C R O C 196, Sudanund v Bonomalee, Marshall 137 2 Hay 205, *see* Paramanund v Sheo, 59 I C 256 2 L 69 21 P L R 1921 15 P W R 1921

(u) Sri Raja v Court, 26 I A 83 3 C W N 415, *see* Surendra v Kala, 12 C W N 658

by saying that the adopter meant only that he had given him the same right of inheritance as a natural son would have. But it should be observed that that is a right which the law gives to an adopted son, no contract was necessary for securing it to him in that case

What adopted son cannot question

An adopted son cannot question the validity of a bequest made by a testator by a Will giving authority to his wife to adopt.(v) Nor can the adopted son who was the adoptive father's brother's son, question an alienation made by the adoptive father jointly with his brother, who were joint at the time of alienation, because his rights in the natural father's estate ceased from the date of adoption and his rights in that of adoptive father accrued after the alienation (w) The adoptive father can compromise a suit on behalf of the adopted son as to bind the latter (x)

Sub Sec VII —ADOPTION BY WIDOW AND DIVESTING

Divesting of estate by adoption

When a person dies giving an authority to his widow to adopt a son unto him, then his estate must vest in the nearest heir living at the time of his death , for a Hindu's estate cannot remain in abeyance for a nearer heir who may come into existence in future. Hence if he dies without leaving male issue, his estate must vest either in his widow or widows, or in the surviving collateral male members of the joint family if governed by the Mitâkshara. If again the person leaves behind him a son and authorizes his widow to adopt in the event of that son's death without male issue, his estate vests in that son, and on the latter's death may vest in a person other than the widow authorized to adopt.(y) Between the death of the adoptive father and the adoption, succession might open to the estate of deceased relations of the adoptive parents, which would have devolved on the adopted son had his adoption taken place before the falling in of the inheritance. Hence arises the vexed question as to what estates,

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(v) Sri Gadicherla v Nayapathy, 46 M 300 · 32 M L T 47 : 17 L W 31.

(w) Nagarmal v Abdul, 1926 N 5 · 89 I.C 941.

(x) *See* Medhi v Ghanshiam, 31 C.W N. 93 : 1927 P C 204.

(y) In this connection the subject, "Power incapable of execution" pp. 13-215 should be read

already vested in other persons, may a subsequently adopted son take by divesting them, the ordinary rule of Hindu law being that an estate once vested by inheritance cannot be divested by reason of any subsequent disqualification of the heir (z) or by reason of a nearer heir coming into existence afterwards. (a) Hence divesting by adoption is an exceptional rule founded on the peculiar character of the institution, and entirely based upon judicial decisions which do not seem to be quite consistent

Adopting widow divested,

Adopting widow.—When the estate is vested in the adopting widow as heiress of her deceased husband, she becomes divested by the adoption which is an act of her own choice Even if absolute power over property is given to the widow by a Will with power to adopt, the widow on adoption will be divested of the estate (b) But when it was stated in the Will "she should be absolute owner of his entire estate the adopted boy having no power of interference during her life-time," the adopted son shall have no right to possession during her life-time (c) If the husband's estate is vested in two co-widows, and one of them or both of them jointly adopt a son in the exercise of the power granted by the husband, both the widows become divested,(d) including the office of trusteeship, (e) even if they divided the property among themselves (f) So in Bombay it has been held that when the senior widow without authority from the husband adopts a son of her own accord, the junior widow is also divested of her interest in the husband's estate (g)

all widows

Who else divested,

Other than adopting widow—But in a case where a person died leaving two widows and a son by the senior widow and giving authority to the junior widow to adopt in the event of that son's death, and on the happening of that event the junior widow adopted a son, it has been held that

(z) Moniram v Keri, 5 C 776
(a) Callydoss v Krishnan, 11 W R O C 11 2 B L R F B 103.
(b) Krishnamma v Lakshminarayana, 1938 M 271.
(c) Durgi v Kanhaiya, 49 A 579: 1927 A 387.
(d) Mondakini v Adinath, 18 C 69; Tiruvengalam v Butchayya, 52 M. 373: 1929 M. 11
(e) Tiruvengalam v Butchayya, *above*
(f) Annapurnabai v Ruprao, 1924 N 319
(g) Rakhmabai v Radha, 5 Bom. H C R A. C. J 181.

the senior widow cannot be divested of the estate which became vested in her as the mother and heiress of the son (*h*) So also when on the existing son's death the estate vested in his widow or in his paternal grandmother or other heir, it has been held that his mother in the former case, and his step-mother in the latter, could not adopt, and cause the estate to be divested.(*i*)

mothe

Mother after son's death.—But if the estate vests in the adopting widow by inheritance from her son or sons' son, and she then adopts, the adoption will be valid, and the widow will be divested of the estate according to the Mitàkshara school (*j*)

Daya

The law may be contended to be different in the Bengal school, as regards divesting in such cases, because here under no circumstances can a brother take in preference to the mother, or a paternal uncle in preference to the paternal grandmother, whereas according to the Mitakshara the male members of a joint-family take, to the exclusion of the females, the undivided coparcenary interest of a deceased member, and the adoption may be assumed to relate back to the time when the estate vested in the adopting widow

Mit

Different opinions have been expressed by the learned Judges of the Calcutta High Court, the preponderance is in favour of the view that the mother becomes divested (*k*) The principle upon which is based, the opinion expressed by the Judicial Committee in the cases of *Bhoobunmoyee*, (*l*) namely, that the widow becomes divested of the estate even when inherited by her from a deceased son,—appears to be, that the power of adoption is a kind of power of appointment, (*m*) and accordingly the adoption of a son by the widow operates as the execution of the power and the appointment of the property to he adopted son, and so the widow becomes divested by the operation of law, of the property, from whomsoever inherited.

(*h*) Faizuddin *v*. Tincowri, 22 C 565

(*i*) Bhoobunmoyee *v* Ramkisore, 10 M I A. 279 3 W R P C 15, Drobomoyee *v* Shama, 12 C 246, Annammah *v* Mabbu, 8 Mad H.C R 108, Anandi *v* Kashi, 28 B 461, Manikyamala *v* Nanda, 33 C 1306, Adivi *v* Nidamarty, 33 M 228, Madana *v* Purushothama, 38 M 1105

(*j*) Jamnabai *v* Raychand, 7 B 225, Ravji *v* Lakshmibai, 11 B 381, Lakhmi *v* Gatto, 8 A 319, Manikchand *v* Jagat Settani, 17 C 518.

(*k*) Puddo *v* Juggut, 5 C 615, Amrito *v*. Surnomoni, 2 C W N 389 : 25 C. 662, Rai Jatindra *v* Amrita, 5 C W N 20.

(*l*) 10 M I A 279; *see* Vellanki *v* Venkata, 1 M. 174, 185 P.C.

(*m*) Bai Moti *v*. Bai Mamu, 21 B. 709.

An adoption by the widow of a predeceased son without the assent of her mother-in-law cannot divest the latter of the father-in-law's estate vested in her (*n*)

undivided co-parcener,

Undivided coparcener —When a member of a joint family governed by the Mitāksharā dies giving permission to his widow to adopt a son, then his undivided co-parcenary interest vests, on his death, in the surviving male members, who, however, will be divested by the subsequent adoption made by the widow (*o*) It should be observed, however, the vesting and divesting go on continually by births and deaths in a Mitāksharā joint family, and the law in this respect, is somewhat different in the two schools But it appears that if the male member in whom the undivided interest of another member authorizing his widow to adopt, vests by survivorship, dies and the whole family property vests in his widow, and then the other widow adopts, such adoption would be invalid by reason of the second widow being not divested (*p*) So, if the sole co-parcener, inspite of the authority to adopt given by his deceased co-parcener to his widow, alienates all or any of the family properties absolutely, even by gift, the son adopted after the alienation cannot question it and the ordinary doctrine that adoption relates back to the date of the adoptive father's death, does not apply to such cases (*q*) The distinction is that if the adoption is made when the undivided co-parcenary interest of the adoptive father remains vested in his co-parcener taking by survivorship the interest is divested and the adoption is valid, but if the adoption is made after the estate has passed from the co-parcener taking by survivorship to his heir or to a stranger by alienation then the estate cannot be divested and the adoption is invalid (*r*)

and when vests after him to his heir

and any person

Any other person —As regards the estate of any person other than the adoptive father, succession to which had opened before adoption, the adopted son cannot lay any claim to the

(*n*) Gopal *v* Vishnu, 23 B. 250.
(*o*) Bachoo *v.* Mankorebai, 34 I A 107, Sri Virada *v* Sri Broko, 1 M. 69: 3 I A 154; Surendra *v* Sailaja, 18 C 385
(*p*) Rupchand *v* Rukhmabai, 8 Bom H C R, A C J 114.
(*q*) Veeranna *v* Sayamma, 52 M 398 1929 M 276.
(*r*) Chandra *v* Gojarabai, 14 B 403

same (*s*) even when the adoption was delayed by the fraud of the person in whom the succession vested. (*t*) So the sons adopted by the widows of two *gotraja sapindas* of a deceased owner who succeeded to the estate on the latter's death, cannot resist the claims of the reversioners, inasmuch as, the adopted sons may claim the estate of their respective adoptive fathers, but cannot claim the estate in which their adoptive mothers had only a limited interest (*u*)

Vatan property.

An adoption made by the mother who inherited her son on his death does not divest the *vatan* property which vested in the son's male heir on his death (*v*)

Assent

An adoption made with the assent of the person in whom the estate is vested will divest him of that estate. (*w*)

Sub-Sec viii—UNAUTHORIZED ALIENATION BY WIDOW

Adopted son's right to challenge alienation by widow

As an adopted son becomes entitled to the adoptive father's estate by divesting the widow, he acquires from the time of adoption (*x*) the right to recover any property that has been alienated by the widow without legal necessity The position is not altered if a second adopted son question the validity of an alienation by the widow before the adoption of a first adopted son who died a minor. (*y*) He is not to wait until the widow's death, like the reversioner, for, the widow's estate comes to an end immediately on adoption, consequently no unauthorised alienation by her, can subsist beyond the extinction of her own title which alone could pass to her transferee (*z*)

Widow's estate ends with adoption

A contrary view, however, has been taken in some cases in which the unauthorized alienation by the widow before adoption is held valid for her life, upon the hypothesis that she had power to transfer her life interest (*a*) But this decision has subsequently been overruled by a Full Bench holding that an adopted son can set aside an unauthorized alienation made by the

(*s*) Kally *v* Gocool, 2 C 295
(*t*) Bhubaneswari *v* Murugain, 12 C 18 affirming, 7 C 178
(*u*) Hanmava *v* Venkappa, 1925 B 26
(*v*) Adiveva *v* Chinmall, 26 Bom L R 360 81 I C 1018 1924 B 393
(*w*) Payapa *v* Appanna, 23 B 327, Siddappa *v* Ningangavda, 38 B 724, *see* Vaman *v* Venkaj, 45 B 820 23 Bom L J 269 61 I C 460
(*x*) Hanamgowda *v* Irgowda, 48 B 654 26 Bom L R 829 1925 B 9
(*y*) Hanmant *v* Krishna, 49 B 604
(*z*) Banomali *v* Jagat, 1 C L J 319 (P C), Moro *v* Balaji, 19 B 809
(*a*) Sreeramulu *v* Kristamma, 26 M. 143

adoptive mother (*b*) Some learned Judges of the Calcutta High Court thought that in *Bhoobunmoyee's* case (*c*) the adoption was not intended to be declared invalid, but all that the Privy Council intended to lay down, was, that the adopted son, as brother to the last full owner of the estate, could not succeed during the life-time of his widow and mother, (*d*) and accordingly their Lordships held that the adopted son could not get possession of any property alienated by the widow, during her life (*e*)

Contrary view taken by the Calcutta High Court

Reason why the above view inaccurate

It is difficult to understand how the widow could be held to have a life-interest in the estate inherited by her If that were so, how is she divested by adoption? If the exercise of the power of adoption operates as the appointment of the estate to the adopted son, the legal effect of which is to cause the estate to vest in the son by divesting the widow, then the widow's transferee also must necessarily be divested, he cannot be in a higher position than the widow herself. It is impossible to find out any principle for drawing a distinction between the widow and the transferee from her, with respect to divestment There is no reason why the widow's estate should be deemed liable to determination by her death or re-marriage only, and not also by adoption under the husband's power The adopted son's rights should be the same as those of a posthumous son

Adopted son's right dates from adoption held by P C

A purchaser from a widow who is authorized to adopt, cannot invoke any principle of equity for preventing the immediate resumption by the adopted son, of what has been alienated without legal necessity The adopted son's cause of action is held by the Privy Council to arise from the date of adoption, to recover possession from the widow's transferee, (*f*) so adverse possession against the adoptive mother does not affect the rights of the adopted son as time does not run against the adoptee prior to the date of his adoption (*g*)

Sub Sec ix—INVALID ADOPTION

Invalid adoption and its effect on status of the boy

Effect —There are two elements in an adoption, *first*, the transfer of the *patria potestas* or paternal dominion over the boy from the natural father to the adopter, causing the extinction of his status in the family of birth, *second*, the investment of the boy with the status of son unto the adopter. When slavery was recognised, if the adoption was invalid, the

(*b*) Vaidyanath *v* Savithri, 41 M 75 F B 3 M L J 287 22 M L T 275 42 I C 245
(*c*) 10 M I A 279 (*d*) Puddo *v* Jaggut, 5 C 615, 644
(*e*) Gobindo *v* Ram, 24 W R 183, Kally *v* Gocool, 2 C 295, 307, Prosonna *v* Afzol, 4 C 523
(*f*) Ram *v* Jagat, 32 I A 80 1 C L J 319
(*g*) Sitaram *v*. Rajaram, 48 I C 230 (N)

boy would not acquire the status of sonship to the adopter, but the effect of *gift* by the father or the mother and *acceptance* of the boy, would be the loss of his status in the famil of birth, and the acquisition of the condition of a slave of the adopter, and as such he was entitled to maintenance only in the family of adoption. (*h*) But such an effect as this cannot arise now that slavery has been abolished if the adoption fails, the boy's status in the family of his birth will remain unaffected by the invalid adoption. (*i*) This distinction is not borne in mind There are some decisions in which the former view was taken, which was correct before the abolition of slavery, while there are others in which the latter view has been expressed.

Formerly a slave,

A person whose adoption is invalid, is in the eye of law an absolute stranger to the adoptive family. (*j*) An *upanayana* ceremony performed by the adoptive father in an invalid adoption is a nullity and there is no bar to his subsequent adoption. (*k*)

now a stranger

Though an adoption may be invalid yet an adopted son as such may acquire by adverse possession property belonging to another. (*l*)

Adverse possession by such a son

The widow is not personally estopped from disputing the validity of the adoption and recovering the estate of her deceased husband, in the case where the adoption is invalid unless the adoptee's position has been prejudiced. (*m*)

Estoppel on adopting widow

Ratification of invalid adoption.—An important question often arises whether an invalid adoption can be made valid by subsequent ratification. It should be borne in mind that there is a vast difference between estoppel and ratification. The former binds the particular person or persons or those who might claim any right under them, while the latter

Ratification of invalid adoption;

(*h*) Ayyàvu *v* Niládatchi, 1 M H C R 45

(*i*) Bawani *v* Ambabày, 1 M H C R 363, Laksmàppà *v* Ramava, 12 Bom H.C R 364, 397, Dalpatsingji *v* Raisingji, 29 B 528, 533 17 Bom L R 566 29 I C 943, Vaithilingam *v* Murugaian, 37 M [illegible] M L J 189, Vaman *v* Venkaji, 45 B 829 23 Bom L R 269 61 I C 460

(*j*) Ramkishore *v* Jayanarayana, 10 N L R 1 40 C. 966 40 I A 213 17 C W N 1189 18 C L J 237 15 Bom L R 867 11 A L J 865 25 M L J 512 20 I C 958

(*k*) Vadervu *v* Somasundaram, 43 M 876 59 I C 609.

(*l*) Aiyanacharıar *v* Lakshmi, 21 M L J 500 10 M L T 19 10 I C 194

(*m*) Ramchari *v* Saraswati, 60 I C 246 12 L. W. 544 (1920) M W N 721.

validates the act of adoption and it binds all persons, as if the adoption was valid at the date of adoption. Now the question is whether an adoption *ab initio* void can subsequently be validated by ratification The Madras High Court, in the case of *Venkata* v. *Rungayya*, (*n*) which went up to the Privy Council, has held that the ratification validated the adoption, inasmuch as, no one's interest was prejudicially affected in that case by the subsequent ratification, in consequence of anything which happened before it. A later decision of the Madras High Court, (*o*) however, has refused to accept the doctrine of ratification laid down in the above case as it appeared to Oldfield, J., objectionable on its merits. The same High Court, in the absence of any authority holding that such subsequent assent of the *Sapindas* would validate the adoption, has held that subsequent ratification cannot turn an invalid adoption valid. (*p*)

Madras.

Mr. Justice Ranade of the Bombay High Court (*q*) has expressed an *obiter*, namely, that an invalid adoption can be validated on the principle of ratification by conduct or acquiescence on the authorities of *Sadashiva* v *Hari*, (*r*) *Ravji* v *Lakshmibai*, (*s*) *Sukhbai* v *Guman* (*t*) and *Rajendro* v. *Jogendro* (*u*) The first three cases involved the question of estoppel, whereas in the last the decision mainly turned upon the genuineness of a Will containing the authority to adopt. In a Full Bench decision (*v*) to which Ranade, J, was a party, it has been laid down that subsequent assent to an adoption cannot give it validity, if it was invalid when made. Mr Justice Ranade, however, in the concluding lines of his judgment has said that "the adoption in this case was void for want of legal power in this adoptive mother to make a valid adoption and that this defect was not cured by the consent of the real heirs."

Bombay

(*n*) 23 M 437, 446 affirmed by P C 37 M 199, 41 I A 51 26 M L J 411 18 C W N 554 19 C L J 369 26 Bom L J 328 12 A L. J 315 23 I C 166

(*o*) Sattiraju v Venkataswami, 40 M 925, 938. 32 M L J 119. 40 I C 518 5 I W 63

(*p*) Doraisami v Chinnia, 34 M L J 258

(*q*) Payapa v Appanna, 23 B 327, 333 (*r*) 11 Bom H C R. 190

(*s*) 11 B 381. (*t*) 2 A 366 (*u*)

(*v*) Vasudeo v Ramchandra, 22 B 551, 557

Invalid adoption and *Persona designata*.—When a gift is made by a Deed or Will to a boy who has been adopted, or whose adoption is directed, by the donor, but who is not adopted or whose adoption is held invalid, then a question arises with respect to the validity of the gift. If the intention is clear to benefit the boy who is identified irrespective of adoption, the reference to which is intended as mere description, then the gift must be held good according to the same principle as is laid down in Section 76 (old 63) of the Succession Act (*w*). But, if on the other hand, the adoption of the boy appears to be the condition of, or the moving consideration for, the gift, then the gift cannot take effect, if the adoption fails or is pronounced invalid (*x*). The fact that a Will describes the donee as an adopted son does not mean that unless in law and fact he is an adopted son the testator intended that he was to get no benefit under the Will (*y*). In such cases the Court should not strain, to adopt a construction which would defeat the intention of the testator. (*z*)

Gift *persona designata*

A document which stated : "further you, becoming a son to me, will be such an owner of all my properties as a son is," cannot amount to a gift or transfer of property. (*a*)

Sec. 8—JUDICIAL PROCEEDINGS

Suit to set aside an invalid adoption.—The presumptive reversioner (*b*), or, more properly, the next heir, and when he refuses, or is in collusion, or is a female, the remoter reversioner is permitted to bring a suit for a decree declaring the invalidity of an adoption during the life of the adopting widow. Considering the grave and important nature of disputes relating to the truth or validity of an adoption, involving questions of family status and the serious consequences of a

Suits to set aside adoption and by whom

(*w*) Nidhoo *v* Sarada, 3 I A 253 26 W R 91, Bireswer *v* Ardha, 19 I A 101 19 C 452, Murari *v* Kundan, 31 A 339, *see* Hira *v* Radha, 37 B 116

(*x*) Fanindra *v* Rajeswar, 12 I A 72 11 C 463, Karamsi *v* Karsan, 23 B 271

(*y*) Khub *v* Ramji, 17 A L J 853 52 I C 311

(*z*) Bai Dhondubai *v* Laxmanrao 24 Bom L R 794 68 I C, 504, in this connection see, Krishna *v* Sundara, 35 C W N 617 P C

(*a*) Surappa *v* Sundramma, 1928 M 176

(*b*) Venkatanarayan *v* Subbammal, 38 M 406 21 C L J 515 19 C W N 641, final decision 39 M 107 43 I A 20, Muthukrishna *v*. Harinarayan, 1927 M 785

decree declaring the invalidity of an adoption on the rights of the boy adopted, it appears to be desirable that such suits should be permitted to be brought within a short time from the time of adoption, and that the adjudication made in them should be made final as far as possible. But with respcet to suits relating to alienations made by a female heir it has been held in a series of cases that the presumptive reversioner cannot represent the remote reversioners. And although suits to set aside adoptions are analogous to suits relating to alienations, still they stand on a different footing. Accordingly a Full Bench of the Madras High Court has held that on principle the presumptive reversioner or a more remote reversioner when permitted to bring such suit, ought to be held to represent all reversioners, provided the plaintiff disclose the names of all persons interested in the reversion, and serve notices on them to enable them to be made parties, should they so desire, and provided the matter is decided after a fair trial the true object of the concession of this right of suit, is, the protection of the interest of the actual reversioner, and the perpetuation of testimony which might be lost by the time the succession actually opens. (c) A suit by the mother of the last male owner of the estate, to set aside an adoption made by the widow abates on the mother's death. (d)

Madras Full Bench,

P C on Madras view

The Privy Council (e) has held that a next nearest reversioner may continue the suit to set aside an adoption commenced by the plaintiff, the then nearest reversioner. In arriving at the above conclusion the Judicial Committee has made the following observation with respect to the decision of the Madras High Court in the case of *Chiruvolu* v. *Chiruvolu* (f)

"The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner is not binding beyond the life time of the alienor In the first class

(c) Chiruvolu v Chiruvola, 29 M 390
(d) Arunachallam Pillai v Vellaya, 23 M L J 719
(e) Venkatanarayana v Subbammal, 38 M 406, 411-413 28 M L J 535 . 21 C L J 515 19 C W N 641 final decision 39 M 107 43 I A 20, *see* Kalyandappa v Chanbasappa, 28 C W N 666, 675 48 B 411
(f) 29 M 390

of cases it has been recognised that the presumptive reversioner's suit is in a representative character, in the other, however, chiefly on the ground that the adjudication relating to an alienation to the suit of the presumptive reversioner does not operate as a *res judicata* against the contingent reversioners, it has been held that these have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances when closely examined will be found, so far as the point for decision is concerned, to be the same. The test of *res judicata* applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather."

"What has to be considered is whether 'the right to sue,' in the words of the statute, 'survives,' and if it does, who can continue the action to obtain the relief that is sought?"

The grounds on which such suits are brought are the absence or illegality of the power of adoption given to the widow, the ineligibility of the boy by reason of his being within prohibited degrees for adoption, or other defects, and the non-performance of the necessary ceremonies. The payment by the adopter of any consideration to the boy's natural father for inducing him to make the gift in adoption, has in some cases been contended to constitute the boy as *kritta* or *purchased* son, and not Dattaka son, and so to render the adoption invalid. But the Madras High Court has held that the receipt of money by the natural father in consideration of giving his son, though unlawful, does not vitiate the adoption consisting of the gift and acceptance of the boy—which is a distinct and separate transaction (*g*)

Grounds on which validity of adoption can be questioned.

Court-Fee.—A suit by a reversioner for a declaration that an alleged adoption is invalid, affects title of the adopted son to the property and so *ad valorem* court-fee is to be paid (*h*)

Onus—A person setting up title on adoption, as against another who would succeed in case there was no such adoption, must prove the fact of adoption by evidence free from all suspicion of fraud (*i*) and the *onus* is on him to prove the

Onus on him who sets up.

(*g*) Murugappa *v* Nagappa, 29 M 161 But *see* Esan *v* Harish 21 W R 381

(*h*) Noksing *v* Bholusing, 1930 N 73

(*i*) Sutroogun *v* Sabitra, 5 W R, P C 109, Chatibai *v* Kundibai, 88 I C 573 1925 S 223, *see* Venkata *v* Papayya, 21 I C 737 (1913) M W N 828, Baluk *v* Nanu, 1930 L 579.

adoption, both as regards the power of the adopter and the fact of adoption (*j*) But when the adopted son has been treated as such for a long series of years, slight evidence will be sufficient, (*k*) and Courts will presume adoption (*l*) as

authority,

also the authority of the widow to adopt, (*m*) and so the person who challenges long after adoption, the authority of adoption, must clearly prove the want of it (*n*) If the requisite authority and the *factum* of adoption with the necessary formalities are proved or admitted, the *onus* will be

shifted when

shifted on the party opposing the adoption to prove the existence of other invalidating circumstances such as the adoptee being the only son of his natural father, or of a different faith (*o*) But if the adoption is denied by the person said to have been adopted, the burden of proof lies on the person alleging it (*p*) The *onus* is on the person setting up adoption

State of mind,

that a person was in a fit state of mind to perform the act of taking when the alleged adoption was made by a person who was *in extremis* and was delirious. (*q*)

Homa,

It is to be presumed that *Homa*, if necessary, was performed when the adoption is challenged after 48 years. (*r*)

Dvyamushyayana,

A person setting up a *dvyamushyayana* form of adoption is to prove the agreement necessary under such an adoption. (*s*)

Madras

But the *onus* lies on the plaintiff to prove that an adoption is invalid or false and fraudulent when the suit was

(*j*) Kalpa *v*. Goluck, 4 W R 78, Tarinee *v* Saroda, 11 W R 468, Kishori *v* Chuni, 9 C L J 172 P C : 31 A 116 13 C W N 370 36 I,A 9 11 Bom L R 196 Lal *v* Chiranji, 32 A 104 P.C 37 I A 1 14 C W N 285 12 Bom L R 244 5 I C 549, Chowdry *v* Koor, 12 M I A 350, 356 12 W R, P C 1, 2-3, Ramprotab *v* Abhilak, 3 C L R 170, 174, Hur Dyal *v* Roy Kisto, 24 W R C R 107, Bissessur *v* Ram, 2 W R, C R 326, 328, Roopmonjooree *v* Ramlall, 1 W R, C R 145, 147, Kenchawa *v* Ningapa, 10 Bom H C R 265 note, Kailas *v* Bijoy, 36 C L J 434

(*k*) Kailash *v* Bijay, 36 C L J 434

(*l*) Sambasiva *v* Ramaswami, 48 M L J 353 85 I C 772 1925 M 803

(*m*) Prem *v* Shambhu, 42 A 382 18 A L J 473 76 I C 601

(*n*) Kanchumarthi *v* Kanchumarthi, 89 I C 817 1925 P C 201

(*o*) Kusum *v* Satya, 30 C 999

(*p*) Chandra *v* Narpat, 34 I A 27 29 A 184 11 C W N 321, Har Sankar *v* Lal 23 A 519 34 I A 125 11 C W N 841

(*q*) Kolhapur, Maharaja *v* Sundaram 48 M 1 1925 M 497

(*r*) Chhote Lal *v* Chandra, 45 A 59 (*s*) *See* Sec 9, *p* 291 *infra*

brought for declaring an adoption invalid (*t*) But the Madras High Court has held it otherwise. (*u*)

Evidence

Evidence.—The factum of adoption is to be established by clear and satisfactory evidence. (*v*), When there is no written record of adoption, when the child's name was not changed, when he was not taken to live with his new family, when he was not recognised as an adopted son and when the accounts which give minutest detail do not refer to any expenditure on the ceremony of adoption, the briefest possible evidence of the ceremony having taken place, is highly improbable. (*w*) When after execution of a registered deed of adoption, there is no evidence of continuous treatment as adopted son, and the adopter consistently repudiated the adoption, it could not be said to have been proved that adoption has taken place. (*x*) The Courts will be justified in viewing with care when an adoption based on authority is said to have taken place many years after. (*y*)

A statement by a widow since deceased as to her power to adopt is not admissible as evidence of such power under section 32 (5) of the Evidence Act when she adopted one of her own relations long after her husband's death (*z*)

In order that the evidence given in a former judicial proceeding may be admissible under section 33 of the Act, the party challenging it should have had both the right and the opportunity of cross-examining the witness (*a*)

The *bahi* entries which relate to a family partition of immoveable property of more than rupees one hundred in value though inadmissible in evidence to prove partition may

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(*t*) Brojo *v* Sreenath, 9 W R 463, Patel, *v* Patel 15 B 565, Ashrafi *v* Rup, 30 A 197

(*u*) Raja Gopalu *v* Nathu, 31 M 329, this followed—Laxman *v* Bhulabai, 78 I C 862

(*v*) Padmalav *v* Fakira, 35 C W N 465 P C 53 C L J 202

(*w*) Divakar *v* Chandan, 12 N L R 164 44 C 201 18 Bom L R 992 25 C L J 17 21 C W N 314 32 M L J 636 39 I C 6, *ee* also, *foot note* (*v*) above

(*x*) Ghulam Haider *v* G Nabi, 342 P L R 1913 21 I C 648

(*y*) Krishnayya *v* Lakshmipathi, 30 M L J 265 32 I C 253 affirmed by P C 43 M 650 56 I C 391

(*z*) Dal Bahadur *v* Bijai, 52 A 1 34 C W N 369 51 C L J 230 1930 P C 79

(*a*) *Ibid*

be admissible in evidence for showing the consent to adoption of one party in favour of another. (*b*)

Unless a man, who was only thirty years of age and had only married about three years ago, had been stricken with some serious illness, it is not likely he would think of there being a necessity for a son being adopted to him, and the question how long he had been ailing prior to his death was a vital question in determining whether he had or had not authorised to adopt (*c*)

Estoppel.

Estoppel —A widow, representing that she had authority to adopt, made an adoption, but she will be estopped to impeach the adoption on the ground that she had no authority. (*d*) A widow, however, adopting an orphan boy will not be estopped to challenge the validity of the adoption. (*e*)

Recognition and acquiescence on the part of members of the family acquainted with the facts may give rise to an inference that the conditions relating to the adoption were duly fulfilled, (*f*) but it will not operate as an estoppel against them if the adoption was invalid

Where an adoption had taken place with great publicity and all necessary ceremonies, a formal deed of adoption had been executed and registered, the adopted son had been received into the family of his adoptive father and the adoption was not challenged for several years, the adoptive mother is estopped from challenging the adoption (*g*)

But estoppel must be taken as purely personal and it does not bind any one who claims by an independent title. (*h*)

(*b*) Ichhnun *v* Banwari, 1929 L 16

(*c*) Ramadhin *v* Chandrama, 22 L W 91 89 I C 565 1925 P C 54 (P C)

(*d*) Dharam *v* Balwant, 34 A 398 39 I A 142 16 C L J 60 16 C W N. N 675 15 I C 673, Ganga *v* Buda, 11 I C 27 (A)

(*e*) Govind *v* Chandrabhaga 12 N L R 100 34 I C 675

(*f*) Barangowda *v* Rudrappa, 52 B 393 1928 B 291 in this connection *see* Rajendra *v* Gopal, 10 P 187 34 C W N 1161 52 C L J 287 1930 P C 242

(*g*) Dharam *v* Kalawati, 50 A 885

(*h*) Dharam *v* Balwant, 34 A 398 39 I A 142 16 C W N 675 16 C L J 60 15 I C 673, Parasuramayya *v* Venkalaramayya, 1927 M 777, *see* Vythilinga *v* Munigan, 37 M 529 23 M L J. 189. 15 I C 299

Limitation for declaring invalidity of adoption – The view that if an adoption is invalid, the adopted son's natural rights remain quite unaffected, is just and equitable. There is however, great practical difficulty in giving effect to it, when the adoption is set aside after a considerable time has elapsed from adoption, and most of his natural rights have become barred by limitation.

Limitation for suits regarding adoption.

While construing the provisions of the Limitation Act of 1871, on this point, the Judicial Committee observed,—"It seems to their Lordships that the more rational and probable principle to ascribe to an act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoption shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession "(*i*)

12 Years in declaratory and possessory suits

But nevertheless, all the High Courts did at one time hold that under the present Limitation Act the reversionary heir is entitled to twelve years after the death of the widow who inherited her husband's estate and adopted a son unto him, for instituting a suit to obtain possession of the estate on declaration of the invalidity of the adoption, and that the Article 118 applies to suits for declaratory decrees only (*j*) But having regard to the principle enunciated by the Judicial Committee in *Jagadamba* v *Dakhina's* case, and to an observation made by their Lordships in *Mohesnarain's* case (*k*) and also to the decision in *Lachman Lal's* case,(*l*) the Madras High Court, and a Full Bench of the Bombay High Court presided by Sir Lawrence Jenkins, have held that the Article 118 of the present Limitation Act governs a suit for a declaration that an adoption was invalid, whether the question as to its validity is raised by the plaintiff in the first instance, or arises in consequence of the defence setting up the adoption as a bar to the plaintiff's claim to the adoptive father's estate (*m*)

In Bombay 6 years

This view is supported by the opinion expressed by the Privy Council in the subsequent case of *Mallarjun* v *Narhari* (*n*) in which their Lordships held by applying the principle set forth in *Jagadamba's* case that one year's limitation prescribed by Article 12 (a) of the Act of 1877, is not confined to only suits in which no other relief than a declaration setting aside a sale, is sought, but applies also to suits where other relief is sought which can only be

(*i*) Jagadamba *v* Dakhina, 13, I A 84, 95 13 C 308
(*j*) Jaganath *v* Ranjit 25 C 354, Ram *v* Ranjit, 27 C 242 and the cases cited therein
(*k*) 20 I A 30 20 C 487 (*l*) 22 I A 51 22 C 609
(*m*) Parvathi *v* Saminatha, 20 M 40, Ratnamassari *v* Akilandammal, 26 M 291 and Shrinivasa *v* Hanmant, 24 B 260 (F B), *see* Laxmana *v* Ramappa, 32 B 7, Shrinivasa *v* Balwant, 37 B 513, 531 15 Bom L R 533 20 I C 162
(*n*) 27 I A 216 25 B 337.

granted by setting aside the sale This principle is applicable *mutatis mutandis* to Articles 118 and 119 of the present Limitation Act XV of 1877

Obiter dictum of P C

But in the case of *Thakur Tirbhuwan(o)* the Judicial Committee appears to have expressed a contrary opinion which is no doubt an *obiter dictum* The same view is expressed in a subsequent case by the Privy Council, but that also is an *obiter dictum* (p)

Calcutta, Madras 12 years,

Hence, the result of the conflicting decisions of the different High Courts is that the Calcutta, (q) and the Madras (r) High Courts hold that, where the plaintiff seeks to recover possession as a reversioner on a declaration that the alleged adoption is invalid, or never, in fact, took place," the limitation applicable is that provided in Article 141 of Schedule II of the Limitation Act and not Art 118, and the limitation begins to run from the date of the death of the widow, when the plaintiff's cause of action arises Articles 118 and 119 are applicable to suits where mere declaration is prayed for and no possession is claimed So when an adopted son seeks to recover possession, the period of limitation will be twelve years from the date when his rights have been interfered with

Bombay 6 years, Allahabad

But the Bombay s) High Court holds a contrary view

A later decision (t) of the Allahabad High Court seems to follow the Bombay High Court but the trend of authority (u) of that Court is the other way

Conflict settled by P. C

The Judicial Committee, on a careful review of all the cases on the point, including its previous observations expressed in *Thakur Tirbhuwan* v. *Raja Rameshar* (v), *Umar Khan* v *Muhammad Naiz-ud-din* (w) and *Bijoy Gopal Mookerjee* v. *Srimati Krishna Mahishi*, (x) has finally settled the question holding that the reversioner in a suit for possession will get 12 years time from the death of the widow (y)

(o) 33 I A 156 22 A 727
(p) Umar v Niaz-ud din, 39 I A 19 16 C W N 458 14 Bom L R. 182 30 C 418,
(q) Bhagwant v Muranlal, 15 C L J 97, 104-106 15 C W N 524, 535 7 I C 427, Baikanta v Kali, 9 C W N 222, Jagannath v Ranjit 25 C 354, Ram v Ranjit, 27 C 242, 253-255 4 C W N 405, 411-413, Lala Parbhu v Mylne, 14 C 401
(r) Velaga v Bandlamudi, 30 M 308
(s) Shrinivas v Balwant 37 B 513, 531, Laxmana v Ramappa, 32 B 7, Shrinivasa v Hammant, 24 B 260 (F B), see also Ramchandra v Narayan, 27 B 614, Barot Naran v Barot, 25 B 26
(t) Chuni v Sita, 34 A 8
(u) Chandania v Saligram, 26 A 40, Lali v Murlidhar, 24 A 195, Nathu v Gulab, 17 A 167, Basdeo v Gopal 8 A 644, Contar v Jehangira A W N (1890) 241
(v) 33 I A 156 10 C W N 1065 (w 39 I A 19 16 C.W N 458
(x) 34 C 329 34 I A 87 11 C W N 424
(y) Kalyandappa v Chanbasoppa, 48 B 411 26 Bom L R 509 28 C W N 666 46 M L J 598 22 A L J 508 79 I C 971 1924 P C 137

Similarly, a suit by a widow to recover possession of her husband's estate on declaration that an alleged adoption is false, is not governed by Article 118 of the Limitation Act ( )

But where a suit is in substance one for declaration that an adoption is invalid it is governed by Act 118 of the Limitation Act and the suit will be barred by limitation if brought more than six years from the date of knowledge of the palintiff. (a)

Sec 9—DVYAMUSHYAYANA ADOPTION

In Dvyamushyayana, relationship with natural family subsists

A boy who is adopted in the *dvyamushyayana* form retains his natural relationship to all the original relations, and acquires, in addition, a new relationship to his adoptive parents and their relations. (b) He is called the son of two fathers, as he is not absolutely given away in adoption, but is made a son common to both his original as well as his adoptive parents, just as a property may be transferred so as to become the joint property of the transferrer and the transferee A son could be of this description by agreement at the time of adoption, (c) and not by reason of the performance by the natural parents of any initiatory ceremonies for the boy: such a son of two fathers is called *Nitya-Dvyamushyayana.* (d)

Nitya Dayamushyayana

The Bombay High Court has held that in every case of adoption under this form, there must be an agreement to that effect and the person setting it up must prove it like any other question of fact. (e) But a later decision by the same learned judge, has gone a step futher, on the authority of the above case which, however, did not hold it, and held that in the absence of any express agreement to the effect that the

Onus,

( ) Padmalav v. Fakira, 35 C W N 465 P C 53 C L.J. 292, the Art 11 is a clerical mistake in the report

(a) Lala Jagmohan v Sahu, 32 C W N 153 P C

(b) Nilmadhub v Bishumber, 13 M.I.A 85,

(c) Wooma Daee v Gokoolaunda, 3 C 587, 598 (P C.) Mohna v Mula 89 I C 688 1925 L 623.

(d) Behari v Shib, 26 A 472

(e) Laxmipati v Venkatesh, 41 B 315, 342 19 Bom L R 23 38 I C 552 : Mohna v. Mula *above.*

adoption was to be in the *dvyamushyayana* form, the adoption must be presumed to be in the Dattaka form. (*f*) According to some an only son can be adopted only in this form, for, as a matter of law, he must continue his progenitor's son notwithstanding adoption in the ordinary mode An express adoption in this form is now rare This form of adoption is unknown in the Punjab (*g*) The widows of brothers like their husbands, can give or take an only son in adoption in the *Dvyamushyayana* form (*h*)

Only son

The natural mother of a *nitya-dvyamushyayana* son is entitled to inherit from him (*i*)

Mother may inherit such son

Sec 10—KRITRIMA ADOPTION *

Dattaka and Kritrima,—According to the Smritis and the commentaries, the Kritrima form differs from the Dattaka only in this, that in the latter the boy is given in adoption by his natural parents or either of them, whereas in the former, the consent of the boy only is necessary who should therefore be destitute of his parents, and thus *sui juris*, so as to be competent to give his assent to his adoption . in all other respects there is no difference between the two forms.

Dattaka kritrima compared

Prevalent in Mithila—But the so-called Kritrima adoption that is now prevalent in Mithila appears to be a modern innovation and altogether a different institution from that dealt with in Hindu law An adoption in Dattaka form here is not, therefore, invalid (*j*)

Kritrima in Mithila only

A Contractual relationship—The Kritrima form of adoption such as is now made in Mithila, does not appear to be *affiliation* but is something like a contractual relationship between only the adopter and the adoptee

It based on contract

Both husband and wife may adopt.—In this modern form a man and his wife may either jointly adopt one son,

Husband and wife

(*f*) Huchrao *v* Bhimrao, 42 B 277, 279 : 44 I C 851 Mohna *v* Mala, *above*

(*g*) Mohna *v* Mula, *above*

(*h*) Krishna *v* Paramshri, 25 B 537

(*i*) 26 A 472

* *See ante pp.* 200 "Dattaka and Kritrima" and "Putrika Putra".

(*j*) Chandreshwar *v.* Bisheshwar 5 P 777 : 1927 P. 61

or may each of them separately adopt a son, so that the son adopted by the husband does not become the wife's son, and *vice versa*, and in such a case the son of the one does not perform the exequial ceremony, nor succeed to the estate, of the other. (*k*)

may adopt two sons

Elements of Kritrima adoption.—The offer by the adoptive parent expressing his desire to adopt, and the consent to it by the boy, expressed in the lifetime of the former are sufficient to constitute adoption. No religious ceremonies or burnt sacrifices are necessary in this form. (*l*) There is no restriction in this form as to the capacity of being adopted, such as being an only son, particular age, or performance of the Upanayana ceremony or marriage, and particular relationship. (*m*)

Its elements

His status.—The adoptee in this Kritrima form does not lose his *status* in his family of birth, and by the adoption he acquires right of inheriting from the adoptive parents or parent alone. He cannot take the inheritance of his adopter's father or even of the adopter's wife or husband, the relationship being limited to the contracting parties only. (*n*)

Status of parties

Place other than Mithila.—According to the authoritative commentaries of the Benares school the Kritrima form of adoption may be made in the Kali age, in addition to the Dattaka form, and it appears to prevail in many places in Northern India, if not also in the Deccan. But this form whenever met with at a place other than Mithila, must not be confounded with the modern innovation of the latter district, which though called *Kritrima* is altogether different from it. The real Kritrima form is exactly similar to the Dattaka one as regards their incidents.

Whether prevelent elsewhere

Kritrima and Putrika-puttra.—Properly speaking the name *Kritrima* should not be applied to the adopted sons that are popularly called by a different name in Mithila,

Putrika puttra

(*k*) Sreenarain *v* Bhya, 2 Sel Rep 29 (33), see also Collector, Tirhoot *v* Huroparshad, 7 W R 500 and Shib *v* Joogan, 8 W R 155
(*l*) Kullein *v* Kirpa, 1 Sel Rep 11
(*m*) 3 Sel Rep 192 : 145 Old Edition
(*n*) Collector, Tirhoot *v*. Huroparshad, 7, W.R R 500; Shib *v* Joogun, 8 W.R. 155, Jeswant *v* Ram, 25 W. R. 255.

namely, *Karta-puttra* which does not appear to be a corruption of *Kritrima-puttra* but of *Krita-puttra*. But it has been held that the adoption of *Karta-puttra* is an adoption in the *Kritrima* form, that his position is not better than a *dattaka puttra* and that succession to the estate of the adoptive father is not inherent in the status of a *Karta-puttra*. (o)

Karta puttra

The country called Mithila

Location of Mithila.—Mithila is the modern district of Tirhoot which is a corruption of the word *Tara-bhukti* meaning the country "bounded by the banks" of three rivers, namely, the Gandaka in the West, the Kosi in the East, and the Ganges in the South (*See ante p* 57.)

Sec. 11—ADOPTION OF DAUGHTERS

Adoption of daughters

Adoption of daughters.—Nanda Pandita recommends the adoption of daughters by persons destitute of female children for the purpose of securing spiritual benefit conferred by the daughter's son. But the Hindu community has not favourably received his recommendation

The adoption of daughters appears to be a general custom amongst the dancing-girls and prostitutes who have no daughters born of their body. This practice is, however actuated by secular rather than by spiritual motives The Calcutta (*p*) and the Bombay (*q*) High Courts have held that such adoption is illegal But the Madras (*r*) High Court has held a contrary view A later decision (*s*) of the same Court, however seems to have expressed an opinion which is in conformity with the decisions of the Calcutta and the Bombay High Courts But in a still later case (*t*) some observations in the above mentioned case have been dissented from, but it agreed with the view that unchastity of a married woman will not bring her within the class of dancing-girls so as to enable her to exercise all the rights which

Calcutta, Bombay, Madras

(*o*) Kanhaiya *v* Suga, 4 P 824 90 I C 65 6 Pat L T 503 : 1926 P 90

(*p*) Hencower Bye *v* Hanscower Bye (1818) 2 Morley's Digest 133

(*q*) Mathura Naikin *v* Esu Naikin, 4 B 545, Hira *v* Radha, 37 B 116 : 14 Bom L R 1129 17 I C 834, see also Manjamma *v* Sheshgiri 26 B 491

(*r*) Narasanna *v* Gangu 13 M 133, Muttukannu *v* Paramasami, 12 M 214, Venku *v* Mahalinga, 11 M 393

(*s*) Guddati *v* Gunapati, (1912) 23 M L J 493 17 I C 422, Nagamuthu *v*. Dasi 32 I C 743

(*t*) Meenakshi *v* Muniandi, 38 M 1144, 1151-1152 25 I C 957

by custom and precedent have been allowed to them. An adoption of a daughter by a dancing-girl is valid in Madras(*u*) but not for purposes of prostitution as it is opposed to public policy. (*v*)

The ordinary presumption that property standing in the name of one member of a co-parcenary is the property of all, does not apply to dancing sisters living together. (*w*)

Sec. 12—ILLATOM SON-IN-LAW

Illatom son-in-law.—The usage of adopting a son-in-law appears to owe its origin to the same principle upon which the ancient institution of appointing a daughter to raise male issue for the father was founded.

Ancient usage

In some of the districts of Madras the custom of *Illatom* or affiliation of son-in-law exists. A person who has no male issue, although he may have more than one daughter, may affiliate a son-in-law in this form, whether at that time he was hopeless of having male issue or not. (*x*) The Judicial Committee in an appeal from the Madras High Court relying on an unreported case (*y*) of the same High Court has held that amongst the Sudras of the *Kamma* caste there exists a custom of *Illatom* adoption by persons who had natural sons living at that time. (*z*)

Custom in Madras

P C

An *Illatom* agreement can be implied from the circumstances of a case and is a valid contract, (*a*) but mere living in the house of the father-in-law and assisting his widow after the death of the father-in-law will not, in the absence of specific contract, constitute an *Illatom* son-in-law (*b*)

Agreement necessary

The *Illatom* adoption is not invalidated by the marriage being celebrated after the death of the taker. (*c*)

Marriage after death of taker

(*u*) *See foot notes* (*r*), (*s*) and (*t*) above
(*v*) Kandaiya *v* Chokkammal, 28 M L T 106 59 I C 214 12 L W 7
(*w*) Visalakshi *v* Dorasinga, 29 I C 974
(*x*) Hanumantamma *v* Rami, 4 M 272
(*y*) Hammya *v* Yellawanda, S A No 45 of 1905 of Madras High Court
(*z*) Nalluri *v* Kamepalli, 42 M 805 46 I A 168 37 M L J 1 23 C W N 1010 30 C L J 145 17 A L J 662 21 Bom L R 90- 51 I C 1
(*a*) Vachoone Belarami *v* Ramamma, 13 M L T 113 18 I C 698
(*b*) Gadiyam *v* Mallavaraper, 11 M L T 121 22 M L J 265 13 I C 866
(*c*) Venkayalfatti *v* Negandla, (1911) 2 M W N 193 11 I C 25

Illatom's position better than *Dattaka*

The position of *Illatom* son-in-law is better than that of a son adopted in the *Dattaka* form. He stands in the same postion as a natural-born son and in a competition with natural-born sons takes an equal share. (*d*) At the same time his tie of relationship with his natural family is not severed and consequently his nutural right of inheritance in the natural family subsists. (*e*)

One may have both *Dattaka* and *Illatom*

A man is, however, competent to adopt a son in the *Dattaka* form after having affiliated an *Illatom* son-in-law and the *Illatom* son-in-law and the adopted son may live jointly but by that neither they nor their descendants constitute themselves Hindu coparceners with the right of survivorship. (*f*)

Onus

A person setting up the claim of *Illatom* son-in-law must prove by satisfactory evidence the affiliation of the son-in-law (*g*)

(*d*) 4 M 272 *above* (*e*) Ramkristna v Subbakka, 12 M 442
(*f*) Chenchamma v Subbaya, 9 M 114
(*g*) Panda Pattyya v Venkamma, 17 M L.T 393 29 I C 54

ADDENDUM "A" TO CHAPTER IV.*

(*Author's explanation given in the addenda to the fourth edition of this treatise published in 1910, regarding the circumstances under which his erroneous view on the adopted son's pre-existing right to property was expressed and how the mistake was detected*)

I have been asked by some friends, and I think it proper, to state the circumstances under which I expressed what I subsequently discovered to be an erroneous view on the subject of the effect of adoption on the adopted son's right to property inherited from the natural father before adoption, and also the circumstances under which the error was discovered

I delivered the Tagore Lectures on the Hindu Law of Adoption in 1888, but had not written out the lectures before delivery, but had prepared a mere Synopsis of the topics of the subject, arranged and divided under twelve heads, that should be discussed in the work, and a few notes on each topic The lectures ought to have been published within six months of the delivery according to the direction of the founder of the Tagore-Law Professorship, but as nevertheless a practice contrary thereto had grown up of delaying the publication, I was preparing the work in a leisurely way, the progress being also retarded by ill-health. But in June 1890 when only four lectures out of eight then ready for the press, had been printed, and the remaining four were still in an incomplete state, I received a letter from the then president of the Faculty of Law of the Calcutta University, calling my attention to the founder's direction, and requiring me to publish the work without delay. I was thus compelled to hurry on and complete the work without proper research with respect to all matters contained in the last three or four lectures

As regards an adopted son's right to property inherited by him before adoption, what I stated in that work was deduced from the general principles enunciated in the Blindman's son's case, and in the Unchastity case The special rules laid down by Manu and the commentators were completely overlooked by me And the oversight and error were brought to my notice under the following circumstances

After the report of Mr Justice (now Right Honourable) Amir Ali's judgement had been published in 1 Calcutta Weekly Notes p 121, holding that under the Dàyabhàga School an adopted son is not divested of the property inherited by him before adoption from his deceased natural father or other natural relation by his subsequent adoption, I was informed in November, 1896 by Babu Saratchandra Khan then a junior vakil of our High Court that during the previous long vacation he had a discussion with a learned Pandit on the question of the effect of adoption on an adopted son's rights to property inherited by him in the family of birth before adoption, and that the Pandit expressed surprise on hearing that I had stated in the Tagore Lectures on the Hindu Law of Adoption that there was no authority in Hindu law to support the position that an adoption operated as civil death and extinguished the adopted son's rights to property inherited in the family

* *See ante pp* 252, 256

of birth before adoption, and that the Pandit requested him to draw my attention to Manu's texts on the subject and the explanation of them given by the commentators The young pleader explained to me the Pandit's view of the texts and satisfied me that the matter is worthy of enquiry and study

On perusing Manu's texts (pp 121—122 *infra*) and the interpretation of the same by the commentators I found that there is ample authority in Hindu Law for the position that an absolute adoption, like renunciation of the world, disregard of temporal matters, or degradation, operates as civil death of the adopted son and causes extinction of his existing rights of property in the family of birth and opens succession to his then heirs

Manu (IX, 142) says that the Dattaka son does not take away the *gotra* and the *riktha* of his natural father when he passes from the family of birth to the family into which he is adopted the term *gotra* in this text means, not family, but the status of sonship to the natural father, and not the right to inherit property in future The two terms *gotra* and *riktha* form one conjoint work in original, and are equally connected with the other words in the sentence and the purport is that as the adopted son's relation as son of the natural father becomes extinguished by adoption, similarly his relation to the property inherited from the natural father becomes also extinguished, *i e*, his existing proprietary right in the natural father's estate ceases This is the explanation given by all the commentators including the authors of the Dattaka-Mimānsā and the Dattaka-Chandrikà

It is clear therefore that the view expressed by me in the Tagore Lectures as one deducible from general principles, was not correct, inasmuch as the special provisions of law bearing on the question was not only not taken into consideration at all, but it was erroneously thought and stated that there was no such authority in Hindu law It is a matter of very great regret that the authorities on the subject escaped my attention at the time that part of the Tagore Lectures was compiled in a hurry and in a perfunctory manner My present opinion was embodied in the second edition of this treatise for the first time, as the chapter on Adoption in the first edition had been printed before the error was discovered

This very question arose in two recent cases in Madras, one in the Court of the Subordinate Judge of the Kristna district, and the other in the Court of the District Judge of Godavery The former case was decided in December 1899, by the Sub-Judge who relied on and followed Justice Amir Ali's decision, and also referred to the view expressed in the Tagore Lectures, while the other case was still pending and had made very little progress The parties to the two cases were the same

Sri Raja Rangayya Appa Rao who had lost the case before the Sub-Judge sent an officer and a local lawyer in June or July 1900 to Calcutta for consulting Mr J T Woodroffe the then Advocate-General of Bengal, and for retaining him to argue the appeal preferred in the Madras High Court against the decision of the Sub-Judge The pleader submitted to him the texts of law and the arguments furnished by learned Pandits in support of the position that an adopted son becomes divested of property inherited from the natural

father at the same time when he becomes divested of his status of sonship to him

The Advocate-General who had the kindness to consult me whenever he felt any doubt or difficulty with respect to questions of Hindu law, and knew me very well, advised the party to take my opinion on the question, after drawing my attention to the texts and the arguments, notwithstanding their objection to consult me on the ground that I had already expressed an adverse opinion, but without noticing the texts relied on by them

They came to me in July 1900 The pleader placed before me the texts, but appeared to feel some delicacy to say that the opinion expressed by me was opposed to them, when they were agreeably surprised to learn that I had already considered them all, and changed my opinion They then disclosed how they come to me against their own inclination and the client's original instruction, and requestsd me to give a writtn opinion referring to all the authorities, and to give English translation of such of them, as had not been done into English

The opinion given by me was shown to Mr Woodroffe, and a conference was arranged to which he and Woodroffe junior (Mr J G Woodroffe now Justice Woodroffe) and myself were parties, I explained the correct meaning of the terms in the text of Manu, and how that text and the law on the question were explained by the commentators and the Advocate General was convinced that according to the right view of the law, an adoption operates as civil death of the adopted son, as regards his proprietary rights in the family of birth

Armed with my written opinion, the Raja wanted to convert it into judicial evidence for the purpose of using it against my opinion in the Tagore Lectures, and accordingly he cited and examined me as an expert witness in the case pending in the Court of the District Judge of Godavery My evidence related chiefly to the English translations of the Sanskrit texts, and to my present opinion. But the Madras High Court have not accepted either my present opinion or my translation of Manu's text (IX, 142), nor have they accepted the translation of that text given in the edition of Manu's Code as one of the Sacred Books of the East Series

See I L R, 29 M 437

ADDENDUM "B" TO CH IV *

Evidence of the author given in Medur case in 1900 reported in 29 Mad 437 published in 31 Madras Law Journal, Journal portion, p 87, 1916 after the author's death)

EFFECT OF ADOPTION ON PRE EXISTING RIGHTS

[Behari Lal v Kailas Chander, (1896) 1 C W N 121, Birbhadra v Kalpataru, (1905) 1 C.L J 388, Venkatanarasimha v Rangayya Apparow, (1905) I L R 29 M, 437, Dattatraya Sakharam v Govind Sambhaji, (1916) I L R 40 B 429]

The Privy Council in dealing with the Medur case, avoided deciding the question, whether when a person is adopted, he is thereby divested of rights *already* acquired by him in properties belonging to his natural family Judicial

* *See ante pp* 252, 256

opinion in Indian is evenly divided upon the point. The earliest of the above cases (decided by Ameer Ali, J) arose under the Dayabhaga law, but that circumstance seems to make no material difference in the decision of the question The conflicting views may perhaps be conveniently described as dominated respectively by legal logic and textual authority The text of Manu, (IX, 142) is the starting point for the discussion and there has been some controversy not only as to its true interpretation but even as to its correct reading The different considerations relating to this aspect of the question were so fully brought out in the evidence given in the Medur case by Mr Sarkar Sastri and Mr M Rangachariar that we deem it desirable to place it before the profession substantially in its original form We are aware that the Madras High Court held that their opinions were not admissible under the head of 'expert evidence', there being no question of 'foreign' law—but we reproduce them as containing a full statement of the case for one side or the other, from the textual point of view

The theory that adoption is analogous to 'Civil death' is based on a particular interpretation of Manu's text and it will be begging the question to assume that as the basis of the argument It has also to be borne in mind that the analogy is in any view incomplete, for it has never been suggested that the adoption puts an end to the adoptee's rights or lets in the next heir, in respect of properties acquired by him *by his own exertions* If on the other hand, the text of Manu is held to be clear and express that the adoption not only affects his rights of future inheritance in the natural family but divests the adoptee of rights already acquired in the properties of the natural family, the argument founded on the assumed disfavour of the Hindu Law to the divesting of vested rights has little force in it That such an operation may lead to anomalous or inconvenient consequences, especially in connection with the rights of alienees and of prospective heirs cannot be denied and this consideration seems to have weighed much with the Judicial Committee in *Kerri Kolitani's case*, (1879) I L R 5 C 7/6 But such anomalies exist in other branches of the Hindu law, *Cf* for instance the effect of an adoption by a Hindu widow on alienations made by her (or by any co parcener) prior to the adoption, and even as regards the present topic, it seems to be undisputed that the adoption will deprive the adoptee of his right by birth in the ancestral property of the natural family, though his right to a share therein was one that he could have even alienated, prior to the adoption

Mr. Golap Chandra Sarkar Sastri.

(Examined on interrogatories)

9 Please translate Manu, Chapter IX, Sloka 141, with the commentary of Medhatithi, and Sloka 142 with the commentaries thereon of Medhatithi, Sarvagna Narayana, Kulluka, Raghavananda and Nandana.

Answer —Manu, Chapter IX, Sloka 141 But if a person's *datrima* son (that is, given son) be endowed with all good qualities, he (the given son) certainly takes his (that person's) property, though received from a different *gotra*

Commentary of Medhatithi —In the text (of Manu, ChapterIX, Sloka 185),

"neither brothers, nor fathers, (that is, father or remoter ancestors) but sons take the father's property"—is predicated the right of all descriptions of sons to take the property (of the legal father), but where there is an *aurasa* son, their right to get maintenance only (is predicated) of the Kshetraja (appointed wife's son) and the like (secondary sons) in the text (of Manu, Chapter IX, Sloka 163) "*aurasa* son alone is the master of the paternal wealth, but he must give maintenance to the other descriptions of sons, for the sake of compassion", hence the right of the *datrima* son to take the property (of the adoptive father) is certainly established (by the text of Manu, Chapter IX, Sloka 185), but this text (Sloka 141) is intended to provide for (the adopted son's right to the adoptive father's property) even when an *aurasa* son exists, otherwise no purpose would be served by this text But what is his share ? On this some say equal to that of the *aurasa* (son) by reason of the absence (of specific deduction) of the twentieth part (for the eldest son, Manu, Chapter IX, Sloka 112) This is not reasonable, for if equality had been intended to be laid down, then just as in the topic of appointed daughter, so in this (topic of the given son) also, it would have been declared,—"then the division must be equal"—(Manu, Chapter IX, Sloka 134), hence it is asserted (by us) that an inference should be made, of the sixth or eighth or the like share as is provided for the appointed wife's son" (Manu, Chapter IX, Sloka 154) As to this also (there) arises the observation (*viz*) as a particular share is declared (by Manu) for the appointed wife's son in the text—"but the sixth is the share of the appointed wife's son (Manu, Chapter IX, Sloka 164), so also a similar share will be declared for the *datrima* son (Manu, Chapter IX, Sloka 159), hence the necessity for the present text on the same subject should be considered Upadhyaya, however, says—"From the present text on the same subject and from the absence of any specification of any particular share, this inference is reasonable, that (the given son's share) is less than that of an appointed wife's son, but not absence of any share nor participation of an equal share (with the *aurasa* son), nor equality with the appointed wife's son"

Manu, Chapter IX, Sloka 142 —The *datrima* son is not to take (with him when he passes from his family of birth to that of adoption) the *gotra* and the ***riktha*** of his progenitor, anywhere ***Pinda*** is follower of ***gotra*** and *riktha*, (therefore), the *swadha* (spiritual food) goes away absolutely from the giver"

Medatithi's Commentary —(The reading '*tuktam*" in the first line of Medatithi's comments on this text as given in Mandalik's edition of Manu appears to be incorrect I think it should be "***yuktam***" For, as it is, the translation of the first sentence would be—"In this text also it is declared that the ***datrima*** son should get a share (of the adoptive father's property), and this must be wrong as it is not declared in the text I proceed therefore to translate as if there was the word "***yuktam***" From this (text) also it appears reasonable that the ***datrima*** son should get a share (of the adoptive father's property), inasmuch as he does not take away the *gotra* and the ***riktha*** from the progenitor's side by reason of his being gone away from the lineage, and in the absence of his taking the *gotra* and the ***riktha*** he does not also offer

pinda to the progenitor; because the pinda is the follower of the gotra and the riktha, that is, follows the gotra and the riktha, by the gift of oblation of food and the libation of water he performs the exequial rite of him, whose gotra and riktha he takes, "goes away absolutely", that is, ceases with respect to him, (by the term swadha) are indicated "Sradha with offering of pinda" and the like means of offering spiritual food Alike to it are these two (gotra and riktha, because these two also cease), he who gives away his own son to another, with respect to him (the rite) ceases,—the meaning is, should not be performed in his honour This very reasoning applies to the *kritrima* and the like subsidiary sons) The pregnant bride's son and the deserted son and (other) sons of two fathers confer benefit on both (the fathers) Others, however, explain that the word 'haret" is to be deemed to have the suppressed causal form equivalent to "harayet" [The word "harayat" in Mandalik's edition is erroneous, it should be harayet] and accordingly they say (the *dattrima* son) should confer benefits on both the fathers as a son of two fathers. (This sentence as well as the rest of the commentary on this text are obscure. But if the word "gamayanti" be changed into "gamayati" then I think, I may decipher its meaning which is as follows) But the subsequent introduction of spiritual benefit (in the second line of the text) indicates the same (that is, the same meaning) in the way (we have put),—if the (adopted) son is not to take the gotra and the riktha, then, however, it must be explained (as we have done) (As regards the meaning put by others by taking "haret' to be equivalent to "harayet"), that, however, is not expressed (in the text), nor is there any proof which can be put forward in support of that other meaning

Commentary of Sarvagna Narayana —"Now the datrima son has not in any way connection with the property of the progenitor,—that is declared in the text beginning with *gotra* (that is, in the above text) For this very reason, he is not the son of two fathers, because he is of the adopter's gotra But the son begotten by the husband's younger brother (on a woman according to the old custom of levirate) and the son of the appointed daughter are alone (sons of two fathers)—for they have two fathers (Follower of Gotra and riktha), the meaning is in case of identity of gotra and taking of riktha offering of pinda (takes place) Of him who gives his son (in adoption) the "swadha', that is, sraddha to be performed by that son, goes away

Commentary of Kulluka —"The dattaka son is never to get the gotra and the riktha connected with the progenitor, and pinda is follower of gotra and riktha, whosesoever gotra and riktha he takes, to him alone he gives pinda Hence of the progenitor who gives away his son, the swadha, that is, the sraddha with pinda and the like to be performed by that son, ceases"

Commentary of Raghavananda —There being a doubt whether the datrima son has a connection with his progenitor's gotra, riktha and pinda, or not, the text beginning with gotra (that is, the above text) is declared "The gotra and the riktha", the word "riktha" here means wealth, (for) Amara, (the lexicographer) (says) "riktha and dhana and vasu are synonyms" These two he does not get, therefore pinda also offered by him does not reach

the (natural) father The reason for this (is) "pinda is follower of gotra and riktha" (that is) is on account of gotra and riktha, of the giver, that is, of the proganitor, the swadha ceases, the words "swadha" is illustrative —the purport is he is not entitled to all the three (*viz*) (the gotra, riktha and pinda) Govinda says—since it is declared,—"the ten sons are proclaimed in default of the aurasa and the kshetraja" therefore the datrima son is entitled to property in defanlt of these two (But this is not correct), even when these two exist the datrima gets property, otherwise the special rule laid down in the text (141) "But if a person's datrima son, &c," would be useless Therefore says Medhatithi—"But this text is intended to provide for (the datrima son's right to take the adopter's property) - even when an aurasa exist, otherwise, no purpose would be served by it"

Commentary of Nandana —"The datrima son is not to get, that is, not to appropriate the gotra and the riktha of the progenitor, but he is to take the gotra and the riktha of him to whom he himself is given The reason for this is declared by the latter half (of the text) "Follower of the gotra and the riktha,—(what follows the gotra and the riktha The meaning is, he who takes the gotra and the riktha is also the giver of the pinda, none else Hence of the giver, (that is) of the progenitor, the spiritual food (that is) the offering of the pinda, etc ceases"

It should be observed that this text appears to be differently read by different commentators Medhatithi appears to read the text with the word "haret" while Nandana with the word "bhajet" It is not, however, clear what reading the other commentators adopt The word "dadatah" in the above text—I have translated into "from the giver", taking it to be in the ablative case, having regard to the commentary of Medhatithi, but Kulluka takes it to be in the genitive case the form being the same in both these cases I have not translated the words "gotra" and "riktha" because there are no English equivalents of them for gotra means the descent through the father in unbroken male line from an ancient sage or rishi, after whom the gotra is named, or the status of being the son of the father, and riktha means property to which a person's right accrues by reason only of relationship to the owner, which is sometimes improperly translated into heritage Bat under the Mithákshara the right of the male issue arises from their birth to the property of the father or other lineal male ancestor in the male line, such property cannot be called heritage, for *nemo est heres viventis*

It may be observed here that my translation of the above text does not convey its full meaning and effect, which are to be gathered from other textst of that chapter bearing upon the subjects dealt with in this text The object of this text is to show the change in the status of the boy given in adoption It should be noticed that the text No 168 Ch IX, Manu, shews that a son may be given in adoption either by the father or the mother or both, and this text also applies in a case in which the giver is the mother The progenitor also is to be taken as illustaative meaning not only the progenitor but also all persons connected through him The provision relating to the

cessation of connection with the progenitor's gotra implies that his relationship with all sagotra persons ceases It is worthy of special notice that nothing is said by Manu about the connection with maternal relations The reason appears to be that at Manu's time no importance was attached to cognate relationship As the Twelve Tables of Rome, so the Code of Manu does not recognise at all the heritable rights of cognates nor is there any provision in Manu for offering pindas to maternal ancestors The texts in which daughter's son and maternal grandfather are mantioned in connection with inheritance and performance of sradha ceremony relate to the putrika-putra or the apointed daughter's son, a kind of subsidiary son In them the daughter's son occupies the position of either a son or a son's son and the maternal grandfather that of a father or paternal grand father. The full meaning of this text read in the light of other texts in this chapter bearing on the subject of sonship is that adoption operates as civil death of the boy as regards the family of his birth by putting an end to all secular and spiritual connection of the boy with all natural relations.

10 Please translate also Smrithi Chandrika, Chapter X, paragraphs 12 to 15 Parasara Madhaviya, paragraph 63 beginning with *dattakadinam* etc, and ending with *dadatah*, etc, Dattaka Mimansa, section VI, pragraphs 6, 7 and 8 and Dattaka Chandrikà, S II, paragraphs 18 & 19

Answer —"Hence the devolution of property from a secondary father in the Kali age (relates) only to the (secondary) son called dattaka On this (subject) Manu 'declares',-But of him whose *adtrima* son is endowed with all good qualities, (the son) is certainly to take his riktha though received from a different gotra (Reading of this text (Manu Chapter IX, 141) is slightly different from that given in Mandlik's Edition, I am referring to the Calcutta Edition, of the Smriti Chandrika by Pandit Bharat Chander Siromani, Professor of Smrithi in the Government Sanskrit College, Calcutta 1870 The Calcutta Edition contains "haretaib" instead of "saharetaib" From the word "though" (it appears that the son takes) even when received from a person belonging to a different gotra In this sloka the meaning of the third foot is thus explained by Devaswamin "Is certainly to take his entire property and gotra" Thus it is to be uuderstood that by this very act creating paternity (of the adoptive father) the datrima son's ownership in the property of the adopter as well as the status of being of the some gotra with him, arise , but it is to be understood that through the extinction of the filial relation from the gift in adoption the extinction of the ownership of the datrima son in the property of the giver and the extinction of the giver's gotra (lineage) take place With this intention it is declared by (Manu),—the datrima son is not to take the gotra and the riktha of the progenitor

Parasara Madhaviya, Para 63 —The dattaka and the like do not take the riktha of the progenitor This is declared by Manu in the text—"The datrima son is not to take the gotra and the riktha of the progenitor, pinda is follower of gotra and riktha, the swadha (spiritual food) goes away absolutely from the giver" [Manu's text as quoted here, has "bhajet"

instead of "haret" but the meaning is the same)

Dattaka Mimansa, paras, 6, 7 and 8, S VI —Manu declares also another rule, *viz.*,—"The datrima son is not to take the gotra and riktha, the swadha (or spiritual food) goes away absolutely from the giver The datrima son is not to get the progenitor's *gotra* and *riktha*, likewise *swadha*, that is, *sradha* performed by the son given goes away from the giver of the son, since *pinda* is follower of the *gotra* and *riktha* The author of the (Smrithi) Chandrikà (says) —"By this text (text of Manu) is declared that by the very act creating filial relation, the datrima son's proprietary right in the adopter's property and the status of being of the same gotra with him, arise, but through the extinction of the filial relation from the very act of giving the extinction of the *datrima* son's proprietary right in the property of the giver and the extinction of the giver's *gotra*", take place.

Dattaka Chandrika, S II, paras. 18 and 19 —Likewise Manu (declares) —"The datrima son is not to take the *gotra* and *riktha* of the progenitor *pinda* is follower of *gotra* and *riktha*, the *swadha* spiritual food goes away absolutely from the giver" By this (text) it is declared that through the cessation of the filial relation from the very act of giving, the cessation of the *datrima* son's proprietary right in the property of the giver and the cessation of the giver's gotra take place.

I have translated the word "nibritti" used in the Smrithi Chandrikà, the Dattaka Mimànsà, and the Dattaka Chandrikà into either "extinction" or "cessation"

11 Please read the translation of the slokas mentioned in question 9 above as given by Sir William Jones, Dr Burnell and Dr Buhler and of the passages mentioned in question 10 above as given by Mr Krishnaswami Aiyar, Dr Burnell and Dr Sutherland

Answer —As regards Sir William Jones' translation of text No 141 he has interpolated in his translation words which are not justified by the original text He has not really translated the text but has construed it and has, in fact, given the meaning put upon the text by Kulluka He has translated the word "haret" into "shall take" which appears to be misleading, if this phrase conveys the idea of futurity. The conjugation of Bidhiling in "hareta" only indicates an imperative rule but no tense As regards Sir william Jones' translation of text No 142, the word "claim" does not appear to be a correct rendering of the word "haret" or "bhajet", nor are the words "family" and "estate" of "gotra" and "riktha"

As regards Dr. Buhler's translation of text No 141, the words "shall take" for "hareta" are misleading, as has already been observed

As regards his translation of text No 142, the wards "shall take" "family" and "estate" are open to objection, as has already been observed As regards the word "never" I would prefer "nowhere" to it, since the original word "kwachit" primarily conveys the idea of place.

As regards Krishnaswami Iyer's translation of Smrithi Chandrika, paras 12 to 15, I find that in para 13 he has adopted Sir William Jones' translation of text No 141, Chapter IX, Manu, ommitting the italicised words

interpolated by Sir William Jones, in his translation from Kulluka's commentary And also in para 15 he has adopted Sir William Jones' translation of the first line of the text No 142. And I have already stated my opinion with respect to the translation As regards the last sentence of para 13 the reading of the book from which he translated appears to be slightly different from the book I have As regards para 14, he has not correctly translated the most important part of it, but he only gives what he takes to be the sense of it in his own words The last sentence of that paragraph, as translated by him, is misleading The original says—"the cessation of datrima son's proprietary right in the property of the giver" indicating the extinction of such right existing at the time of adoption The difference will appear from a comparison of this translation with the literal translation given by me.

Mr Sutherland in Section IV, para 6, Dattaka Mimànsà, has adopted Sir William Jones' translation of Manu, Chapter IX, 142, with slight exception I have already stated my objection to the words "claim", "family" and "estate" Mr Sutherland has made use of these words in paras 7 and 8 also

In para 18, Section II, Dattaka Chandrikà, Mr Sutherland translates Manu, Chapter IX, Sloka 142 in the same manner as in the above passage of Dattaka Mimànsà In this para, and in the next, the words "claim", "family" and "estate" have been used, and I have already stated my objection to them

12. Would you accept the translations of all or any of these as correct? If so, state which of them you accept as correct?

Answer —It is difficult to answer a question like this, I have translated the very same passages and have also given my opinion generally on these translations in answer to previous questions

Cross interrogatories

4. Are there any words or phrases in these passages used in any peculiar or technical sense? If so, please state such words or phrases, what their ordinary meaning is and their peculiar or technical sense, if any, as used in these passages

Answer —The subject itself is a technical one and an ordinary student cannot understand—how can a person cease to be the son of his own father and of his own mother—how can he cease to be brother of his brother, cousin of his cousin--how can his relationship with all his real relations cease? There are many words in these passages used in a peculiar and technical sense In text No 141 and No 142, Manu, Chapter IX, words "datrima" "hareta" and "haret", "riktha" "*gotra*", "*Janaitu*", "*pinda*", "*dalatah*" and "*swadha*" are used in technical senses

"*Gotra*" primarily means that which protects cows —Ordinarily the term *gotra* is understood to be the name of a *rishi* from whom a person is descended in an unbroken line of males,—but that meaning is to be taken subject to the fiction of adoption. Then again, it is said that none but Brahmins can have a *gotra* in the sense of being descended from the *rishi* after whom the

gotra is called in the case of the Kshatriyas and Vaisyas, it is said that their gotra means the name of some ancestor of their Guru but the Sudras cannot even have such a gotra as they cannot have a Guru or preceptor of the sacred literature, as the study of the shastras is absolutely prohibited to them In Manu, Chapter IX, 141, the word "gotra" means collectively all the persons descended in male lines from the founder of the natural father's gotra, the descent is to be taken to be either real of fictional as in the case of adoption, and in Mnnu, Chapter IX, 142, the word "gotra" means the status of sonship

As regards the word "datrima" it means "given" None can understand the meaning of the word "datrima" by reading this text. In Manu Chapter VIII Sloka 415, the word "datrima" means "a kind of slave' "Datrima son" has been defined by Manu in the subsequent text, No 168, Chap IX Before reading that text, it is impossible to understand the meaning of words "datrima son" in texts Nos 141 and 142 The word "hareta" or "haret" is derived from the root *hri*, which ordinarily means removing a thing without the consent of the owner, stealthily, for the purposes of appropriation But verbs in Sanskrit are used in various different senses, for instance, from the root are derived the following words ahar (taking food), "bihar" (walking for pleasure) prahar (beating), and Samhar (killing), but the pervading idea appears to be that of removal of something In the text No 141 it means acquiring proprietary right (to the property of the adopter) the right is as it were removed from the adoptive father and brought to the adoptive son Thus there is a connection between this meaning and the ordinary meaning It may be that this root "hri" and the English word "heir" has some philological connection It may sometimes be translated into inherit when it is connected with obstructed heritage or "Saprathibandha-daya" But in this text it cannot mean inherit, as the proprietary right is acquired from the moment of adoption In text No 142, the sentence is a negative one and it means—"is not to take away with him when he is passing from the family of his birth to the family of adoption" It appears that, according to the Laws of Manu, a man's status was determined by the gotra, the riktha and the pinda He belonged to some gotra or other, he was entitled to some riktha from which he derived his maintenance and he had spiritual connection with some (deceased) persons to whom he offered pinda as being his ancestors By declaring the cessation of secular and spritual connection with natural relations indicated by gotra, riktha and pinda, it is intended that he becomes civilly dead to the family of his birth, and the subsequent texts Ncs. 158 and 159, Chap IX, Manu, show that the dattaka son acquires connection both secular and spiritual with the family of adoption, inasmuch as he becomes member of the adopter's gotra, offers pinda to him and his ancestors and takes his property The intention of the text No 142 is to state the change that takes place in the status of the boy at the time of adoption The word "riktha" ordinarily means wealth, but in the Smrithis dealing with the subject of dàya-bhàga, it means property to which a person's proprietary right arises by reason only of his relationship

to his owner. In some texts it means "aprati-bandha-daya", as in the text of Gautama cited in para 8, S I, Chap I, Colebrooke's Mitakshara and explained in para 13 of that section In these two texts (Nos 141 and 142, Ch IX, Manu) it is used in the same sense The text No 141 contemplates acquisition of proprietary right to the adopter's riktha from the moment of adoption And the text No 142 contemplates that the boy is to lose the proprietary right he had acquired in the property of his natural father from the moment of his birth The word "Janaitu" in the text No 142, which means progenitor, includes all relations to whose property the boy might have acquired proprietary right as "aprati-bandha-daya" or "sapratibandha-daya" for instance, the paternal grandfather or the paternal uncle

"Pinda" is ordinarily used in various senses other than that in which it is used here (text No 142), namely, thickness, mass, ball, body, corridor of a house, morsel of food, &c Here it means food offered to manes of ancestors, but it really stands for the exequial rites in which pinda in this sense is offered

The word "dadatah" means the giver, but here it stands for all natural relations

And "swadha", which means spiritual food, stands here for all exequial ceremonies There are a few words in the commentaries, used in technical senses which need not be mentioned here

5 (a) Does not the Sloka, Manu Chapter IX, 141, refer to partition between an after-born aurasa son and an adopted son?

(b) Does not the rikthaharnam mentioned in the said sloka refer to the taking of a share on partition?

Answer —(a) There is nothing in the language of this text showing that it refers to such partition But some of the commentators have held, having regard to other texts of Manu, that this text should be construed to refer to a case in which a son is born to the adopter after adoption and consequently partition between the adopted and the begotten sons may taken place

(b) This question has been answered by my answer to 5 (a) above

6. (a) Are there not two reading of the verb in the first Hemistich of Manu, Sloka Chapter IX, 142?

(b) Is not the word "Bhajet" in the reading of the said Sloka as quoted in your edition of the Viramitrodaya (page 52, cls 11 and 12)?

(c) Is your translation of the said sloka as given at page 124 of your edition of the Viramitrodaya, correct?

(d) Is not the reading of the said verb as "Bhajet" accepted by the authors of the Mitakshara and other Nibandha Karas?

Answer —(a) Yes, some read "bhajet" instead of "haret"

(b) Yes

(c) I did not translate the sloka myself, but adopted Colebrook's translation of it as given in his Mitakshara, Chapter I, S 11 para 32, subject however to the difference of reading and to the interpretation put upon it by the author of the Viramitrodaya See preface to my translation of the Viramitrodaya, page XV I can not say that it is correct, for, the words

"claim", "family" and "estate" are open to the objection already stated The words "family" and "estate" do not convey accurately the meaning of the original words for which there are no equivalent words in English, and as the word "claim" is an inaccurate rendering of the word "haret"

(*d*) Yes, it is accepted by the author of the Mitakshara and the Parasara "Madhaviya" but not the authors of the Smrithi Chandrika, the Dattaka Mimansa, the Dattaka Chandrika and the Vivada Ratnakara who have adopted the reading "haret"

7 Is not the word "Bhajet" used in the sense of taking share, in Slokas 104, 119, 121, 124, 156, 192 and 200 of Manu IX ?

Answer —In sloka 104, the word used is not "bhajet' but "bhajerun" its plural form and bears the sense of division

In sloka 119, the word means division

In sloka 121, the word means division.

In sloka 124, the word "bhajerun" appears to mean "take"

In sloka 156, the word "bhajerun" means division

In sloka 192 also it means partition

In sloka 200 the word "bhajerun" means simply "taking", but it may also mean divide.

8 (*a*) In Manu IX, 124, are not the words "Bhajet" and "Haret" used synonymously ?

(*b*) Does not Nandana in his commentary on Manu use "Haret" and "Bhajet' synonymously ?

(*c*) Do not Kulluka Bhatta and the author of the Dattaka Chandrika use or understand the said words in the same sense ?

Answer —(*a*) Yes, in the sense of taking

(*b*) It is difficult to answer this question without going through the entire commentary of Nandana

(*c*) See answer to the previous question.

I fail to see the drift of these questions relating to the meanings of the words "bhajet" and "haret" I have already said that in Sanskrit verbs are used in various senses, for instance, this root "bhaja" means primarily a kind of connection between a thing and a person, "Bhakta" "Bhakti" and "Bhajana" are derived from it—meaning respectively devotee, devotion, and prayer, the word Bhaga or partition is also derived from it The way in which this root has come to signify division is this it means getting or being entitled to get or taking property, and when this word is connected with two or more persons, it means partition as being jointly entitled to or jointly getting or jointly taking And the particular meaning which is to be put upon such words depends upon the other words with which they are connected in the sentence Because it signifies partition in some sentences, it does not follow that it bears the same sense in all sentences Even if the reading be "bhajet", in the text No 142 it can by no means signify divide, because, that meaning is inapplicable to gotra Hence it must mean either "take" or "have connection with"

9 (*a*) What does the word "Haret" mean ?

(*b*) Does it refer taking a share by partition or taking by inheritance, or both ?

(*c*) Please translate Slokas 123 and 124 of Manu, Chapter IX

(*d*) In what sense is the word "Haret" used in the said slokas ?

(*e*) Is not "Haret" used in the sense of "taking on account of his share" in Manu, Chapter IX, 117, 123, 124 and 141 ?

Answer —(*a*) Haret primarily means removing a thing without the consent of the owner for the purpose of appropriation. It has already been observed that the root of this verb is used in various senses In text No 141, it means "acquires proprierary right to". In text No. 142 it means "take away with him when he is passing from the family of his birth to the family of adoption at the time of adoption

(*b*) No

(*c*) manu, Chapter IX, Sloka 123

One born of the first wife is to take a bull as a specific deduction, the next best bulls other than that (shall be allotted) to those inferior to him on account of their mothers

Do Sloka 124

But the eldest son born of the eldest wife is to take a bull and fifteen cows then (other sons) are to take the rest according to their mothers this is the settled rule

(*d*) The word "haret" is used in the sense of taking

(*e*) Texts Nos 117, 123 and 124 contemplate partition—hence, what is taken must constitute a part or the share In sloka 141 it cannot mean taking on account of share so far as the language of the text goes

10 Does the word "Haret" refer to the future or the past ?

Answer —The conjugation called Bidhiling does not contemplate any time, but having regard to the fact that a Lawvgiver lays down rules that are to apply to cases arising afterwards, it may be, as it has been, translated into "shall take" But the futurity thereby implied has reference to the time of promulgation of the law Therefore, it means that whenever an adoption takes place in future that law will apply But the term does not mean futurity relatively to the time of adoption No importance is therefore to be attached to the future tense It does not refer to the future or the past but to the present, that is to say, the time of adoption

11 Is it "Nishedhavidhi" directed to a future act ?

Answer —This has been answered by my answer to the previous question

13 (a) What does *Swatwam* occuring in verse 9, S 6 of the Dattaka Mimànsà and in Dattaka Chandrikà, S 2, para 19, mean ?

(b) Does it not mean "a right to the wealth, &c" ?

Answer —(a) "Swatvam" primarily means the quality of a thing which is owned by a person It is a relative term A thing becomes "Swa" in relation to a person who is its owner, and "Swatvam" is the quality of the thing importing that it is owned by the person But it has acquired a secondary meaning, viz, proprietary right or the relation between a thing and a person as property and proprietor These two meanings are some

what analogours to the two meanings of the English word 'property', viz proprietary right and the thing which is the subject of the proprietary right, This word is correlative of "Swamitwa" It should be observed that three ideas must be present in the mind in order to understand fully the meaning of any of these words, viz, "Swa", "Swamin", "Swatwam" or "Swamitwam", viz, a thing and a person and the relation between them, that is the relation of property and proprietor Each of these words denotes one idea and connotes the other two The word "Swa" denotes the thing, the word "Swamin" denotes the person, and each of these words, 'Swatwam' and 'Swamitwam' denotes the relation The two ideas other than what is denoted are connoted The word "Swatwam" here (Dattaka Mimànsà, S 6, para 8, first sentence) means proprietary right or the relation of property and proprietor between the datrima and the adopter's property, and between the datrima and the giver's property in the second sentence And in the Dattaka Chandrikà S 2, para 19 also, it means the proprietary right

(*b*) Yes, it means existing proprietary right in the giver's property.

Re-examination

2 In what sense is the word "bhajet" used in Sloka 59, Chapter X, 70, Chapter IX and 9, Chapter IX, Manu ?

Answer —In Sloka 59, Chapter X, the word "bhajeta" means gets or derives, in Sloka 70, Chapter IX, the word "bhajeta" means have sexual intercourse with, in Sloka 9, of the same chapter, the word "bhajeta" bears the same meaning

3. As the word "hareth' is used with reference to gotra and riktha in Sloka 142, Chapter IX, Manu, is there any rule that it should have the same signification with reference to riktha as with reference to gotra ?

Answer —Yes, it is the ordinary rule

4 Do you find such a rule referred to in the Viramitrodaya, Chapter III, Part I, S VIII, as well as in Mitàksharà, Chapter II, S I, placita 33 and 34 ?

Answer —In the Viramitrodaya there is a reference to such a rule, but not in the Mitàksharà

5 In Sloka 142, Chapter IX, Manu, can you understand the word "haret" to mean divide with reference to gotra

Answer —No.

6 Is it possible to understand the word "*haret*" in the sense of divide with reference to *riktha* alone in the compound word *gotra riktha* governed by the same expression "*naharet*".

Answer —No

7 You said in reply to cross interrogatory, 6a, that there are two readings, viz,—"haret" and "bhajet" in Chapter IX, Manu, Sloka 142, how do you account for the double reading in particular, and different readings in works in general ?

Answer :—The difference of reading is to be accounted for by the practice among Pandits of committing to memory much of what they read and of quoting from memory while writing any work

8 Assuming that the reading is "*bhajet*" and not "*haret*" in Sloka 142, Chapter IX, Manu, can it alter the sense when understood with reference

to the *gotra-riktha* ?

Answer —No

9 Can "bhajet" (assuming that to be the reading in Sloka 142, Chapter IX, Manu) mean divide when used with reference to gotra ?

Answer —No

10 Can it then bear, having regard to the recognised rules of construction and interpretation, a different signification with reference to riktha alone in the compound word *gotra-riktha* ?

Answer —No

11 What is the reason assigned in the second half of Sloka 142, Chapter IX, Manu, for the pinda going away from the giver ?

Answer —The reason is that inasmuch as the pinda can be offered only by one connected with the gotra and the riktha, and inasmuch as the adopted son ceases to be connected with the natural father's gotra and riktha, therefore the adopted son ceases to offer pinda to the natural father and other natural relations

12. Give the meaning of the word "Vyapaiti", having regard to the prefixes "vi" and "apa" added to "eti"

Answer —I have already translated the word into "goes away absolutely"

13 What is meant by "*paitrikam riktham*" in Sloka 104 Chapter IX, Manu ?

Answer -Here it means the Estate left by the father

14 In the above Sloka 104, Chapter IX, Manu, is that which was previously father's property spoken of as "*paitrikam riktham*" even after his death and descent to his sons ?

Answer --Yes

15 What is that Sloka in Manu which deals with the cessation or extinction of all proprietary rights and ownership of the datrima son by reason of adoption in the property of the natural relations ?

Answer —Manu, Chapter IX, Sloka 142, is the only Sloka on the subject

16. Do the words "Janaitu-riktham" in the said Sloka 142, denote what is father's property or what was father's property, or both ?

Answer —The genitive case in the word "Janaitu" shows the connection of the progenitor with the words "gotra" and "riktha", the expression "Janaitu-riktham" therefore means wealth belonging to the father, whether he be dead or alive

19 When does a son born acquire the gotram of his father (the progenitor) ?

Answer —From the time of his birth

20 On adoption, does the boy retain or lose the gotram which has attached to him in his natural family and take the gotram of the adopter ?

Answer :—Before answering this question, I ought to state that the word "gotra" is often translated into "family" "or general family" meaning collectively all persons descended in unbroken lines of males from the Rishi after whom the gotra is named, But in the text No 142, Chapter IX, Manu, it is used in the sense of sonship or lineage or the status of being the son.

By the adoption, the sonship, lineage or the status of being the son of the progenitor ceases or becomes extinguished, and he acquires the gotram in the sense of sonship, lineage or the status of being the son of the adopter

But the gotram in the other sense may remain unchanged when an adoption is made within the family

21 As the existing gotra ceases by adoption, does also the existing proprietary right in the riktha of the progenitor cease ?

Answer —Yes, it does by virtue of the said text No 142, Chapter IX, Manu

CHAPTER V

MITAKSHARA JOINT FAMILY

Sec. 1—ORIGINAL TEXTS

१। भू-र्या पितामहोपात्ता निबन्धो द्रव्यम् एव वा ।
तत्र स्यात् सदृश स्वाम्य पितु: पुत्रस्य चोभयो: ॥

Father and son's right in grandfather's estate,

1 In land which was acquired by the grandfather also in a corrody or in chattels (aquired by him), the ownership of both father and son is similar.

२। मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभु ।
स्थावरस्य समस्तस्य न पिता न पितामह: ॥

Father's rights in gems, etc.

2 The father is master even of all of gems, pearls and corals but neither the father nor the grandfather is so, of the whole immovable property

३। स्थावरं द्विपदञ्चैव यद्यपि स्वयम् अर्ज्जितं ।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रय ॥
ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिता. ।
वृत्तिं तेऽप्यभिकाङ्क्षन्ति वृत्तिलोपो विगर्हित ॥

Father's right of alienation

3 Though immovables and bipeds have been aquired by a man himself, a gift or sale of them should not be made without convening all the sons Those that are born, and those that are yet unbegotten, and those that are still in the womb, all require the means of support the dissipation of the hereditary source of maintenance is censured

४। अविभक्ता विभक्ता वा सपिण्डा स्थावरे समा ।
एकोह्यनीश सर्व्वत्र दानाधमन विक्रये ॥

Kinsmen's rights

4 Kinsmen joint or divided are equal in respect of immovables, for, one is not competent to make a gift, mortgage or sale of the whole

५। एकोऽपि स्थावरे कुर्य्याद् दानाधमन विक्रयम ।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषत ॥

In distress

5 Even a single member may make a gift, mortgage or sale of immovable proparty, at a time of distress for sake of the family, and specially for (necessary) religious purposes

६। अनेकपितृकानान्तु पितृतो भागकल्पना ।

Division per stirpes

6 Among grandsons by different fathers, the allotment of shares is according to the father's (i e, *per stirpes*)

७। भक्तस्यानीहमानस्य किञ्चिद् दत्वा पृथक्-क्रिया ।

When trifle given to member

7 The separation of one who is able (to support himself), and is not desirous (of participation in the patrimony) may be completed by giving him a trifle

८। विभक्तेषु सुतो जातः सवर्णायां विभागभाक्।

8 A son born of a wife of equal class after the (other) sons have been separated is entitled to the (paternal) share

Right of sons,

९। अनीशः पूर्वजः पित्रो भ्रातु भागे विभक्तजः।

9 A son begotten before partition has no claim on the share of the parents, nor one, begotten after it, on that of a brother

same

१०। यदि कुर्यात् समानंशान् पत्न्यः कार्याः समांशिकाः।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा॥

10. If he make the (son's) allotments equal, his wives to whom *Stridhanam* has not been given by the husband or the father-in law, shall be made partakers of equal allotments

Wives' shares

११। विभजेरन् सुताः पित्रोरूर्ध्वम् ऋक्थम् ऋणं समम्।

11 Let the sons divide equally the property and the debts after the demise of the parents

Division between sons

१२। पितुरूर्ध्वं विभजतां माताप्यंशं समं हरेत्।

12 The mother also, of those dividing after the death of the father, shall take an equal share

Mother's share

१३। असंस्कृतास्तु संस्कार्या भ्रातरः पूर्वसंस्कृतैः।
भगिन्यश्च निजादंशाद् दत्त्वांशं तु तुरीयकम्॥

13 Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed, and sisters should be disposed of in marriage giving them as an allotment an one-fourth share

Provisions before division

१४। पितृद्रव्याविरोधेन यदन्यत् स्वयम् अर्जितम्।
मैत्रम् औद्वाहिकं चैव दायादानां न तद्भवेत्॥
क्रमाद् अभ्यागतं द्रव्यं हृतम् अभ्युद्धरेत् तु यः।
दायादेभ्यो न तद् दद्यात् विद्यया लब्धम् एव च॥

14 Without detriment to the father's estate whatever else is acquired by a parcener himself, as a present from a friend, or a gift at nuptials, does not belong to the co-parceners He who recovers hereditary property which had been lost, shall not give it up to the parceners, nor what has been gained by science

Self-acquired property

१५। पूर्वनष्टां तु यो भूमिम् एकश्चेद् उद्धरेत् क्रमात्।
यथा भागं लभन्तेऽन्ये दत्त्वांशं तु तुरीयकम्॥

15 But if a single co-parcener recovers ancestral land which had been formerly lost, the rest may get the same according to their due shares, having set apart a fourth part for him

Ancestral lost and acquired

१६। सामान्यार्थसमुत्थाने विभागस्तु समः स्मृतः।

Accretion to joint property

16 But if there be an accretion to the joint property (made by any parcener through agriculture, commerce, etc), an equal division is ordained

१७। पितृभ्यां यस्य यद्‌दत्तं तत् तस्यैव धनं भवेत्।

Gift by the parents

17 Whatever has been given by the parents, belongs to him to whom it was given

१८। पितरि प्रोषिते प्रेते व्यसनाभिप्लुतेऽथवा।
पुत्र पौत्र ऋणं देयं निह्नवे साक्षिभावितम्॥
रिक्थग्राह ऋणं दाप्यो योषिद्‌ग्राहस्तथैव च।
पुत्रोऽनन्याश्रितद्रव्य पुत्रहीनस्य रिक्थिनः॥
सुराकामद्यूतकृतं दण्डशुल्कावशिष्टकं।
वृथादानं तथैवेह पुत्रो दद्यान्न पैतृकं॥

Father's debts,

18 If the father is dead or gone to a distant place (and not heard of for twenty years), or laid up with an incurable disease, his sons and son's sons shall pay his debts which must be proved by witnesses in case of denial He who takes the heritage, likewise he who takes the widow, or a son, if the estate is not vested in any one else, or the heirs of one leaving no son, shall be compelled to pay the debts A son is not liable for his father's debts incurred for indulgence in wine, woman or wager or for unpaid fine or tax imposed on him, or for his promise to make an unlawful gift

१९। भ्रातृणां जीवतोः पित्रोः सहवासो विधीयते।

Abode while parents alive

19 For brothers a common abode is ordained so long as the parents are alive

२०। जायापत्योर्न विभागो विद्यते॥ १६। पाणिग्रहणाद्धि सहत्वं कर्मसु॥ १७। तथा पुण्यफलेषु॥ १८। द्रव्यपरिग्रहेषु च॥ १९। न हि भर्तुर्विप्रवासे नैमित्तिके दाने स्तेयम् उपदिशन्ति॥ २०॥

आपस्तम्बधर्मसूत्रं २। ६। १४। १६—२०।

No partition between husband and wife

20 "There is no partition (or separation between husband and wife (16) because from the *taking of hand* (i e marriage) companionship (or jointness, of husband and wife) in (religious) acts (is ordained) (17), likewise in the fruits of (acts of) spiritual merit (18), and also in the ownership of wealth (19), since (Manu and other sages) do not declare (the commission of the offence of) theft, in the case of necessary gift (made by a wife, of her husband's property)" (20)

Apastamba's Dharma-Sutras, 2, 6, 14, 16-20

Suretyship indebtedness or witnessing between certain members invalid,

२१। भ्रातृणाम् अथदम्पत्योः पितुः पुत्रस्य चैव हि।
प्रातिभाव्यम् ऋणं साक्ष्यम् अविभक्ते न तु स्मृतम्॥ २, ५२॥

21 "Of brothers, also of husband and wife, as well as of father and son, suretyship, indebtedness or witnessing (of one with respect to other) is not ordained (valid, if undivided"—Yajnavalkya, ii, 52.

The following is the commentary of the Mitakshara on this text of Yajnavalkya,—

२१। प्रतिभुवोभावः प्रातिभाव्यं, भ्रातृणां, दम्पत्योः, पितापुत्रयोश्च अविभक्ते द्रव्ये, द्रव्यविभागात् प्राक्, प्रातिभाव्यम् ऋणं साक्ष्यं च न स्मृतं मन्वादिभिः। अपि तु प्रतिषिद्धं साधारणधनत्वात्। प्रातिभाव्यसाक्ष्ययोः पक्षे द्रव्यव्ययाव सानत्वात् ऋणस्य चावश्यप्रतिदेयत्वात्। एतच्च परस्परानुमतिव्यतिरेकेण। परस्परानुमत्या तु अविभक्तानामपि प्रातिभाव्यादि भवत्येव। विभागादूर्द्ध्वं तु परस्परानुमतिव्यतिरेकेणापि भवति।

ननु दम्पत्योरविभागात् प्राक् प्रातिभाव्यादिप्रतिषेधो न युज्यते। तयोर्विभागाभावेन विशेषणानर्थक्यात्। विभागाभावश्चापस्तम्बेन दर्शितः,—"जायापत्योर्न विभागो विद्यते" इति।

सत्यम्। श्रौतस्मार्त्ताग्निसाध्येषु कर्म्मसु तत्फलेषु च विभागाभावः, न पुनः सर्व्वकर्म्मसु, द्रव्येषु च तथाहि। "जायापत्योर्विभागो न विद्यते" इत्युक्त्वा किमिति न विद्यते इत्यपेक्षायां हेतुमुक्तवान्,—'पाणिग्रहणाद्धि सहत्वं कर्म्मसु तथा पुण्यफलेषु" चेति।

हि यस्मात् पाणिग्रहणादारभ्य कर्म्मसु सहत्वं श्रूयते,—"जायापती अग्निम् आदधीयाताम्" इति। तस्माद्दाने सहाधिकारात् आधानसिद्धाग्निसाध्ये कर्म्मसु सहाधिकारः। तथा "कर्म्म स्मार्त्तं विवाहाग्नौ" इत्यादिस्मरणात् विवाहसिद्धाग्निसाध्येष्वपि कर्म्मसु सहाधिकार एव।

अतश्चोभयविधाग्निनिरपेक्षेषु कर्म्मसु पूर्त्तादिषु जायापत्योः पृथगेवाधिकारः संपद्यते। तथा पुण्यानां फलेषु स्वर्गादिषु जायापत्योः सहत्वं श्रूयते,—"दिवि ज्योतिरजरम् आरभेताम्" इत्यादि। येषु पुण्यकर्म्मसु सहाधिकारस्तेषां फलेषु सहत्वम् इति बोद्धव्यम्। न पुनः पत्नीनां भर्त्रानुष्ठितानां फलेष्वपि।

ननु द्रव्यस्वामित्वेऽपि सहत्वमुक्तम्,—"द्रव्यपरिग्रहेषु च, नहि भर्त्तुर्विप्रवासे नैमित्तिके दाने स्तेयमुपदिशन्ति" इति।

सत्यम्। द्रव्यस्वामित्वं पत्न्या दर्शितमनेन, न पुनर्विभागाभावः, यस्मात् द्रव्यपरिग्रहेषु, चेत्युक्त्वा तत्र कारणमुक्तम् —भर्त्तुर्विप्रवासे नैमित्तिकेऽवश्यकर्त्तव्ये दानेऽतिथिभोजनभिक्षादानादौ हि यस्माद् न स्तेयमुपदिशन्ति मन्वादयः, तस्माद् भार्य्यायामपि द्रव्यस्वामित्वमस्ति अन्यथा स्तेयं स्यादिति। तस्माद्भर्त्तुरिच्छया भार्य्याया अपि द्रव्यविभागो भवत्येव न स्वेच्छया। यथा वक्ष्यति। यदि कुर्य्यात् समानंशान् पत्न्यः कार्य्याः समांशिका इति ॥ २ । ५२ ॥

when prohibited,

22 "Suretyship" is the state of being surety "Of brothers, of husband and wife, and of father and son," if property be "undivided" *i e*, before partition of their property, suretyship, indebtedness or witnessing, is not ordained by Manu and other sages, but on the contrary is prohibited, by reason of (their) property being common, and by reason of the possible expenditure of wealth being the ultimate result in the cases of suretyship and witnessing, and by reason of the repayment of debt being necessary This, however, is the rule in the absence of mutual consent But by the consent of each other, suretyship and the like may certainly take place even among the undivided (co-parceners) And after partition they may take place even without mutual consent

when allowed,

between husband and wife

It may be objected—that with respect to husband and wife, the prohibition of suretyship etc, *before partition,* is not reasonable, by reason of the meaninglessness (in their case) of the qualification "if undivided," as there can be no partition between them and the absence of partition is shown by A'pastamba in the text—"There can be no partition (separation) between husband and wife" (Text No 20)

Partition between husband and wife,

It is true that there is absence of partition (separation) as regards the acts (ceremonies) that are performed by means of the fire ordained in the Sruti or in the Smriti, and as regards their fruits, but not as regards all acts, nor as regards properties For, after having declared that—"There is no partition (separation) between husband and wife," (the sage A'pastamba) with a view to answer the question why is there no partition (between husband and wife ?), sets forth the reason (for the same), in the passage—"Because from the taking of hand (*i e*, marriage) arises companionship (or jointness between husband and wife) in (religious) acts, likewise in the fruits of (acts of) spiritual merit"

A'pastamba,

A'pastamba explained,

(The meaning of A'pastamba's above text is now explained) Because from the time of marriage companionship (or jointness) in (religious) act is ordained in the text,—"The wife and the husband shall establish the "fire", hence, from the joint right in the establishment (of the fire) follows the joint right in the acts that may be performed by means of the fire made by the establishment likewise, by reason of the ordinance in the text - "Acts ordained in the Smritis (shall be performed) in the nuptial fire," there is certainly joint right also in the acts that may be performed by means of the fire made at marriage

religious rights may be separate,

Consequently it follows that as regards the (religious) acts independent of the twofold (consecrated) fire, and as regards charitable acts, the right of husband and wife (to perform the same) is certainly separate (or independent of each other), "likewise is the fruits of (acts of) religious merit," such as (blissful abode in) heaven and the like, the companionship (or association) of husband and wife is revealed in the following and other texts, namely,—"Both shall consecrate undecaying light in heaven" It should be understood that there is jointness in (the enjoyment of) the fruits of only those acts of religious merit, with respect to which there is joint right of

performance, but not also in (the enjoyment of) the fruits of charitable acts (though) performed (by the wife) with the permission of the husband

jointness in property,

If it be objected that jointness (of husband and wife) is declared (by A'pastamba) even as regards ownership of property in the text—(Jointness of the husband and wife arises from marriage) also in the respect of the ownership of property, because (the sages) do not ordain (the commission of) theft in the case of necessary gift (made by the wife, of the husband's property) in the absence of the husband at a distant place

wife's right over husband's property

Yes, the wife's ownership in the (husband's) property is certainly shown by this text, but not the absence of partition Because after having declared,—"also in respect of the ownership of property"—(the sage) declared its reason (by saying) because in the husband's absence in a distant place, Manu and other sages do not ordain (the commission of) theft in the case of necessary gift (made by the wife) *i e*, gift which must be made, such as feeding of a religious mendicant giving of alms to beggars, and the like, therefore ownership of the (husband's) property is vested in the wife also, otherwise there would be theft (when such gift is made) Hence there may certainly be a partition of property, (but) by the husband's desire, and not by her own desire, on which a share is allotted to the wife also (separately from that of the husband) is will be declared (by Yájnavalkya, ii, 116) later on in the text,—"If he makes the shares equal, his wives to whom no *Stridhana* has been given by the husband or the father-in law, must be made partakers of equal shares" see Mit 1,2,8

Sec. 2—GENERAL TOPICS

Daya or heritage explained

The Sanskrit word for inheritance—is *dáya* which is derived from the root *dà* (= Látin *do*) to give, and which primarily means a *gift*. Heritage resembles a gift in this that in the former as in the latter one person's right accrues to another person's property without any valuable consideration. Heritage may also be deemed an implied gift ; for, the law of inheritance in a country is moulded and regulated by the feelings of its people, so that if every person of a community could have declared at the time of his death his wishes with respect to the persons that are to take his property, then in the majority of instances the donees would have been the very persons that are declared heirs by the law. The law of inheritance, therefore, may be regarded as the General Will of the Community, and hence heritage may, not improperly, be regarded as gift which the previous owner intended but omitted to make, but which the law relating to the order of succession, gives effect to, by raising a conclusive

presumption of such intention, founded on degrees of what are usually called *natural* love and affection, but what are really feelings of sympathy occasioned and determined by the peculiar conditions, exigencies and associations of each society, and may vary in different communities, and also in the different stages of development of the same community, so that what is regarded as quite natural in one, may be deemed contrary to natural justice in another.

Heritable right not dependent on proprietor's pleasure

Although the origin of the law of inheritance may be traced to the love and affection of the proprietors towards the heirs, yet it must not be understood that the heritable right of an heir does at all depend on the pleasure of the proprietor · and a person being displeased with cannot disinherit the legal heir by simply declaring that he shall not take his estate , for, notwithstanding such declaration, the heir, on whom the law confers the right, would be entitled to take the estate if not validly disposed of in favour of other persons

3 modes of devolution when family (1) Joint (2) Separated (3) Re-united

Three modes of devolution in Mitakshara —According to the Mitáksharà the estate of a deceased male devolves in three different modes under different circumstances ; (1) by *survivorship*, and (2 & 3) by *succession* in two different orders : if a person was *separated* from his co-parceners *and not re-united* with any of them after separation, then *succession* in the order set forth in the Mitáksharà, Chapter ii, Sections 1 to vi, applies , if he was *re-united* with any of the co-parceners after separation, then also *succession* applies, but, in the order, stated in the Mitáksharà, Chapter ii, Section ix, and fully explained in the Viramitrodaya, Chapter iv ; and if he was not separated at all, then servivorship applies. It is erroneous to suppose that *survivorship* applies to the estate of a *re-united* person, and that *succession* applies to the estate of a person who was *not separated,* and who died leaving behind him no male co-parcener but only female co-parceners with whom he used to live jointly, and who are entitled to take, by survivorship, the estate, to which, however, succession is erroneously applied, though it is properly applicable to the property of one who had become separated.

(1) *Joint.*

Survivorship—If he was a member of a joint undivided family his interest in the joint *ancestral* property and in the accretions to the same, passes by survivorship to the surviving members of the family.

Maternal grand-father's property, whether ancestral

Maternal grandfather's property—The term *ancestral* property is to be understood to mean the property of the father and other paternal lineal male ancestors in the male line, to which the right of the son or other male descendant in the male line, accrues from the moment of his birth or rather conception, and which is on that account, called *unobstructed* heritage. According to the view taken by the Privy Council in the case of *Chelikani* v *Chelikani* (a) it does also include property inherited jointly by two undivided brothers from their maternal grandfather ; such property does pass by survivorship as joint ancestral estate, if either of the brothers dies without making partition.

This decision overrules the cases of *Jasoda Koer* v *Sheo Pershad* (b) and *Saminadha* v *Thangathanni* (c) in which it was held that survivorship was limited to the *unobstructed heritage*, that is, to such property only, to which right accrues by birth

Chelikani v. *Chelikani* discussed

It is difficult to understand the principle enunciated by their Lordships in this case, in which what was actually held is, that when two full brothers who were members of a Mitâkshara joint family succeeded to the estate of their mother's father, and one of them died without leaving male issue, while living jointly with the other, survivorship applied to that estate in which their ownership was that of joint tenants But there are some expressions which create considerable difficulty For instance their Lordships observe, —"It is the right to partition which determines the right to take by survivorship" If it implies that the joint heirs must be members of a joint family, who have the right to *partition* in the technical sense, then, it embodies an important condition In another place the maternal grand-father's property in the hands of the grandsons is said to become *ancestral* property If this be deemed another condition for the application of the decision, then the difficulty may be removed

Madras decision on survivorship.

Mother's Stridhana & Maternal uncle's estate.—A Full Bench of the Madras High Court has held that members of a joint family succeeding to thier mother's *Stridhanam* or to their maternal uncle's estate, take the same as tenants-

(a) 25 M 678 29 I A 156 7 C W N 1 12 M L J 299 4 Bom L R 657
(b) 17 C 33 (c) 19 M. 72

in-common and not as joint tenants, so they have not the benefit of survivorship. (*d*)

Collateral's estate if ancestral

Collateral's estate —The property inherited by one from a collateral relation such as a brother, uncle and the like, is not taken as, and subject to the incidents of, ancestral property, and his male descendants are not co-parceners with him in respect of such property. (*e*)

Right among grandsons by daughters

Daughters' sons—It would seem that survivorship would not apply to the estate if inherited by two or more grandsons by daughters, who are members of different families.

Survivorship between widows, daughters

Two widows or daughters —It should be observed that the proposition of law, enunciated by the eminent Hindu Judge who decided *Jasoda Koer's* (*f*) case appears to be perfectly correct according to the true view of the Hindu law, namely, that *survivorship* applies only to property in which right is acquired from birth, and not to property jointly inherited according to the rules of succession In consequence, however, of the proper materials not having been placed before the Judicial Committee, their Lordships had held that two widows [in *Bhugwandeen Doobey's* (*g*) case] and two daughters [in *Aumritolall Bose's* (*h*) case] succeed as *joint tenants*, and there is survivorship between them The passage of the Mitakshara, providing partition by two or more widows, of the husband's estate inherited by them is omitted in Colebrooke's translation Nor was the fundamental doctrine of the Bengal School, namely, that co heirs take as *tenants-in common* in all cases, and never as *joint tenants*, —brought to their Lordships' notice in the latter case which was governed, by the Dayabhaga There appears to have been another misapprehension namely, that the surviving widow or daughter who takes the share of the deceased, as being the *then nearest heir* of the last male owner, is mistaken to take *by survivorship*

H C and P C.

Justice Banerji, the learned Hindu Judge who decided *Jasoda Koer's* case had in his mind the true view of Hindu law when deciding that case, while the Judicial Committee rejected the general proposition propounded by his Lordship as erroneous, inasmuch as the same was in conflict with what had been laid down in those two cases decided by their Lordships

The Judicial Committee has, therefore, held that *survivorship* did apply to the property inherited by *succession*, by two widows and two daughters.

(*d*) Karuppai v Sankaranarayanan, 27 M 300 *See also* Vythinatha v Yeggia, 27 M 382
(*e*) Gurumurthi v Gurammal, 32 M 88 5 M L T 74, *see also* Suraj v Sukhdel, 2 O I J 502 32 I C 291
(*f*) 17 C 33 (*g*) 11 M I A 487 9 W R P. C 23,
(*h*) 15 B L R 10 23 W R 214 2 I A 113 3 P C.J 430

Gift to brother, living jointly

Property obtained by gift —Nor does survivorship apply to property jointly obtained as a gift by two or more brothers living jointly, (*i*) or by *two* widows for their maintenance. (*j*)

Pass by survivorship, a misnomer

Pass by survivorship —It should be observed that the expression *pass by survivorship* is a contradiction in terms, for the undivided coparcenary interest of a member in the joint property lapses on his death, and therefore nothing *passes* to the survivors whose right to the whole of the family property accrued at the time of their respective births, and no new right is acquired on the death of a member

(2) *Separated.*

(2) Separated

Succession —If he was separated from his co-parceners and was not subsequently re-united with any one of them, his estate descends agreeably to the rules of succession

Succession,

The rules of succession also apply to the self-acquired and other separate property of a member of a joint family according to the *Shivagunga* case. (*k*)

survivorship

And conversely the rule of survivorship applies to any joint *ancestral* property (including accretions to the same) which may have been kept joint and undivided at the time of partition of all the rest of the property. (*l*)

The rules of succession will apply, as stated above, to even joint property other than *ancestral* and accretions to the sams.

(3) *Re-united*

(3) Re-united

Succession in different mode —If he was re-united with any of his co-parceners after partition, his estate goes according to a certain order of succession, though in some cases it may seem to pass by survivorship which, however, does not really apply to such property. (*See* Ch VII)

It should be observed here that although there are good reasons for considering that the different courses of

(*i*) Bai *v* Patel, 26 B 445 4 Bom L R 102
(*j*) Sashibala *v* Chandra, 56 I C 937 (Pat)
(*k*) Katama Nachiar *v* Rajah of Shivagunga, 9 M I A 539 2 W R.P C 31.
(*l*) Chowdhury Chintamun *v*. Nowlukho Konwari, 2 I A. 263

succession to the estate of persons were regulated by their status of being joint or separate or re-united, yet it is now settled that the course of descent is determined by the character of the property, so that whether the status of the family be joint or separate, the property which is joint will pass by survivorship and the property which is separate will devolve in a different course according to the rules of succession. The first proposition, however, should be restricted as being applicable only to such joint property as is *ancestral* or accretion to the same.

Course of descent how determind

Joint family system, normal condition,

The joint family system—is a cherished institution of the Hindus and is the peculiar characteristic of their society, of which it is the normal condition. (*m*) It is only a continuation of the ancient patriarchal form of family government, deprived of its original autocratic rigor by the civilizing influences of later times. Those that are called by nature to live together, continue to do so, with the exception of daughters born in the family, who must pass out of it after marriage, and with the addition of wives of male members brought from other unconnected families. The Hindu Shástras enjoining brothers to live together so long as the parents are alive (*n*) give a religious sanction to the usage, and are unlike the Christian Scripture ordaining,—"Therefore shall a man leave his father and mother and cleave unto his wife, and they shall be one flesh,"—which appears to have moulded the structure of European society in the individualistic mode. Originating in natural love and affection, the joint family depends for its continuance on self-control, mutual sympathy and the spirit of self-sacrifice and forbearance, while its disruption owes its origin to the spirit of selfishness and impatience in some of its members. The system founded as it is on the virtues of sympathy and self-sacrifice, and tending as it does to create a spirit of forbearance and mutual dependence, conduces to the law abiding and religious character of the Hindus.

(*m*) *See Sec* 13 below.

(*n*) Text No. 19.

This system, however, is opposed to the spirit of self-reliance and independence, which distinguishes the people of Europe, and is, on this account, disapproved by some English-educated Hindus who would introduce the European system · but this view of theirs is looked upon by the orthodox Hindus as the outcome of selfishness

This joint family system is organized on the principle of subordination, and not on that of co-ordination or equality of the members with respect to rank and position. Under it no two persons can be equal, one of them must be superior and the other inferior relatively to each other an elder brother or cousin is like a father, his wife and an elder sister are similar to the mother ; while a younger brother or cousin is like a son, and his wife and a younger sister are similar to daughters; the paternal uncle's wife and the father's sister or cousin are similar to the mother, and so on. Thus the idea of equality is unknown to the Hindu mind with regard to family government and social order , and the title to respect among the members of a joint family depends on age and higher degree of relationship Superior ability in a junior member is recognised to this extent, that it entitles the member possessed of it to be the head of the family as regards the management of its property, and its affairs and dealings with the outside world

Its constitution,

The Hindus accustomed to live in joint family groups and to be attended and nursed by the members of their family when suffering from disease and the like, do not require the aid of hospitals , on the contrary they appear to feel an instinctive abhorrence for being tended by strangers in a hospital.

Its advantages

hospital,

The joint family takes care of its young orphans and its old and infirm members It looks after and guards and protects the wives and children of its absent or deceased members. Under this system violence and cruelty to wives and children are impossible, and old age pension is unnecessary. The system exercises a salutary influence on the mind : as so many persons cannot live together peacefully,

protects orphans, infirm, children, old etc

without self-control, sympathy, patience and forbearence. Suppression of selfishness is neccessary there cannot be a happier mode of life than under this system, if all the members work for common good, and the comforts and happiness of all be felt by each to be his duty to secure. The members of a joint family do not feel the necessity for making any separate provision for themselvs in their old age or for their children, since the family affords shelter and protection to all its members, young or old, and its property is ordained to be the hereditary source of maintenance of all.

The joint family system depends for its continuation on the possession of certain virtues by its members, and fostering as it does the religious spirit it may be called the stronghold of Hinduism The vitality of the Hindu community is derived from this system which forms the foundation of their religious and spiritual character, the existence of which depends entirely on its continuance. What is noble and good in Hindu character is its effect. The Hindus should preserve and stick to the system. It still prevails in Hindu society sometimes more in form than in spirit, an exclusively secular education dissociated from religion, now imparted in our schools and colleges, has been undermining the Hindu spiritualism on which the system is founded and on which its continuance depends This institution like every other, has its advantages and disadvantages, but its advantages are both spiritual and secular, whilst its disadvantages are merely secular in character.

advantages, spiritual and secular,

Jointness even after death

Bred up under this system, the Hindus cannot conceive of a heaven without joint family The *Sapinda* relationship in the sense of connection through participation in funeral oblations implies a celestial joint family composed of the *manes* of male and female members of a mundane joint family.

Selfishness of English educated members

It is, however, worthy of remark that Hindus English-educated at the expense of the joint family, and enjoying the advantages afforded by it, are yet often found so blinded by selfishness, as to be dissatisfied with the rule of Hindu

law, imposing on them certain correlative duties to the family, in return for the diverse benefits received from it. They commit to the family, the care of their wives and children, while they are compelled to reside elsewhere, for the practice, of any profession or in the exercise of any calling, or in service, and are themselves incapable of taking care of them, or think it inconvenient to take them with themselves to the place of business In fact, they cannot do without the joint family, and cannot sever their connection with it which they are at perfect liberty to do at their pleasure ; but at the same time, they are unwilling to participate with the joint family, their earnings, which under the circumstances the Hindu law requires them to do, as being fair and equitable.

Expenses of higher education, if investment by family

It should also be especially noticed in the present connection that India is a very poor country, and even the ordinary expenses of English education here, are out of all proportion to the means of the middle class Hindus The expenditure necessary to give such education to the smart boys in the family, is regarded as a sort of investment. It is not correct to suppose that the boys are entitled to the expenses of such education from the family, as its natural duty towards them. The indigenous system of education formerly prevailing in this country, was the training imparted by the secular *Gurus* or pedagogues in the village *pàthsàlàs*, and that is what one might say he is entitled to have, at the expense of the family, as ordinary education But English education should be held to be special training, and the gains by one who has received such education at the expense of the family, should be considered earned with the aid of family fund, so as to become the subject of joint right.

For presumption as to jointness and separation, *see Sec. 13* below.

Sec. 3.-MEMBERS OF FAMILY

Sub Sec 1—MALES, FEMALES AND DEPENDANTS

Members are (1) Males,

Males —The members are males and females. The male members are, (1) those that are lineally connected in the

mâle line, such as father, paternal grandfather, son and son's son, (2) collaterals descended in the male line from a common male ancestor, (3) such relations by adoption, and (4) poor dependants.

(2) Females.

Females.—The female members are, (1) the wife or the "widowed wife" of a male member, and (2) his maiden daughter. As a general rule, a married daughter is not a member of her father's family ; since by marriage she becomes a member of her husband's family ; (*o*) there may, however, be cases in which a married daughter continues to live as a member of her father's family, sometimes together with her husband ; (*p*) a widowed daughter also may sometimes come back to her father's family and live as a dependent member thereof.

(3) Poor dependants,

Poor Dependants.—Some helpless persons mostly poor relations more or less distant, are also maintained as members of the family ; the original words for ***poor dependants*** दीनाः समाश्रिताः indicate that they are actually getting their subsistence and living under the protection of the family.

Sub-Sec ii—SLAVE, CONCUBINE AND THEIR ISSUES

(4) Slave, concubine, illegitimate son

The female slave or concubine, and the illegitimate son—mentioned in the commentaries as members of a joint family may now be so only in very exceptional and rare cases. When slavery was prevalent a female slave would be permanently attached to a family as a dependent member thereof, and a son begotten on her by a male member would likewise be an inferior member. But although there cannot, at the present day, be a female slave in law, there are instances of such in fact, called concubines and living as members of the family of the men keeping them, this we find possible either in the cases of holders of Rajes or big estates, or in the cases of low-caste people, herein the extremes meet, the former are above public opinion, and the latter are

(*o*) Kartick *v* Sarodа, 18 C 642

(*p*) *See pp* 170-171 205-296

below the same In other cases such conduct would not be tolerated by the other members of a joint family.

Illegitimate son's right,

Some misconception appears to prevail on this subject The Hindu commentators treat of an illegitimate son's right while dealing with the partition of a joint family They evidently mean that only such an illegitimate son, as is a member of his father's family, may get maintenance if the father is of a regenerate class, and a share, if the father is a Sûdra. The following texts form the foundation of the law on the subject —

अनपत्यस्य शुश्रूषुर्गुणवान् शूद्रयोनिजः ।
लभेताजीवनं शेष सपिण्डाः समवाप्नुयुः ॥ बृहस्पति. ॥

according to Vrihaspati,

which means—"The virtuous and obedient son, borne by a Sûdra woman to a man who has no other offspring, should obtain a maintenance, and let the kinsmen take the residue of the estate "—Vrihaspati This text is explained to refer to a son of a twice-born person by a Sudra woman not married by him see Dâyabhâga, ix, 28

दास्याम् वा दासदास्याम् वा य शूद्रस्य सुतो भवेत् ।
सोऽनुज्ञातो हरेद् अंशम इति धर्म्मो व्यवस्थित: ॥ मनु ॥

which means—"A son begotten by a Sûdra, or on a female slave, or on a female slave of a slave, may take a share (on partition) if permitted (by the father) this is settled law" —Manu According to a Sanskrit rule of construction the repetition of the particle "or' may be taken to imply "or on any other similar woman"

Manu,

जातोऽपि दास्यां शूद्रेण कामतोंऽशहरो भवेत् ।
मृते पितरि कुर्युस्त भ्रातरस्त्वर्द्धभागिनं ।
अभ्रातृको हरेत् सर्व्वं दुहितॄणां सुतादृते ॥ याज्ञवल्क्य: ।

which means—"Even a son begotten by a Sûdra on a female slave may get a share by the father's choice, but if the father be dead, the (legitimate) brother should make him partaker of half a share one, who has no (legitimate) brother may take the whole, in default of (heirs down to) the son of daughters" —Yajnavalkya

Yajnavalkya,

These three texts are cited in the Dâyabhâga The author of that treatise lays down, on the authority of the above text of Vrihaspati, that the son of a regenerate person by any Sûdra woman not married by him, is entitled to maintenance, and then goes on to discuss the law relating to such a son of a Sûdra, and begins thus,

Dayabhaga.

शूद्रस्य पुन: अपरिणीतादास्यादिशूद्रापुत्र' पितुरनुमत्या पुत्रान्तरतुल्यांशहर: ।

as the correctness of the rendering by Colebrooke, of this passage has been doubted, it is literally translated thus,—"But of a Sûdra a-son-by-a not married-female-slave-or-the like-Sûdra-woman, may share equally with other sons, by the father's permission" The words connected by the hyphens stand for a compound word in the original

Colebrooke's translation is as follows,—"But the son of a Sùdra, by a female slave or other unmarried Sùdra woman, may, &c" So it is difficult to maint iin that Colebrooke's ... ·pting this that the word "unmarried" is ambiguous ind may suggest a meaning not intended by the original, namely, that the wc in must be a *maiden*, whereas the real meaning is, that she is not married by the man The two words *Dàsi* and *Adi* may be done, in either of the above two ways, namely, either into "a female slave or other,' or into "a female slave or the like" No Sanskritist would be prepared to say that the first of these versions, which is given by Colebrooke, is wrong, the translation given in *Narain Dhara's* case, (q) omits the word "Sùdra woman" altogether

Meanii f *Dasi*

Case-law *Dasi-putra*

Dasi putra—There was a difference of opinion as to proper import of *Dasi putra* between the Calcutta High Court and the other High Courts, the latter held that an illegitimate son of a Sudra by a *kept woman* or *continuous concubine* would be entitled to a share under the foregoing texts, while the former took a contrary view (r) So also in *Ram* v *Tek* (s), it was held that a Sudra's illegitimate son not born of a female slave, is not entitled to a share where the father had parted with his interest during his life-time

In Western India *Dasi putra* has come to mean son by a kept mistress of one of the lower castes. (t).

under Da school.

It should, however,, be observed that two commentators of the Dàyabhàga, namely, Ràmabhadra and Srikrishna explain the term "on a female slave of a salve" as used in the above text of Manu, thus,—

दासदास्याम् रति, दासस्य अपरिणीतरक्षितायाम् इत्यर्थे ।

which means,—"On a female slave of a slave, means, on one, not married, but kept by a slave" And this somewhat unreasonable interpretation is put, as otherwise the sages might be thought legalise adultery and its effect seems to be consistent with what is said in the Dàyabhàga with respect to the illegitimate sons of regenerate persons

Hence if the son begotten by a Sudra on a *kept woman of his slave* be entitled, it follows *a fortiori* that a son begotten by a man on his *own kept woman* should be entitled to a share So these commentators of Dàyabhàga appear to support the view taken by the other High Courts

Maintenance provided to all

It has already been said that the Hindu lawgivers appear to be anxious to provide a source of maintenance for every person, and therefore also for an illegitimate son It would be a little too puritanic to deprive one publicly

(q) 1 C, 1

(r) Kirpal Na v Sukurmoni, 19 C 91

(s) 28 C 194

(t) Raoji v Kunjalal, 54 B 455 34 C W N 627 51 C L J 434 1930 P C 163.

acknowledged as son by the father and his family, on the ground of his being illegitimate, he is not responsible for the manner in which he came into existence

Distinction between *dasi* and slave

There does not appear to be any difference on this point between the commentaries of the two schools If it be contended that in order to entitle an illegitimate son to claim a share, it is necessary that his mother must be a slave, then none would be so entitled, now that slavery has been abolished and the decisions of the other High Courts (*u*) as well as the ruling of the Privy council in the case of *Jogendra Bhupati*, (*v*) must be pronounced wrong In fact, however, though not in law, there are women holding the position of a female slave, such as there was in the last case It should moreover be observed in this connection that the Sanskrit word *Dàsi* does not necessarily mean a female slave, but may also mean a Sudra woman and the latter meaning is suggested by the whole context of the Dàyabhàga on the subject

Dasi may mean Sudra woman

Calcutta F B. has settled this point

Illegitimate son same as Dasi-putra, when—A Full Bench of the Calcutta High Court, by its majority, has finally settled the matter and has rightly made the law uniform throughout India (*w*) The Full Bench has over-ruled the decisions in the cases of *Naryan Dhara* (*x*) and *Kripal Narayan* (*y*) and has practically followed the decision in the case of *Chatturbhuj* v *Krishna*. (*z*) The decision of the Full Bench is in accordance with the Hindu law and is in consonance with public policy. It is in accordance with public policy, because, the members of the family, who will be entitled to the property after the death of the member living openly in continuous concubinage, may, even at the risk of losing a share or the entire inheritance by incurring his displeasure, protest against the immoral conduct of such a member and may succeed in nipping the evil in the bud. It is desirable to put a stop to such immoral life being led by any member of a family, at the beginning, than to allow him to indulge in such immoralities and then after the death of

Consonant to public policy,

(*u*) Rahi *v* Gobind, 1 B 97, Sadu *v* Baiza, 4 B 37, Gangabai *v* Bandu, 40 B 369 18 Bom L R 70 32 I C 986, see Manchharam *v* Dattu, 44 B 166, 170 21 Bom L R 1172 54 I C 110, Krishnayyah *v* Muttusami, 7 M 740, Soundararajan *v* Arunachalam, 39 M 130 29 M L J 793 18 M L T 568 2 L W 1247 33 I C 858, Subramania *v* Rathnavelu, 41 M 44, 67 F B 42 I C 556, Sarasuti *v* Mannu, 2A 134, Hargobind *v* Dharam, 6 A, 329 4 A W N 100, Ram *v* Jamma, 30 A 508 5 A L J 629 A.W N (1908) 229, see Jwala *v* Sardar, 4
(*v*) 18 C 151 17 I A 128 appeal from 11 C 702
(*w*) Rajani *v* Nitai, 48 C 643 32 C L J 333 25 C W N 433 63 I.C 50.
(*x*) 1 C 1 23 W.R 334 (*y*) 19 C 91.
(*z*) 16 C.L.J 335 . 17 I.C. 276 : 17 C.W.N 442.

such a member when there is no risk of disherison, to raise the question of sentiment at the time when the son by the concubine claims a share or the entire interest of his putative father.

its reasons.

A plausible argument may be advanced by those who hold a contrary view. They may as well say that the fallen woman with whom the man lived in continuous concubinage, would not have adopted such a life, had she known that the male issue of her immoral life, would be excluded from inheritance. But the various causes assigned for prostitution do not include the one stated above, and hence exclusion from inheritance, or a share of it, of the illegitimate son, who is not responsible for the manner in which he is brought into existence, will not prevent the evil, nor will it patch up the sentiment which has already been violated by allowing the parties to lead such an immoral life as members of the family.

Concubine living in joint family entitled to maintenance,

Concubine when entitled to maintenance—The verious decisions on the right to maintenance of a concubine from the estate of her deceased paramour, and their son's claim to a share therein, contemplate cases in which the concubine lived as a member of the family. The words used in the aforesaid text of Manu, namely, दास्याम् वा दासदास्याम् वा may, as is stated before, be taken to imply '*or on any other woman*' by the application of the rule of construction, put on the repetition of the particle वा—"*or*." The Hindu law-givers have ordained for the maintenance of all those that are members of the family out of the family property, and wherever a concubine is directed to get maintenance out of the estate of a deceased paramour, the sages meant permanent concubine living in the family of her paramour like a female slave. Such a concubine is called *abaruddhá stri* and is entitled to maintenance.

but P C. includes outsiders in Bombay.

But the Judicial Committee of the Privy Council, (a) in a case governed by the Mayukha school, has held that a

(a) Bai Nagubai v Bai Monghibai, 44 C.L J 53, appeal from 47 B. 401, see also Rama Raja v Papammal, 48 M. 805 : 49 M.L.J 348. 1925 M. 1230.

concubine is entitled to maintenance out of the estate of her deceased paramour, provided the concubinage be permanent until the death of the paramour and sexual fidelity to him be preserved although the concubine be not kept in the family house of the deceased "Their Lordships are of opinion that such common residence is now unnecessary, whatever may have been the case when the concubine was a slave of the household" This, their Lordships have stated, to be the law of the Mayukha school relying on an earlier decision of the Bombay High Court. (*b*) In this latter case the deceased paramour took the concubine to his house and she lived with him as his mistress and there is nothing in the judgment to show that their Lordships of the Bombay High Court meant that the concubine who although not treated as a member of the family, is entitled to maintenance out of the estate of her deceased paramour

Who is permanent concubine

In the earlier Bombay case referred to above a question was raised whether ten or twelve years' concubinage can be held to be permanent, and their Lordships held that "a concubine who has been kept by a man for some years, or even many years, gets no right of maintenance against him unless, having been kept continuously till his death, it can be said that the connection became permanent" In the above mentioned Privy Council case the woman lived with the deceased as his mistress for five years up till his death and the concubinage is held to be permanent. Their Lordships of the Privy Council, however, have not indicated the period a woman is to live with her paramour in exclusive concubinage observing sexual fidelity, so as to be called a permanent concubine. (*c*)

P C decision a legislation,

In the above Privy Council case their Lordships have practically exercised the functions of legislature. The question of custom or usage was not raised by the plaintiffs in that case but she based her claim on legal rights. There is no provision in Hindu law to support the plaintiff's case or at

(*b*) Ningarredi *v* Kahshmawa, 26 B 163, Rathinasabapathi *v* Gopala, 1929 M 545
(*c*) *See* Rama Raja *v* Papammal, 48 M 805 · 49 M L J 348 1925 M 1230.

any rate their Lordships have not based their judgment on any such law or existing statute Their Lordships stated "such common residence is now unnecessary," and decreed claim though there is no provision of law which empowers a Court to grant such a decree.

No right by birth of illegitimate son

Right by birth of illegitimate son—An illegitimate son does not acquire any right by birth to the property of his Sūdra putative father,(c1) during whose lifetime he cannot claim any share, (d) there cannot be any co-parcenary between them,(e) but two illegitimate brothers enjoying their putative father's property jointly after their father's death may form a joint family. (f)

Illegitimate son's paternity must be proved

The term female slave applied to the illegitimate son's mother implies that she lived as a member of the master's family; and so there could not be any doubt as to the alleged paternity of an illegitimate son. In the case of an illegitimate son by a concubine, however, there cannot be any presumption as to paternity such as arises in the case of the offspring of a married couple, under Section 112 of the Evidence Act A person claiming as an illegitimate son must prove his alleged paternity in the same manner as any other disputed relationship is proved.

He has no right of representation,

His right of representation—An illegitimate son's claim for a share must fail, if it is not shown that the deceased father left any separate or self-acquired property, but died undivided with his own father and brother who took the joint property by survivorship, the illegitimate son could not represent his father in the undivided family (g)

But a divided brother is held to be not entitled to succeed in preference to the legitimate son of a predeceased illegitimate son of his brother whose entire separate estate the latter as representing his father is entitled to take in default of any heir down to the daughter's son. (h)

(c1) Packiriswamy v Dorasawmy, 9 R. 266.
(d) Ramsaran v Tek, 28 C 194
(e) Shamu v Babu, 52 B 300, 305 1928 B. 153, Packiriswamy v Dorasawmy, 9 R 266 (f) Shamu v Babu, *Supra*
(g) Gopalasami v Arunachellam, 27 M, 32; Kanoji v Kandoji, 8 M. 557.
(h) Ramalinga v Pavadai, 25 M, 519: 11 M.L J 399.

His Status—The son by a continuous concubinage of a Sudra gets the status of a son; and is entitied to maintenance and cannot demand partition when his father was a member of a joint family. (*i*) An illegitimate son's right to maintenance is a personal right, and is not heritable. (*j*) If the illegitimate son's mother be not a Hindu but a Christian, then he cannot claim even maintenance; as he cannot be regarded as a Hindu by birth; since the status as to Dharma or law and religious rites is determined by the mother's caste, therefore he is not governed by Hindu law, his mother not being a Hindu. (*k*)

maintenance is personal

Collateral's heritage.—An illegitimate son of a Sûdra governed by the Mitâksharâ law cannot inherit collaterally in preference to the legitimate heirs (*l*)

nor can inherit collaterally,

When illegitimate son entitled to succeed.—An illegitimate son of a Sûdra is entitled to succeed to the estate of his putative father, if he was not the offspring of an adulterous intercourse or of a connection forbidden by law. (*m*)

my get estate of father,

There is no distinction between the right of the illegitimate son of an unmarried woman to maintenance out of the estate of the putative father and that of the offspring of an adulterous intercourse. (*n*)

There was a conflict of decisions of the Madras High Court on the question of the right to inheritance of the male offspring, the issue of illegitimate connection between a man

incest,

(*i*) Vellaiyappa *v* Natarajan 55 C L.J 451, 461, P C 35 C W N 1278, Subramania *v* Rathnavelu, 41 M 44 33 M L J 224 42 I C 556, Gopalasami *v* Arunachallam, *Supra*, Panchapagesa *v* Kanaka, 33 M L J 455 42 I C 344, Rathinasabapathi *v* Gopala, 1929 M 545 (must not be compassionate), in this connection *see*, Packiriswamy *v* Dorasawamy, 9 R 266

(*j*) Roshan *v* Balwant, 27 I A, 51,56-57 22 A 191 4 C W N 353, *see*, Raoji *v* Kunjalal, 54 B 455, 459 34 C W N 627 51 C L J 434 1930 P C 163

(*k*) Lingappa *v* Esudasan, 27 M 13

(*l*) Ravji *v* Sakuji, 34 B, 321 12 Bom L R, 204 5 I C 964, Nissar *v* Kowar, 1 Marshall, 609, Shome Shankar *v* Rajesar, 21 A 99 18 A W N 170, Ramalinga *v* Pavadai, 25 M, 519 11 M L J 399, Krishnayyan *v* Muttusami, 7 M 407, Thangam *v* Suppa, 12 M 401, 403, Karuppa *v* Kumarasami, 25 M 429, Raj *v* Baldeo, 3 Luc 416 1928 O 233, Nagarathnammal *v* Chinnu, 1928 M 127, Gopal *v* Brojo, 34 C W N 944

(*m*) Datti Parisi *v* Datti, 4 M H C R, 204, Venkatachella *v* Parvatham, 8 M H C R, 134, Annayyan *v* Chinnan, 33 M, 366 20 M L J 355 7 M L T 140 : 5 I C 84, *see*, Mewa *v* Lal, 1927 A 410

(*n*) Subramania *v*. Valu, 34 M 68 5 I C 919 20 M L J, 350 7 M L.T 161.

and a woman *forbidden by law.* The conflict has been set at rest by a Full Bench of the Court. The Full Bench has held "that according to the preponderating weight of the case-law the son by a permanent concubine while he is an illegitimate son and not a legitimate son is entitled to get his appropriate share after the father's death provided the connection between his father and his mother was not incestuous or adulterous and that his said right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged "(o)

rule of possible marriage,

Sub-Sec iii—CONVERSION TO DIFFERENT FAITH

Conversion to Christianity of member

Conversion of a member to Christianity—at once effects his severance from the joint family; (p) but if the Christian and Hindu members live jointly as before and keep property jointly, an implied contract to share properties alike is presumed (q) But if all the members become Christians, their rights of co parcenership will not be affected by this renunciation, if they adhere to the old law (r) But the Madras High Court holds a contrary opinion (s)

Sec 4—PROPERTY OF FAMILY

Sub-Sec i—UNOBSTRUCTED AND OBSTRUCTED HERITAGE

Heritage,

Heritage unobstructed and obstructed —Heritage is defined in the Mitakshara to be that property to which one's right accrues by reason only of his relationship to the previous owner. It is called *obstructed*, where the accrual of the right to it, is obstructed by the existence of the owner; and it is called *unobstructed*, where the owner's existence offers no obstruction to the accrual of the right (t) A son, a son's son, and any other remoter male descendant in the male line acquire from the moment of their birth or rather conception,

obstructed,

unobstructed,

(o) Soundararajan v Arunachalam, 39 M 136, 153 29 M L J, 793 · 33 I C. 858

(p) Abraham v Abraham, 9 M I A, 195 1 W R 1 P C, Kulada Prasad v. Haripada, 40 C 407 16 C L J 311 17 C W.N 102, Subbaya v Rangayya, 1027 M 883

(q) Jogi v Chinnabai, 90 I.C 1016 1925 M 1105

(r) Jalbhai v Louis, 19 B, 680, Lastings v Gonsalves, 23 B 539 1 Bom L R 53 Kulada v Haripada, 40 C 407, 418 · 16 C L J 311 17 C W N 102

(s) Tellis v Saldanha, 10 M, 69

(t) *See*, Bai Parson v Bai Somli, 36 B 424 14 Bom L R 400 15 I C 774

a right to the property of the father, the paternal grandfather and other paternal male ancestor in the male line, and such property is, therefore, denominated heritage without obstruction. But when the right of a person arises to the property of his paternal uncle and the like relations, only on their death without male issue, on account of his being their heir, and to which property he had no right during their lifetime, such property is called obstructed heritage, the existence of the owner having offered the obstruction to the accrual of the right

Ancestral and self-acquired

There is a great distinction between the father's self-acquired property and *ancestral property*, or the property inherited by him in regular course of inheritance from his father and other paternal male ancestors in the male line, as regards the son's right by birth to the same, which will be dealt with in next topic.

Daya is heritage

It should be noticed that the expression *unobstructed heritage* is a contradiction in terms; for, *Nemo est hæres viventis:* the original word *dáya* cannot be and should not have been, rendered into *heritage.*

Sub Sec ii—JOINT AND SEPARATE

Joint property

Joint property, Joint tanants, Co-parceners and Tenants-in-commo —When two or more persons are entitled to the same property in equal or unequal shares it is said to be their *joint property* The expressions *joint-tenants, tenants-in-common,* and *co-parceners* are technical terms of English law used to designate different descriptions of co-owners of joint property, with special incidents The use of these terms to express co-heirs under Hindu law by reason of analogy in some respect, is often misleading and gives rise to confusion.

Joint-tenancy

For instance, members of a Mitakshara joint family holding ancestral property are called *joint-tenants,* by reason of *unity of possession* and *interest,* and *survivorship* being

common to both. The analogy between them ends there, and does not extend to other incidents.

English law its origin

Joint-tenancy in English law owes its origin of a grant jointly made to two or more persons by a deed or a Will; it arises always by *purchase*, never by *descent*.

introduced in India,

The English *joint-tenancy* seems to be introduced to this country by the codified law For instance, Section 106 of the Succession Act, which provides that if a legacy be given to two persons jointly, and one of them dies before the testator, the survivor takes the whole,—appears to imply *joint-tenancy*.

distinction between English & Mitakshara law,

The English joint tenancy and the Mitâkshară joint-tenancy differ from each other in many respects.—The former is created by a grant under a deed of transfer *inter vivos*, i e. by *purchase* and not by *descent;* while the latter owes its origin to *inheritence* only (u) Under the former each co-tenant is entitled to the *whole*, as well as to his *undivided equal share* of the property, *i e.* the *whole estate* as well as *his own equal proportion* are vested in each *joint tenant :* but under the latter, the whole estate, not any share of it, is vested in each member, who whilst undivided, cannot predicate of the property that he has any definite share, which again when ascertained by partition is not necessarily *equal*: accordingly, an English joint tenant possesses an absolute power to dispose, by a transfer *inter vivos* but not by a Will, of his own share, and so to put an end to his joint-tenancy; whilst a member of a Mitakshara joint family, having no definite share, (v) cannot alienate his undivided co-parcenary interest, and he cannot destroy the joint tenancy except by separation which he is at liberty to effect, whenever he chooses.

four units of English law

An English joint-tenancy is said to be distinguished by *four unities*, namely, (1) by unity of *possession*, (2) unity of *interest*, (3) unity of *title* and (4) unity of *time* of the

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(u) *See* Sarada v Umi, 37 C L J 233, 249 50 C 370 77 I C 450 1923 C 485, Packirisawmy v Dorasawmi, 9 R 266

(v) Sankar v Madan, 14 C W N. 298 11 C L J. 61 5 I C 298.

commencement of such title. Of these, two only apply to a *Mitâkshara joint tenancy* namely, (1) unity of *possession* and (2) *community* of interest, and although *inheritance* is the common name of the title of all the members, still there is not *unity* of the same, nor is there unity of the *time* of its commencement. Except in cases of co-parcenery joint tenancy in unknown to Hindu law. (*w*)

Co-parceners:

Co-parceners, are two or more persons who jointly *inherit* property, whereof they have unity of *possession* which, however, may be severed at any time by partition. There is no *survivorship*, each taking an undivided share, which, on his or her death, goes to his or her heir. The co-heirs and their heirs are called *co-parceners* or *parceners* so long as unity of possession continues

English law;

The following extracts from the well-known commentaries on the laws of England will give the real import of of the word *Co-parceners* : (*x*)

Joint-tenancy and co-parcenery:

"An estate in Co-parcenery resembles, in one respect, an estate in joint-tenancy, there being the same unity of possession. But in the following respects they materially differ —

1. Parceners always claim by *descent* whereas joint tenants always claim by *purchase*. (*y*)

2. There is no necessary unity of interest among co-parceners; for each of them is entitled to a distinct share, and though, in the first instance, all parceners in equal degree take equally, yet in subsequent descents, this equality may easily disappear.

(*w*) Gour *v* Subashini, 42 C L J 200 30 C W N 39 90 I C 523

(*x*) Stephen's Commentaries on the Laws of England, 16th Ed Vol I pages 237-238 See also Principles of English Law by R Campbell, page 173

(*y*) The legal meaning of *purchase* differs from the popular notion of purchase, which implies that the subject is obtained by way of bargain and sale for money The legal notion of *purchase* is wider than this. *Purchase* is defined by Littleton as "the possession of lands and tenements which a man hath by his own act or agreement, not by descent from any of his ancestors or kindred"— Principles of English law, by R Campbell The English Inheritance Act 1833 defines "the *Purchaser*" as " the person who last acquired the land otherwise than by descent."

3. Though the interest of co-parceners may, in a sense be said to accrue by the same title yet they may accrue at different periods

Tenants-in-common

Tenants-in-common are such co-owners of property as hold it by several and distinct titles, but by ***unity of possession***

English terms may mislead

The use of these English terms to matters in Hindu law, analogous to them in some respect may mislead lawyers into thinking that all the incidents annexed by English law to those terms, apply also under Hindu law

The students of Hindu law should try to learn and master all the incidents of these terms under the English law, so as to be able to differenciate between them and their use with respect to matters under Hindu law, analogous to them in a particular inciden but dissimilar in others.

Joint property

Joint property (z)—is of the essence of the notion of a joint family. It consists, (1) of the ancestral property, (2) of the accession to the same, (3) of the acquisition with joint funds and (4) of the self-acquired property thrown into the common stock, when the acquirer allows such property to be treated as family property so as to convert it into joint property (a) immovable property lost to the family, if recovered by any member other than the father of the family, is subject to the incidents of joint property, and so is property acquired by the special personal exertion of a member but with the aid of joint funds. In the last three cases the acquirer or recoverer is entitled to a larger share on partition, but in the first of them this distinction does

(z) As to presumption and evidence as joint property *See Sec* 13 below.

(a) Suraj v Ratan, 40 A 159 44 I A 201 21 C W N 1065 26 C L J 267 15 A L J 684 33 M L J 180 19 Bom L R. 737 2 Pat L W 160 40 I C 588 Indar v Shiam, 17 C L J 299 17 C W.N 509 17 I C 760 25 M L J 57, Bai Parson v Bai Somli, 36 B 424 14 Bom. L R. 400 15 I C 774, Rampershad v Sheochurn, 10 M I A 490, Lal v Kanhaia, 29 A 244 34 I A 65 44 A L J 227 5 C L J 340 : 11 C W N 417 17 M L J. 228 9 Bom L.R. 597, Gobardhan v Bulkhan, 1 Pat L J 195, Hari v Velji, 20 I C 476 15 Bom. L R. 584, Annamalai v Subramania, 33 C. W N 435 P C 49 C L J 93, see *foot note* (r) p 348

not seem to be observed by the Courts. It is doubtful whether survivorship will apply to joint acquisitions made without the aid of ancestral nucleus, but it has been held that when a family consisting of the father and two sons, is not shown to have had any ancestral property, but it acquired property by joint trade, then in the absence of any indication of intention to the contrary, the property must be presumed to be joint property with the incident of the right of survivorship (*b*)

Property acquired by joint exertion

Acquisitions by joint personal exertion (*c*)—The joint acquisition by personal exertion only, in the absence of ancestral nucleus, would stand on a somewhat different footing, when made by undivided father and son, from that made by two or more brothers or other collateral *sapindas*, on account of the accrual of a son's right by birth even to the father's self-acquired property, notwithstanding the imperfect character of that right, explained later on. The question that arises for consideration when the acquirers are collateral *sapindas*, is, whether the property is to be deemed as joint property of partners or *tenants-in-common*, or as *joint* family property with *survivorship* and the like incidents.

Whether survivorship applies, a question of intention

It should be remembered that as regards even the members of the joint family, other than the male issue, the separate self-acquired property of a brother or the like, held in severalty, is always *obstructed heritage* unless he chooses to throw the same into the common stock. Hence when two or more undivided brothers or other collateral *sapindas* who had not inherited any ancestral nucleus, or had taken no aid from such nucleus if any, acquire and amass wealth solely by their joint personal exertion and skill in carrying on a trade, or otherwise, then it depends entirely on their intention whether they should hold the property as *tenants-in-common* like strangers entering into a partnership, or as members of a joint family, clothing the same with the legal qualities and incidents of joint family property, chief among which is

(*b*) Gopalasami *v* Arunachellam, 27 M. 32

(*c*) About presumption and evidence *see sec* 13 below

survivorship. (*d*)

It is difficult to say whether there should be a presumption in favour of the one or the other of the two alternatives. In these days of progress *succession* seems to be preferable to *survivorship* (*e*)

Acquisition by husband and wife

It has been held, that the interest of the wife in properties, acquired with the profits, earned by a husband and his wife in a trade which was carried on by them, was her Stridhana which on her death did not survive to her husband but devolved on the heirs to her Stridhana property. (*f*)

Acquisition when living in common dwelling house

The dwelling house in possession of the parties could not, in law, furnish any nucleus in the hands of either party for acquisitions made subsequent to the death of the ancestor so as to clothe them with the character of ancestral property. (*g*) Nor any addition made to it raises any such presumption. (*h*)

Incident of obstructed heritage

Joint inheritance of obstructed heritage—When two or more members of a joint family jointly inherit, according to the rules of succession, property left by a deceased relation, as obstructed heritage, they hold such property as the *co-parceners* in English law before partition, i. e. the co-tenancy of the co-heirs of obstructed heritage is like *tenancy-in-common*, the right of each extending to his undivided share only, and there being no *survivorship* between them. (*i*) But the case of *Raja Chelikant* (*j*) has introduced an exception to this rule by holding that two brothers succeeding to their maternal grandfather's estate hold the same like *joint-tenants* having the benefit of survivorship. It is difficult to understand the principle underlying this decision The Bom-

(*d*) Karsondas v Gangabai, 32 B 479 10 Bom L R 184, Sanwal v Kure, 9 L 470, 480 1928 L 224 *Held* not ancestral, Trimbakdas v Mathabai, 1930 N 225

(*e*) See foot note (*d*) *above*

(*f*) Muthu Ramakrishna v Marimuthu, 38 M 1036 26 M L J. 532 24 I C 363

(*g*) Trimbakdas v Mathabai 1930 N 225, Birdichand v Popatlal, 24 N L R 68 1926 N 389

(*h*) Thanesher v Ram, 1929 L 468

(*i*) Karuppai v Sankara Narayana, 27 M 300 (F B)

(*j*) 29 I A 156 7 C W.N 1 25 M 678 4 Bom. L.R, 657.

bay High Court, however, has held that under the law of the Vyavahàra Mayukha as also under that of the Mitàksharà, property inherited by sons from their mother descends to them, not as a joint tenancy, but as a tenancy-in-common. (*k*)

Separate property.

Separate—property of female members is called *Stri-dhana* which will be separately dealt with. Separate property (*l*) of a male member consists, (1) of his self-acquired property, and (2) of property inherited by him as *obstructed* heritage according to the rules of succession, (*m*) excepting however, the maternal grandfather's estate (*n*) in certain cases. Two or more members may jointly hold separate property as distinguished from the joint property of all the members of the family; for instance, in a family of first cousins, those composing one branch being the sons of one brother, may have property consisting of the separate property of their father and mother, or of property inherited by them from their maternal grandfather, such property though joint between themselves, is separate as regards the rest of the family.

Sub-Sec. iii—ANCESTRAL AND ACQUIRED

Ancestral property, from paternal ancestors and, maternal grandfather

Ancestral.—property (*o*) may be defined thus —property acquired by a lineal male ancestor in the male line, devolving by inheritance on a son or other male descendant in the male line, becomes ancestral on the death of the ancestor, in the hands of the descendant. (*p*) Property inherited from the maternal grand-father has been held by the Privy Council to become *ancestral* in the hands of the two sons of his only daughter, and they took as *joint tenants* with the benefit of *survivorship*; (*q*) It is most unfortunate that the true meaning of the term *ancestral property* or rather of the original Sanskrit term which means, property inherited from the *paternal grand ancestors* in the male line, and cannot include

(*k*) Bai Parson *v* Bai Somli, 36 B 424 14 Bom L R 400 15 I C 774
(*l*) For presumption and evidence *see Sec* 13 below
(*m*) Gurumuthi *v* Gurammal, 32 M 88 5 M L T 74
(*n*) Jamna *v* Ram, 29 A 667 4 A L J 582 A W N (1907) 211
(*o*) For presumption and evidence *see Sec* 13 below
(*p*) Rajah Ram *v* Pertum, 20 W R 189 11 B L R 397
(*q*) Venkayyamma *v* Venkata Ramanayyamma, 25 M 678 29 I A 156 4 Bom. L R 657 7 C W N 1, in this connection see Ahobilachariar *v* Thulasi, 1927 M 830

what is inherited from a maternal ancestor,—was not brought to their Lordship's notice. Had that been done, then it seems this *anomaly* would not have arisen But the Judicial Committee has in another case (r) said that "unless the lands came by descent from a lineal male ancestor in the male line they are not deemed ancestral in Hindu law." So property inherited collaterally from a brother is not an ancestral but self-acquired property. (s) It has been held by the Allahabad High Court that although the maternal grandfather's estate in the hands of the daughter's sons is called *ancestral*, yet their sons do not acquire a right by birth to such property. (t)

but not from collateral relation

A share of ancestral property obtained by partition continues to be ancestral in the hands of the coparcener getting the same (u) So also when such share is obtained according to a distribution made by a deed of gift (v) or by a Will executed by the ancestor (w) it retains its character of ancestral property, except when the gift is made in terms clearly showing an intention that the donee should take an absolute estate for his own benefit only ; (x) otherwise, the ancestral nature of the estate is to be presumed.(y)

share on partition of ancestral property,

The property obtained by an illegitimate son of an undivided deceased coparcener for maintenance is not ancestral property of the illegitimate son in which the son of the latter gets a right by birth (z)

but not illegitimate son's share,

(r) Atar v Thakar 35 I A 206, 211 35 C 1039, 1045 12 C W N 1049, 1052 8 C I J 359 10 Bom L R 790 18 M L J 379 128 P W R 1908 6 I C 721, see Karam v Jai, 24 I C 928 224 P L R 1914 124 P W R 1914

(s) See Radhakant v Nazma, 45 C 733 22 C W N 649 27 C L J 632 35 M L J 99 16 A L J 537 20 Bom L R 724 45 I C 806, see also Bharat v Sarsuti, 60 I C 137 7 O L J 459 23 O C 244, Pudai v Baijnath, 56 I C 745 7 O L J 273 23 O C 264

(t) Jamna v Ram, 29 A 667 4 A L J 582 A W N (1907) 211, Biswanath v Ganjadhar, 3 Pat L J 168 43 I C 370

(u) Adurmoni v Chowdhry, 3 C 1

(v) Muddun v Ram, 6 W R, 71

(w) Tara v Reeb, 3 M H C R 50, Nana v Achrat, 12 B 122

(x) Jugmohandas v Mangaldas, 10 B 528, 576

(y) Nagalingam v Rama, 24 M 429

(z) Krishnaswami v Seetalakshmi, 39 M 1029 18 M L T 542 31 I C 803.

There is a great diversity of opinion in the Courts in India as to the effect in a Mitàkshara family of a bequest made by the father of property which in the father's hand was self-acquired, to his son. The Privy Council in the following passage has clearly expressed it but has reserved its opinion for a future occasion to be based on a considera-tion of the original texts of the Mitàksharà.(*a*).

Nature of interest in bequests,

P C keeps open to consider texts.

"In Calcutta in 1863, the point first arose in the case of *Muddun Gopal* v *Rambux* (*b*) where it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall* v *Abani Nath Adhuriyya* (*c*) In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed shall be ancestral or self acquired, on the principle of *cujus est date ejus est disponere*, but that unless he expressed his wish that it should be deemed self-acquired it is ancestral see *Tara Chand* v *Reeb Ram* (*d*) and compare it with *Nagalingam* v. *Ram Chandra* (*e*) and other cases In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention, it is deemed self acquired see *Jugmohandas* v *Mangaldas Nathubhoy* (*f*) and *Nanabhai* v *Achratbai* (*g*) At Allahabad "the decision was that such property is self-acquired *see Parsotam* v *Janki Bai* (*h*) Finally in Oudh, in the case of *Rameshar* v *Mt. Rukmin* (*i*) decided in 1909, after a review of all the cases, it was held that where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passed to his heirs at his death."

Calcutta, Madras, Bombay, Allahabad, Oudh,

In Sindh, the Court refrained from entering into this debatable question (*j*).

Sindh.

The following texts are, therefore, added for the considera-tion of the Privy Council.—

P C requirements supplied.

In Chapter 1, Section I, paragraph 27 of the Mitàksharà on Inheritance, *Vyasa* is cited which runs as follows .—

"Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support, no gift or sale should, there-fore, be made"

(*a*) Lal Ram v Deputy, 45 A 596, 604 50 I A 265 1923 P. C 160
(*b*) (1863) 6 W. R 71
(*c*) (1912) 17 C W N 280 18 I C 625 17 C L J 38
(*d*) (1866) 3 M H C R 50. (*e*) (1901) 24 M 429 11 M L J. 210
(*f*) (1886) 10 B 528. (*g*) (1888) 12 B 122
(*h*) (1907) 29 A 354 4 A L J 257 (*i*) (1911) 14 O C 244 12 I C. 770
(*j*) Hassanand v Denmal, 1930 S. 174

But the Mitákshará in Chapter 1, Section IV paragraph 1 in the subject on Inheritance says —

"Whatever else is acquired by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at the nuptials does not appertain to the co-heirs"

The author of the Mitákshará in Chapter 1, Section VI, paragraph 13 of the subject on Inheritance, relies on the following passage of Yajnavalkya which runs as follows .—

"But effects, which have been given by the father, or by the mother, belong to him on whom they were bestowed" (*k*)

The author of the Viramitrodaya in Chapter VI, Section 5 states as follows .—

"Likewise, what has been given by the parents (is not divisible) by reason of the text of law,—'Whatever has been given by the parents to any one, becomes exclusively his property'." (*l*)

Applying the ordinary rule of interpretation of Hindu law to the passage of the Mitákshará (Ch. 1, Sec. I, para 27) it seems that it lays down a rule of law which is not mandatory, but merely recommendatory, inasmuch as, the law-giver states his reason in support of his rule Therefore, on a consideration of the above passages, it seems that the gift of the self-acquired property of the father becomes the self-acquired property of the son, unless the donor limits the rights of the son in express terms.

Accretions to ancestral property,

Accretions to ancestral property, by purchase with the income thereof, or otherwise, are deemed ancestral (*m*) But mere purchase of a property out of the earnings of two brothers cannot be presumed to have been acquired by joint family funds in the absence of any evidence to the effect that the money earned by them was thrown into the common stock and treated as such. (*n*)

new business

A new trading business started by the father as manager of the joint family is ancestral though it was started by the father. (*o*)

(*k*) Yajnavalkya, 2, 123 (*l*) *See* Author's translation page 251.
(*m*) 10 B 528, 580 *above*, Umrit *v* Gouree, 13 M I A 542 15 W R P C. 10
(*n*) Moti *v* Bhagawan, 35 I C 655 (C) but as to throwing into joint stock *see* Narendra *v* Abdul, 30 I C 216 (Oud).
(*o*) Annabhat *v* Shivappa, 52 B 376 1928 B 232, in this connection *see* *pp* 356-358 below.

The Sanskrit word for *ancestral* is पैतामह meaning, "belonging to पितामह *pitamaha.*" This word पितामह though it is ordinarily applied to the father's father, means in the plural number, all the paternal male ancestors of the father in the male line, how high soever, accordingly ब्रह्मा God the Creator, is called सर्वलोक-पितामह meaning *grand-father* or *grand-ancestor of all persons,* and the names of the great-grand-father and other ancestors are formed from that term by affixing some particle and words as प्र पितामह, वृद्ध प्र-पितामह, अति वृद्ध-प्र-पितामह and so on.

Meaning of ancestral

Ancestral, lost and recovered.—Ancestral property lost to the family, when recovered by the father is deemed his self-acquired property as against his sons But when it is recovered by any other member solely by his own exertion, then, if the property be movable, it becomes exclusively his own, but if it be immovable, he is entitled to a quarter share as his remuneration for the exertion in recovering it, and the residue is to be shared by all the members including him.

Ancestral property recovered,

Acquired—property(*p*) may be thus subdivided —

(1) What has been acquired with the ancestral funds, i e, accession to the family estate.

with ancestral funds

(2) What has been acquired with the aid of joint ancestral funds but by the special personal exertion of any member.

but by personal exertion,

(3) What has been acquired by the joint exertion of all the members,—the exertion need not be of the same kind, for instance, if of two brothers one goes out to a distant place and earns money there, and the other remains at home in charge of the family and the property of both, to take care of them, then any property acquired with the money earned by the first brother must be regarded as joint acquisition by both. (*q*)

joint exertion of all,

(4) What has been acquired entirely by the personal exertion or influence of a member without any aid from, or detriment to, joint funds, or what is called self-acquired property.

personal exertion without aid from joint funds,

(*p*) For presumption and evidence *see Sec.* 13 below

(*q*) Haridas v Narotam, 14 Bom. L.R.237 14 I 3 769.

Self acquired but thrown into joint stock

(5) Self-acquired property allowed by the acquirer to be enjoyed by all the members in the same manner as if it were joint property, and so thrown into the common stock, otherwise it remains as the self-acquired property of the acquirer.(r) "A member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate" (s)

Mixing up of funds accrued from both joint and self-acquired properties makes them both joint family property,(t) but no such presumption arises when the person was separate and had no son (u)

Marriage gifts.

Money acquired by a member at his marriage is his self-acquired property ,(v) so also the wedding presents made to a woman is her separate property (w)

Savings of impartible estate

Savings of an impartible estate by a holder of such estate during his incumbency, and property acquired with the same are considered as his separate or self-acquired property. (x)

Inherited from collaterals.

Property acquired by a member by inheritance from a collateral relation, after litigation carried on with money taken from the large floating balance of the family business,

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(r) Mampershed v Sheochurn 10 M I A, 490, 505; Lal v Kanhaia, 29 A 244 34 I A 65 : 5 C L J 340 11 C W N. 417 : 17 M L J 228 9 Bom. L R 597; Indar a Shiam, 17 C L J 299 17 C W N, 509 17 I C 760 25 M L J 57 ; Suraj v Ratun. 40 A. 159 44 I A. 201 21 C W N, 1065 : 25 C L J 267 15 A L J 684 33 M L J 180 19 Bom L R 737 2 Pat L W 160 40 I C 988, Bai parson v Bai Somli, 36 B 424 14 Bom L R 400 15 I C 774, Radhakant v Nazma, 45 C 733 22 C W N, 649, 27 C L J 632 35 M L J. 632 16 A L J 537 20 Bom L R 724 45 I C 806, Annamalai v Subramanian 33 C W N 435 P C 45 C L J 93, Gajadhar v Lachhuman, 1927 P 339, Punji v Govind 1930 N 7, See *foot note* (a) P 340.

(s) Annamalai v Subramanian, *Supra*

(t) Krishnamacharao v Challammal, 1928 M 561, Parvathi v. Sivarama, 1927 M 90.

(u) Alavandar v Danakoti, 1927 M 383.

(v) Adhar v Nobin, 12 C W N, 103.

(w) Thyalalambal v Krishna, 32 I C 955 (M).

(x) Maharajulungaru v Rajah, 5 M H C R, 31, Kotta v Bangari, 3 M 145; Parbati v. Jagadis, 29 C 433 29 I A 82 6 C W N 490 4 Bom L R 365, Janki v Dwarka, 35 A 391 40 I A 170 25 M L J 34 17 C W.N 1029. 18 C L J. 200. 15 Bom L R 853 *See* Ch XV

is held to be *self-acquired*, the money being taken as borrowed and subsequently replaced.(*y*) Property received by the son by Will from his mother who again obtained the same by Will from her husband who himself acquired the property, is a personal property of the son (*z*) In Bombay a son inheriting his mother's property who in turn inherited it from her father, is the absolute property of the son so as to enable him to bequeath it by Will, and not an ancestral property (*a*)

There can be no presumption that a joint family had any joint property(*b*) or a nucleus (*c*) Nor can there be any presumption that a property acquired by a member of joint family, is joint property, when it is not shown to have possessed any nucleus (*d*) Where no nucleus is admitted nor proved, the onus is on the party who assert that the property is not self-acquired but joint family property (*e*) A dwelling house in possession of the parties is not a nucleus so as to clothe with the character of ancestral property, the subsequent acquisition made by any of the parties ,(*f*) nor any addition made to it raises any presumption of jointness without the existence of any nucleus.(*g*)

Presumption

onus,

nucleus,

Where a person, who had no co-parceners, built a house worth forty thousand rupees with his self-acquisitions, on an ancestral piece of land of few rupees in value and when there is no evidence showing his intention of treating it is as joint family propeity,—these facts did not render it a joint family property of himself and his son subsequently adopted (*h*)

When an acquisition has been made with the assistance of a joint family property which yield some income though not

(*y*) Bachcho v. Dharam, 28 A 347 3 A L J 155 A W N (1906) 34 see Atchamma v Venkata, (1922) M W N 487 16 L W 269 1922 M 423
(*z*) Gohati v Debendra, 32 C,W N 272 1928 C 285
(*a*) Manibhai v Sankarlal, 54 B 323 1930 B 296
(*b*) Ram Kishen v Tanda, 33 A 677 10 I.C 534 8 A L J 27 Padamraj v Gopi 56 I C 129 (N)
(*c*) Ram Kishen Tanda, *supra*, Daji v Laxmam, 1927 B 110 Vithal v Siva, 8 N L R 82 ,15 I C 933
(*d*) Durga v Chanharja, 1930 A 536
(*e*) Ramasamy v Marimuthu, 1928 M 764
(*f*) Trishuleakdas v Malibai, 1930 N 225 , Bridichand v Popalal, 24 N I R. 68, 1926 N 389
(*g*) Thanesher v Ram, 1929 L 468
(*h*) Periakaruppan v Arunachelam, 50 M.582

substantial, the burden of proof is on him who asserts the acquisition to be separate (*i*) Mere existence of a nucleus will not impress the acquisitions with the character of joint family property unless it is shown that the acquisition could have been made from the income derived from the uncleus. (*j*) But presence of substantial nucleus is held to raise a presumption of acquisition from the income (*k*) But the Madras High Court (*l*) has held that where there is no evidence that the purchase money was taken from the family funds, the acquisition is the member's self-acquired property.

evidence,

Whether the property acquired by a member of a joint family is his self-qacuired property or joint family property is a question of fact to be determined on the evidence.(*m*) Acquisition of property in the name of different individuals is evidence of intention to keep the property separate (*n*) But property acquired during jointness is to be presumed joint family property (*o*) But if the member had sufficient means to purchase the property the presumption will be in favour of self-acquisition (*p*)

test

The criterion, whether a property standing in the name of a junior member of a family was his self-acquisition, is the source from which the purchase-money was paid (*q*)

Gains of science

Gains of science.—This subject has no more than an academic interest now, the question being settled by legislation mentioned below Wealth gained by a member of a joint

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(*i*) Sukhnandan *v* Brijnandan, 1923 A 574 73 I C 1052, Abhaidat *v* Partab 3 O W N 40, see Haranarayan *v* Suresh 1925 P 161, Har Dat *v*. Dhandhi, 84 I C 1011 28 O C 113 1925 O 93

(*j*) Vadamalai *v* Subramania, 16 L W 936 71 I C 130 1923 M 262, Kanshi *v* Shankar, 1928 L 397

(*k*) Bali *v* Sardari, 1930 L 613, see Durga *v* Chanharja 1930 A 536

(*l*) Subbalakshmi *v* Narasinni, 1927 M 586

(*m*) 45 C 666, 684 above, Suraj *v* Ratan, 40 A 159 44 I A 201 26 C L J 267 33 M L J 180 19 Bom L R 737 2 Pat, L W 160 40 I C. 988, Kannammal *v* Ramathilakammal, 1927 M 38

(*n*) See Dulhin *v* Bodhnath, 26 C W N 565 (1922) M W N 5? 30 M L T 216 15 L W 343 3 P L T 383 4 U P L R (P C) 42 66 I C 551 1922 P C 94

(*o*) Soshi *v* Chandra 35 C,L J 348 1923 C 204 68 I C 322, Acharji *v* Harai 52 A 911, Pondichary *v* Sundarammal, 21 L W 259 86 I C 632 1925 M 902

(*p*) Chooni *v* Nilmadhab, 41 C L J 374 86 I C 734 1925 C 1034

(*q*) Purbati Dasi *v* Raja Baikuntha, 18 C WN 428 19 C L J 428; 19 C LJ 129 26 M L J 248 12 A L J 79 22 I C 51, Dhurm Das *v* Shama, 3 M I A 229, Gopeekrist *v* Gangaprasaud, 6 M I A 53, 74

family cannot be regarded joint by reason only of his having been maintained and educated at the expense of the family funds (r) unless it is acquired by the practice of a profession for which he received a special training at the family expense, and falls within what is termed *gains of science* The Privy Council in *Gokal Chand* v. *Hukum Chand*, (s) held that the income from the post in the Indian Civil Service falls within the meaning of the term *gains of science.* Lord Sumner had discussed the point at length and portion of the judgment is quoted here —

P C view

"Whatever doubt might once have existed, when the Hindu Law was to be gathered from text writers only has been removed by a series of decisions, and it is now clear that personal earnings and acquisitions may remain partible throughout the unseparated member's life, if he was originally equipped for the calling or career, in which the gains were made, by a special training at the expense of the patrimony It has been so held in the case of a Prime Minister [*Luximon's* case (t)], a dancing girl [*Chalakonda's* case (u)], and a pleader [*Durvasula's* case (v), and *Bai Manchha's* case (w)] but *secus* of an astrologer [*Durga Dat's* case (x)] The like distinction is found in the case of a Karkun [*Krishnaji's* case (y)] and an army contractor [*Lachmin's* case (z)] The ground on which in the three last mentioned cases, however, the gains were held to be impartible serve to define the rule still further In none of them was it held that the occupation in itself was such that the gains of science could not be said to apply to it Impartibility rested in every case on the slightness or the peculiar character of the education by which the science was acquired Thus in the first mentioned case the gains were really due to the astrologer's native talent for that profession In his early youth its rudiments had been instilled into him by his father, an astrologer likewise, but without expense to the family or anybody else, for the casting of horoscopes seems to be a profession in which the equipment is slender and a gift for inspiring confidence is the main thing It was not, however, suggested that, if the special training had been similar to the skill in song and dance which enhanced the attractions of a nautch girl, the gains of the astrologer would not equally have been partible gains As a profession, astrology enjoyed no immunity Still more striking is *Lakshman Mayoram's* case (a) where the family member was actually a

(r) Dhunookdharee v Gunput, 10 W.R, 122 11 B L R 201, Paulhem v Paulhem, I M 252, 262 : 4 I A 109, Lachmin v Debi, 20 A, 435, 438 18 A W N 101

(s) 2 L. 40, 51 48 I A 162 33 C L J 355, 25 C W N 534 40 M L J 327 on appeal from 109 P W R 1916 34 I C 714 (F B)

(t) 2 Knap P C 60

(u) 2 M H C R 56

(v) 7 M H C R 47

(w) 6 Bom H C R A C J 1.

(x) 32 A 305 7 A L J. 216 5 I C 400.

(y) 15 B 32

(z) 20 A 435.

(a) 6 B 225

Subordinate Judge At the family expense he had received a slight elementary education of an entirely non-professional character His law he had picked up for himself His salary was held impartible, not because a judge stands outside the rule or because a knowledge of law in the nineteenth century is not within the term 'learning' as used in the eleventh, but because in these matters a self taught man has the best of it, for gains are impartible which are not the result, directly or indirectly, of anything but his own exertions " (b)

In the earlier case of *Methharam Ramrakhiomal* v. *Rewachand* (c) their Lordships of the Judicial Committee have expressed that,

"Their Lordships connot find in the texts of the Mitàkshará any authority * * * that the gains made * * * personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self-acquired property."

Present law.

Hindu Gains of Learning Act—The Act XXX of 1930 provides that notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer.

Sub-Sec iv—IMMOVABLE, CORODY AND MOVABLE

Immovable

Immovable—property is of very great importance in India where agriculture is the chief source of wealth of the people. The landed property of a family is looked upon as the hereditary source of maintenance of its members present and future, and Hindu law imposes restrictions against its alienation which is prohibited as a general rule, and is permitted only in very exceptional circumstances. The rule against alination appears to be salutary in character, having regard to the exigencies of Hindu society, but it is being modified by the Courts of justice to a great extent.

Corody, or *nibandha*

Corody—is the rendering given by Colebrooke of *nibandha* which means, what is settled or a settlement: it is according to the Mitàkshara (1, 5, 4 and Vir. 2, 1, 13) an interest issuing out of land such as a royal grant or assignment to any person, of the king's share of the produce of any land, in part or whole. It is explained in the Dàyahbàga (2, 13) to mean what is settled to be given as an annuity.

(b) 2 L 40, 51, 33 C L J 355, 361-362 25 C W N 534 40 M L J 327
(c) 45 C 666 45 I A 41 27 C L J 345, 358 22 C W N 377 34 M.L.J. 327 16 A L J 281 20 Bom L R 566 4 P L W 197 44 I C 269, for judgment of lower Court *see* 8 I C 93 4 S L R 161

Now the question is whether *nibandha* can be created by private individuals other than kings. The question was raised by the Full Bench (*d*) of the Bombay High Court, but was not decided as it was not necessary for the decision of that case. But their Lordships expressed an opinion that there are some authorities who "favour the supposition that a private individual as well as a royal personage may create a *nibandha*. Whether the view is sustainable is a question on which we do not intend to give any opinion, such being unnecessary."

who can create,

Yàjnavalkya (*e*) in enjoining the duties of kings has laid down that when making any gift of land or making any permanent arrangement (or assignment of a corody), he should have the terms committed to writing for the information of the future good kings. In the next two stanzas a description is given of how the writing is to be made

according to Yajnavalkya,

In commenting upon the aforesaid slokas of Yàjnavalkya, Vijnaneswara (*f*) has said that gift of land and *nibandha* in this way is to be made by the king only and not to be given by one who enjoys king's powers. It was never the intention of the great commentator to mean that *nibandha* can be created by kings only and not by private individuals. Had it been his intention then according to the construction of the sentence, private individuals would also be excluded from making any gift of land. The true intention of Yàjnavalkya and his commentator Vijnaneswara is that the gift of land and *nibandha* is to be made by the king himself and not by his deputies.

Mitakshara,

So *nibandha* can also be created by persons other than kings. (*g*) This view is supported by many Hindu commentators and a Division Bench (*h*) of the Bombay High Court has expressed an opinion to the same effect. Hence

any person can create,

(*d*) Collector of Thana v Hari, 6 B 546, 559 F B
(*e*) Slokas 318—320
(*f*) Mit, Acharadhya, Rajadharmaprakaranam Sloka 317
(*g*) Dayabhaga Ch ii, 13 Vyavahara Mayukha, Mandlik's Hindu Law p 19, Smriti Chandrika Ch viii 18 Saraswati Vilasa 214
(*h*) Ghelabhai v Hargowan, 36 B 94, 101 12 I C 928 13 Bom. L R 1171.

the office of hereditary priest—*Yajman Vritti*—is a ***nibandha. Nibandha*** whether secured on land or not would rank with ***sthabara*** or immovable property, (*i*) particularly for the purposes of inheritance (*j*) and the Limitation (*k*) and the Registration (*l*) Acts.

Movable property.

Movable—property is not regarded so important as immovable by Hindu law which allows therefore a greater freedom with respect to the alienation of the same.

Sub-Sec v—TRADE

Family trade.

Nature of joint family trade—Joint family trade is a species of ancestral joint property (*m*) in which every member of a Mitàksharà joint family acquires by birth an interest, in the same way as in other kinds of property they become not only *co-parceners* but also *co-partners* of the trading firm. The joint family trading partnerships appear to differ from ordinary partnerships in two respects, namely, (1) it is not desolved by the death of any member (*n*) and (2) a member of the family becomes a *co-partner* by operation of law. (*o*) Not only the assets of the trading business but all kinds of the joint family property would be liable for losses, or for debts incurred for the purposes of the trade by the managing members who are the accredited agents of the whole family. An acknowledgment, therefore, made by one member of the family, of a debt, can be availed of by the creditor as against the entire family (*p*) And no member can say, unless tainted with immorality, (*q*) that his interest in the family property

not dissolved by death,

partnership by operation of law

(*i*) Collector of Thana *v* Hari, 6 B 546 F B , Krishnaji *v* Gajanan, 33 B 373 11 Bom L R 253 , Balvantrav *v* Purshotam, 6 Bom H C R 99
(*j*) Mit Ch I, Sec V, 4 Viramitrodaya Ch II Pt 1, Sec 13 (Author's translation page 65) , Daya Ch II, 9
(*k*) Morbhat *v* Gangadhar, 8 B 234, 238 , Venkaji *v* Shidramana, 19 B 663
(*l*) Madhavrao *v* Kashibai, 34 B 287 5 I C 599 12 Bom L R 9
(*m*) Joti *v* Hira, 1929 L 559
(*n*) Raghumull *v* Luchmondas, 20 C W N 708, 721 38 I C 278 , Samalbhai *v* Someshwar, 5 B 38 , Lutchmanen *v* Siva, 26 C 349 3 C W N 190, Vadilal *v* Shah, 27 B , 157 4 Bom L R 968 , Maharaj *v* Hargobind, (1915) P L R 218 Gokal *v* Hukam, 109 P W R 1916 34 I C 714 F B *See* P C appeal in 2 L 40 , Gauri *v* Keshab, 1929 A 148, see *foot note* (*b*) *p* 352
(*o*) *See* Sec 5, Indian Partnership Act (IX of 1932)
(*p*) Debi *v* Baldeo, 50 A 982 1928 A 491 , *see* Krishnabai *v* Varjivandas 1930 B 236
(*q*) Mata *v* Gaya, 31 A 599 , 6 A L J 799 , 6 M L T 99 , 3 I C 24.

should not be made liable for the losses sustained or for debts incurred subsequent to his birth and during his infancy (*r*)

Indian Partnership Act (IX of 1932) —From Section 59 of this Act. it will appear that the legal rights of the members of a Hindu joint family *inter se* carrying a family business is not governed by this Act, but a business carried on by them through their manager with a stranger seems to be ragulated under the provisions of this Act.

Partnership Act not applicable to joint family trade

Minor member's position in firm —Although a trade is descendible among Hindus, like other personal property, yet it does not follow that a Hindu infant who by birth becomes entitled to an interest in a joint family business becomes at the same time a member of the trading partnership carrying on the business he can only become a member of the partnership by a consentient act on the part of himself and his partners. (*s*)

Minor's interests in firm,

how can he be member,

Accordingly, it has been held that where a member of a joint family carrying on an ancestral family trade, did upon attaining the age of majority completely sever his connection with the family business, and it was not shown that he did ever ratify any of the transactions entered into by the family firm, then although such member's interest in the joint family property could, on failure of the family business, be made liable for its debts, yet he could not be made personally liable. (*t*) Nor can such member's separate property acquired after his separation from the family and the family business, be made liable for the debts of the trading firm. (*u*) There is no difference in principle between the nature of the liability of an infant admitted by agreement into a partnership business and that of another on whose behalf an ancestral trade is carried on by his guardian. (*v*)

his liability

But the infant shall not be liable personally for the debts

(*r*) Thammanna *v* Akarapu, 38 M.L J 55, see *foot note* (*x*) below
(*s*) Lutchmanen *v* Siva, 26 C 349, 354 3 C W.N 190, *see* Lalji *v* Keshowji, 37 B 340 14 Bom L R 840 : 17 I C 193, Anath *v* Bepin, 19 I C 6 (C).
(*t*) Bishambhar *v* Sheo Narain, 29 A 166 A.W N (1907) 9, Official Assignee *v* Palaniappa, 41 M 824 *and see Sec* 248, Indian Contract Act. (IX of 1872)
(*u*) Bishambhar *v* Fateh, 29 A 176 : A W N. (1907) 1.
(*v*) Sanyasi *v*. Asutosh, 42 C 225, 223 . 26 I C. 836.

incurred in such a trade, (*w*) but to the extent of his share in the assets of the firm. (*x*)

May enter into contract,

Manager's Powers—The sole managers of the family business are ordinarily entitled to enter into contracts, that are incidental to and flowing out from carrying on that trade, in their own names to bind the other members and that they can be sued upon that contract without making the other members party to the suit (*y*) The member, other than the managing member or members may contract debt so as to bind the whole family, if he had express or implied authority. (*z*) It is a question for the manager to decide whether money for the purposes of the business, is to be raised by sale or mortgage of the joint property. (*a*) He cannot refer a litigation to arbitration. (*b*)

and how money to be raised

Manager cannot start new business,

Manager's power to start new business—A manager, even if he be the father of the members of a Hindu joint family governed by the Mitakshara or Dayabhaga school, cannot embark on a new trade, (*c*) nor can a certificated guardian enter

(*w*) Sanyasi *v* Asutosh, 42 C 225, 233 26 I C 836, Joykisto *v* Nittyanund, 3 C 738, Rampertab *v* Foolibai, 20 B, 767, 777, Sanka *v* Bank of Burmah, 35 M 692 21 M L J 620 11 I C 79, Raghunathji *v* Bank of Bombay, 34 B. 72 11 Bom L R 255 : 2 I C 173, *see* Muthaya *v* Tinnevelly, 37 I C 230 5 L W 341; Jwala *v* Bhuda, 10 P 503

(*x*) 42 C 225, 233, Anath *v* Bipin, 19 I C 6 (C), Padamraj *v* Gopi 56 I C 129 (N), but see Muthaya *v* Tinnevelly, 37 I C 230 (M), Thammanna *v* Akarapu, 55 I C 64 38 M L J 55 11 L W 55 27 M L T 83 (1920) M W N 112, Dayal *v* Bahal, 60 I C 616 (L), Gopal *v* Hukam, 109 P W R. 1916 34 I.C 714 F B, *See* 247, Indian Contract Act (IX of 1872)

(*y*) Kishan *v* Har, 33 A 272 38 I A 45 15 C.W N 321 13 C L J 345 9 I C 739 21 M L J 378 3 Bom L R 359, *see* Sheik Ibrahim *v* Rama, 35 M 685 21 M L J 508 10 I C 874 and Lalji *v* Keshowji, 37 B 340 : 14 Bom L R 840 17 I C 193, Subbaraya *v* Thamgavelu, 45 M L J 44 72 I C 815 1924 M 33, Ayyasami *v* Gurusami, 3 L W 463 33 I C 691, Lakhmichand *v* Khushul Das, 18 S L R 230 88 I C 116 1925 S 330, Mehlu *v* Bhola, 1928 L 81

(*z*) Lal Chand *v* Ghanaya, 1930 L 243

(*a*) Niamat *v* Din 8 L 597, 603 54 I A 211 32 C W N 233 45 C L.J 548 1927 P C 121, Shivlal *v* Taniram, 1928 B 444, Raghunathji *v* Bank, 34 B 72 2 I C 173 11 Bom L R 255

(*b*) Gainca *v* Firm Nihal, 6 L L. J. 502 84 I C 726 1925 L. 261, *but see* Shib *v* Mohan, 1930 L 388

(*c*) Benares Bank *v* Hari, 36 C W N 826, 831 P C, Sanyasi *v* Krishnadhan, 49 C 560 49 I A 108 26 C W N 954 35 C L J 498 43 M L J 41 24 Bom L R 700 20 A L J 409 67 I C 124 1924 P C on appeal from 23 C. W N 500 29 C.L J 280, Tammi *v* Gangi, 45 M 281 42 M L.J. 570 : 70 I.C 337 1922 M 236 (P C. in 50 M 421 54 I A 136), D Mclaren *v* Verscheyle, 6 C W N 429, 458, Rughunathji *v* Bank, 34 B. 72. 11 Bom. L R. 255, Baba *v*. Bansraj, 27 I C 567; Ghanshyam *v*. Herdat, 32 I C. 380 (C), Rattan *v* Ram, 1928 A. 447; Jan *v*. Bikoo, 1929 P. 130 Jan *v*. Cikoo, 1926 P. 130.

into a new business for the benefit of his Ward without the leave of the Court. (*d*)

There were some decisions in which it was held that a son cannot be made liable for debts incurred by the father in embarking in a new trading business. (*e*) But there was a distinction made between a father as manager and a manager other than the father with regard to a member's liability to pay the debts incurred for carrying on a new business, (*f*) the father was deemed to stand on a different footing from that of an ordinary manager. (*g*) Therefore, the father as manager of a joint family could start a new business so as to make the sons liable for its debts, (*h*) and even contrary to Government Servants' Conduct Rules. (*i*) But this view is now negatived by the Privy Council (*j*) But a speculative transaction by the father cannot be treated as starting of a new business, and a debt raised for the purpose is not legitimate. (*k*) An alienation of property inconveniently situated and less profitable, to substitute one likely to yield large income by an extension of the family business, is not of a speculative nature. (*l*)

even if he be father

The purchase and sale of another commodity should not be considered as outside the scope of the family business, each case is to be decided on its own facts and the question to be determined in each case is whether it is within the reasonable limits of the recognised business, profession, means of livelihood or what is called *kulachara* of the family or a new speculative enterprise (*m*)

The undivided members of a joint family may by common

Members by

(*d*) Sanyasi *v.* Krishnadhan, *supra*

(*e*) Tammi *v* Gangi, *supra*, D Mclaren *v* Verschoyle, *supra*, Raghunathji *v.* Bank, *supra* Baba *v* Bansraj, *supra*, Ghanshyam *v* Herdat, *supra*

(*f*) Annabhat *v.* Sivappa, 52 B 376, 378. 1928 B 232

(*g*) Venkatasami *v* Palaniappa 52 M 227, 236 1929 M 153.

(*h*) Annabhat *v* Sivappa, *supra* Venkatasmi, *v.* Palaniappa, *supra* Official Assignee *v* Palaniappa, 41 M 824 35 M L J 473 49 I C. 220 Mahabir *v.* Amla, 46 A. 364, Atchutam *v*, Ratnaji, 50 M L.J. 208 Inspector *v* Kharak, 50 A 776 1928 A 403 Mohan *v* Dewan, 1929 L 687 Kashibai *v* Shrikumar, 1930 N 10.

(*i*) Ramkrishna *v* Narayan, 40 B 126 17 Bom. L R 954 31 I C 301

(*j*) Benares Bank *v.* Hari, 36 C W.N 826, 831

(*k*) Thaneshar *v* Ram, 1929 L. 468. Biswanath *v* Kayastha, 8 P. 450 · 1929 P. 422, this followed, Muneshwarendra *v.* Ram, 1930 C. 85 : Ram Chandra *v.* Jana, 5 P 199.

(*l*) Jagmohan *v.* Prag, 47 A 452 : 1925 A. 618.

(*m*) Damadaram *v.* Bansilal, 51 M. 711, 719 : 1928 M. 566.

consent may start,

consent start a new business (*n*) and thereby clothe it with the character of joint family property and consequently bind the whole estate for its loss They also hold themselves personally liable for the debts of the firm (*o*) Mere circumstance that some of the co-parcerners are carrying on a certain business does not make it a joint family business, but where the co-parcerners are joint, the joint family assets are devoted to finance the business and all the co-parcerners take active interest in its management, the firm becomes a joint family business. (*p*) Whether a firm is a joint family business or not depends on the facts of each case (*q*) and also on the intention of the parties (*r*) There is no presumption that several firms are joint family business, because the proprietors of several firms are members of a joint family. (*s*)

old business revived,

The continuance of a family trade which was discontinued during the lifetime of the grand-father and for some time after his death, does not constitute it a new business (*t*)

New trade its effect

New trade and members' position.—A new trading business opened by the father as the manager of the family is ancestral though it was started by the father. (*u*) A mortgage of family property to meet the debt of such a business is not

with stranger

binding on the sons (*v*) When a member of a joint family carries on a trade by himself or in partnership with a stranger, and contributes the capital from his separate fund, then he alone is interested in the firm and the profits are exclusively his own From the mere fact that a person carrying on a business is a co-parcener in a joint family, it does not necessarily follow that all his co-parceners are his partners in that business. (*w*) The fact of partnership must be proved by evidence

(*n*) Mewa v Ram, 48 A. 395 1926 A 337 Gauri v Keshab, 1929 A 148; see also Kashibai v Shrikumar, 1930 N 10
(*o*) Somosundaram v Kanoo, 1929 M 573
(*p*) Detaram v Vishindas, 1928 S 57 Lakshmiah v Official, 1930 M 776.
(*q*) Lakshmiah v Official Assignee *supra*, *see* foot note (*e*) *p.* 360
(*r*) Vasudeva v Sakaram, 1928 M 412
(*s*) Hem v Narain, 1929 L 772
(*t*) Damodaram v Bansilal, *supra*, *see* foot note (*e*) p 360
(*u*) Annabhat v Shivappa, 52 B 376 1928 B 232
(*v*) Benares Bank v Hari, 36 C.W N 826 P C, but *see* Mohan v Dewan, 1929 L 687
(*w*) Mirza v Ramashar, 51 A 827 1929 A 536 · *see* Motharam v Pahlajai 1925 S. 159, Sheonarian v. Babulal, 1925 N 268.

showing that all the members had agreed to combine their labour, skill or wealth in the business and share the profits and losses of the same. (*x*)

with stranger (cont)

But when the member entering into partnership with a stranger contributes the capital from the joint family fund, then as between himself and the other members of the family he is to be deemed the representative of the family in the firm, and his share of the profits and the assets belong to the family, not to him alone ; (*y*) the business, however, must not be of a speculative nature (*z*) But a difficult question arises in such cases as to the rights of the other members of the family and of the descendants of the partner members as against the stranger partner, in the absence of express agreement. Are they to be deemed to become partners as a matter of law during the lifetime, as well as after the death, of the partner member ? But it should be noticed that only persons having confidence in each other, agree to enter into a contract of partnership, the effect of which is that every member becomes an agent of the others and as such is authorised to bind them by his acts relating to the partnership business. Hence in the absence of an agreement, the stranger partner is not bound to recognise any member of the family other than his partner as having any interest in the firm. (*a*) Nor will the other members be liable for any debt of the firm if it be of a speculative nature. (*b*) The relationship is to be governed by the provisions of the Contract Act (*c*) so far as they are not affected by the Indian Partnership Act. (*d*) And the partnership must be dissolved on the death of that member, whose share of the profits in his lifetime and of the assets after his death may be claimed by all the members of the family as between themselves. No person can be intro-

(*x*) Vadilal *v*. Shah, 27 B 157 4 Bom L R. 968.
(*y*) Ajodhya *v* Mahadeo, 14 C W N 221 3 I C 9 *see* Lakshman *v* Bhik Chand, 1930 B 1 Ghulam *v* Talla, 1930 L 142
(*z*) *See* foot note (*m*) at p 357
(*a*) Ramanathan *v* Yegappa, 30 M L J. 241 32 I C 427, Sokanadha *v* Sokkanadha, 28 M 344 *see* Gangayya *v* Venkataramiah, 34 M L J 271, 278 . 43 I C 9, Harnamdas *v* Firm Mayadas, 87 I C 905 1925 S 310 Hemraj *v* Topan, 86 I C 960 1925 S 300, *see* 41 M 454, 43 A 116.
(*b*) Ramalinga *v* Vellore, 1930 M 136
(*c*) Bankey *v* Nattha, 1929 A 199
(*d*) Act IX of 1932, Sections 3 and 5

duced into a partnership business without the consent of all the partners.

If after the retirement of the stranger, the partnership is dissolved with him, but the business is carred on by the *karta*, it does not constitute a new business (*e*)

May not enquire finance,

Creditor's duty.—A creditor lending money to a joint family for the purposes of a joint family trade is not bound to enquire into the finances of the business, inorder to bind the whole family with the debt. (*f*) The real existence of necessity is not a condition precedent to the validity of his charge if he acted honestly and with due caution. (*g*) The mere existence of a family business is not sufficient to bind the estate (*h*) He is to establish that the transaction was for the benefit of the joint family, benefit with reference to the transaction and not with reference to the result thereof. (*i*) The creditor is to prove the necessity of borrowing at high rate of interest. (*j*) The creditor will not be affected by the subsequent failure of the business for which the money was borrowed (*k*)

act honestly,

benefit to family

In this connection *see* Sub-section iv of Section 6 below. " Duty of creditor dealing with Manager."

Not by death,

Dissolution of partnership—It has already been stated that joint family business is not dissolved by the death of any member (*l*) But any member of the joint family can dissolve the partnership by an unequivocal expression of his intention to dissolve at once. (*m*) But he may still be held liable by a person dealing with the firm, for any transaction subsequent to the dissolution, unless he gives notice of such dissolution

but by notice.

(*e*) Sri Thakur *v* Ratan, 58 I A 113 35 C W N 841 : 53 C L J 561 *see* foot note (*q*) p 358

(*f*) Raghunathji *v* Bank, 34 B 72 2 I C. 173 11 Bom L R. 255, Baba *v* Bansraj, 27 I C 567 (*o*), Wadhawa *v* Rattan, 30 I C 813 126 P W R 1915 189 P L R 1915, Ghanshyam *v* Hardei, 32 I C 390, (o)

(*g*) Thakur Ram *v* Ratan, 53 C L J 561, 572 P C 35 C W N. 841.

(*h*) Giridhari *v* Kishan, 85 I C 463 1925 L 240

(*i*) Ram Chandra *v* Jang, 5 P 198, 203 90 I C 553 1926 P 70, Sathakan *v* Vadivelu, 1923 M 450, *see* Jagat *v* Mathura, 50 A 959 F B 1928 A 454 *see* "Onus" in sub sec iv in section 9 below

(*j*) Jan *v* Bikoo, 1929 P. 130, *see* S 9, ss iv below

(*k*) Jagmohan *v* Prag, 47 A 452. 23 A L J 209 87 I C 27 1925 A 618

(*l*) *See ante p* 354 *foot note* (*n*)

(*m*) Dwarkadas *v*, David, 1930 S 83, but *see* 5 B 38

under section 264 of the Indian Contract Act (IX of 1872). (n) In a suit for dissolution of partnership entered into by a member of a joint family representing the family and a stranger, the latter cannot insist that the other members of the family be impleaded as parties in the suit. (o) Nor can the managing member of a joint family be compelled to continue the partnership merely because he has a minor son. (p)

When the partition of a joint family business was effected by a deed and by it constituted themselves into a partnership with specified shares, it ceases to be a joint family business. (q)

Sub-Sec v IMPARTIBLE PROPERTIES

This subject is dealt with in Chapter XV below.

Sec. 5—RIGHTS OF MEMBERS

Sub-Sec. 1—RIGHT BY BIRTH AND OWNERSHIP

Right by birth of member to ancestral property,

Right by birth of sons, son's son, and the like—A son or any other male descendant in the male line acquires from the moment of his birth, an interest in the ancestral estate in the hands of the father or the grandfather, which is co-equal to that of the latter in character, and also in extent as regards the grandfather when the father is alive or when there is any other co-heir claiming through the father. *Birth* dates not from the moment the issue comes, into separate exsistence but from that of his conception.(r)

In the Punjab a Full Bench of the Chief Court (s) over-ruling a decision of a Division Bench of the same Court, (t) has held that a son acquires right by birth in the ancestral property unless modified by custom. But he cannot enforce partition against his father. (u)

to self-acquired property.

Right by birth to self-acquired property.—According to the Mitákshará, a son or the like descendant acquires from his birth, a right also to the self-acquired property of the father or other paternal ancestor in the male line, the charac-

(n) *Ibid*, Krishnabai v Varjivandas, 1930 B 235, Sec 43, Act IX of 1932
(o) Mohohar v Ram, 1930 L 655, Lakshman v Bhikchand, 1930 B 1.
(p) Bankey v Natha, 1929 A 199
(q) Nihal Chand, *in the matter of*, 49 A 611, 612
(r) Khan v Ahmad, 1929 L 254.
(s) Hari v Chandu, 105 P R 1917 43 I C 667
(t) Narpat v Devi, 85 P R 1915 : 31 I C 634 358 P.W R 1915.
(u) Hardayal v Mulk, 1928 L. 911, Amir v Malik, 1923 L 255

ter of this right, however, materially differs from that acquired in ancestral property.

Peculiar meaning of ownership.

Ownership in Hindu law—Ownership or rather co-ownership has a peculiar meaning in Hindu law; persons entitled to some of the rights that constitute *ownership* or *dominion* or *property* in modern jurisprudence, are called *co-owners* in Hindu law, of the person having all the rights included in *ownership*. the wife is declared to become *co-owner* of the husband from the time of their marriage (*ante* p. 319), the male issues are declared to become from their birth, *co-owners* of their father and grandfather as regards even their self-acquired property (Mit. 1, 1, 3), and the junior members of a joint family having an *impartible raj* or estate are deemed *co-owners* of the member who alone is entitled to hold the *raj* or estate during his life. The wife and the male issue hold a subordinate position with respect to the ownership of the property of the husband, and of the paternal ancestors, respectively. And so do the junior members, relatively to the holder of the impartible Raj or estate.

right to partition.

It should be observed that neither the wife, nor the son, nor the junior member, can enforce partition of the husband's property, or of the father's self-acquired property, or of the impartible estate, respectively, though in the first two cases partition may take place, on which they are entitled to get shares Nevertheless they are regarded *co-owners* in Hindu law, according to which therefore *right to partition* is not a *necessary* incident of ownership, nor is right of alienation, so.

It has two senses (1) perfect, (2) imperfect.

Ownership, therefore, has two senses in Hindu law, which may be called *perfect* and *imperfect* respectively. The ownership of the wife, the son, and the junior members, stated above, is *imperfect*, as it has not all the rights incidental to full ownership. Their ownership is acknowledged, as they use and enjoy the property in the same way as co-owners, and are entitled to have their maintenance out of the property, and are also entitled to the benefit of survivorship. They cannot, however, enforce partition, nor alienate their right, nor can they prevent alienations, if made for legal necessity,

and even in the absence of the same, provided their *right to maintenance* out of the property be not affected thereby, this right being the incident of their co-ownership, forms a legal charge on the estate, according to the true intent of Hindu law

Right by birth of male descendant,

No limit as to degrees of descent.—A male descendant in the male line, however low in descent, acquires a right by birth to both ancestral and self-acquired property of a paternal ancestor. Suppose A holds ancestral property and a son B is born to him, then B and A are co-sharers with co-equal rights, a son C is born to B and acquires an interest in the property in the same way as another son of A, similarly a son D of C would be a co-parcener, and likewise D's son E would acquire a similar interest and on the same principle, and so on. If the three intermediate descendants were to die during the lifetime of A, E's rights would not be in the least affected by that circumstance. (*v*) The same rules apply also to the self-acquired property of a paternal ancestor, to which right arises by birth.

limited when members separated

But the rule is different if the paternal ancestor is separated from his descendants, and not re-united with any of them, for then the rules of *succession* and *inheritance*, and not the *co-parcenary* rules, would apply to the property of the separated father or other paternal ancestor, according to which in default of male descendants in the male line down to the *third degree*, the widow, daughter and the like heirs succeed in the order explained in the Mitákshará Ch. ii, Sections i-vii. Hence, if there is no son, or grandson, or great-grandson alive at the time of his death, but there is a great-great-grandson, then the latter would be excluded by many other heirs, such as the widow and the like relations who are entitled to take the estate of the *separated* person, in default of male issue down to the *third* degree, according to the rules of *succession* governing the devolution of such property. But it should be borne in mind that this rule restricting the descent to *three* male descendants only, and excluding the fourth, does not apply to a joint ancestor's property to which

(*v*) *See* Thirumàl v. Rangadani, 23 M L J. 79, 94.

right by birth accrues and which is joint family property, to which *survivorship*, and not *succession*, applies. (*w*) This is an important distinction, sometimes lost sight of.

Pre-emption right of Hindus.—*See* Ch. XVI, Sec. 2, Sub-Sec. iii.

Sub Sec ii—POSTHUMOUS AND ADOPTED SONS

Posthumous son's right,

Posthumous son —A son or the like descendants in the womb of his mother at the time of the death of his father, from or through whom he would acquire a proprietary right by birth if he were in existence during his father's life, becomes entitled to the same right if he comes into separate existence subsequently, his birth relating back to the time of his father's death. The Hindu law makes this concession only in favour of the male descendants in the male line, in whom the father and other paternal ancestors are supposed to be reproduced, and accordingly, who take an immediate interest in their property, and as such are heirs *par excellence* or rather co-heirs, for whom their property is designed as the natural hereditary source of maintenance So it has been held that a son can contest an alienation made by the father at a time when the son was in the mother's womb (*x*)

dates from conception but child must be born alive

Hence a son and the like may be said to acquire the right from the moment of their conception, but it is absolutely necessary that the child *in embryo* should be born alive or come into separate existence, in order to be invested with the right, for, the course of inheritance cannot be diverted by the mere fœtal existence of a child not born alive; and no person can claim an estate, as heir of a still-born child. But a child in the womb is not entitled to all the rights of a child *in esse*: a son's right of prohibiting an unauthorized alienation by the father, of ancestral property cannot be exercised in favour of an unborn son, (*y*) nor is the existence of a son *in embryo* a

(*w*) *See* Rama Rao *v* Surya, 41 M 778 45 I A 148 23 C W N 173, 176 28 C L J 428 20 Bom L R 1056 16 A L J 833: 47 I C 354

(*x*) Deo Narain *v* Ganga, 37 A 162 13 A L J 69 26 I C 871, Dwarka *v.* Krishan, 2 L 144 61 I C 628

(*y*) Mt Goura *v* Chummun, W R Gap No 340

bar to adoption. (z) But it has been held that an alienation made by a Hindu to a *bona fide* purchaser for value is liable to be set aside by a son, who was in his mother's womb when the alienation was made. (a)

Other heirs of the proprietor

This rule, which is applicable only to the proprietor's male issue, the greatest favourite of Hindu law, has been extended to other heirs taking by succession, not upon the ground of there being any clear authority in Hindu law, but on the ground that the principle has been adopted by the modern systems of jurisprudence in *Biraja* v. *Naba Krishna*, (b) the sister's son *in embryo* at the time of the maternal uncle's death, was held his heir But it should be observed that all relations other than male descendants, are not really heirs *expectant* they can take only in the contingency of default of male issue, and for them the inheritance is but a windfall Besides, any other son subsequently born of that sister would not be entitled

Descendants and heirs.

The great distinction between the male descendants and all other heirs is that the former are deemed as the ancestor's consubstantial or ownselves reproduced, and as such are entitled to become their co-heirs and co-parceners from birth, whereas the latter are entitled to become heirs after the death of the proprietor without male issue, and that the former confer spiritual benefit by their very existence, while the latter cannot do so, although that doctrine is nowhere invoked by the Mitàksharà while dealing with inheritance.

Adopted son's right.

Adoption —Adoption is tantamount to birth in the adoptive family, and the adopted son acquires, from the moment of his adoption, an interest in the ancestral as well as the self-acquired property of his paternal ancestors by adoption.

Sub Sec iii—SON'S RIGHTS

Father's and son's interests

Character of father's and son's interest in ancestral property —The character and the extent of the interest taken by a son in the ancestral property do not differ from those

(z) Hanmant v Bhima, 12 B 105

(a) Minakshi v Virappa, 8 M 89, Sabapathi v Somsundaram 16 M 76; Venkata v Gatham, 27 M L J 580, Deo Narain v Ganga, 37 A 162. 1 A.L J 69 26 I C 628, *see* Dwarka v. Krishan, 61 I C. 628

(b) Sevestre's Reports, 328

of the father's except so far as they are affected by the son's liability to father's debts

Surajbunsi Koer v Sheo Pershad

The following passage of the judgment of the Privy Council in *Surajbunsi Koer's* case, (*c*) should be read in this connection —

Except son's liability for father's debts their interests equal

"That under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immovable estate is indisputable Upon the questions whether he has the same rights in the self-acquired immovable estate of his father, and what are the extent and nature of the father's power over ancestral movable property, there has been greater diversity of opinion But these questions do not arise upon this appeal The material texts of the Mitákshará are to be found in the 27th and following Slokas of the first Section of the first Chapter It was argued at the Bar that, because in the third Sloka of the above Section, it is said that the wealth of the father becomes the property of his son, in right of their being his sons, and that 'that is an inheritance not liable to obstruction,' their rights in the family estate must be taken to be only inchoate and imperfect during their father's life, and in particular that they cannot, without his consent, have a partition even of immovable ancestral property There was some authority in favour of this proposition, notwithstanding the texts to the contrary, which are to be found in the Mitákshará itself (*d*) But it seems to be now settled law in the Courts of the three Presidencies, that a son can compel his father to make a partition of ancestral immovable property. On this point it is sufficient to cite the cases of *Laljeet* v *Rajcoomar*, 12 B L R 373, and *Raja Ram* v *Luchmun*, B L R, Sup V 731, decided by the High Court of Calcutta, that of *Kaliparshad* v *Ramcharan*, 1 A, 159, decided by the High Court of North West Provinces, that of *Nagalinga* v *Subbhramaniya*, 1 Mad H C R, 77, decided by the High Court of Madras, and the case of *Moro Vishvanath* v *Garnesh*, 10 Bom H C R, 444, decided by the High Court of Bombay The decisions do not seem to go beyond *ancestral* immovable property

"Hence, the rights of the co-parceners in an undivided Hindu family, governed by the law of the Mitákshará, which consists of a father and his sons, do not differ from those of the co-parceners in a like family which consists of undivided brethern, except so far as they are affected by the peculiar obligation of paying their father's debts, which the Hindu law imposes upon sons, and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate"

Father's and son's interest in movables and immovables

Distinction between ancestral movable and immovable — Although sons acquire a co-equal right by birth to ancestral property, both immovable and movable, yet a passage of the law (*e*) declares the father to be master of the movables

(*c*) 5 C 148 6 I A 88 4 C L R 226
(*d*) *See* slokas 5, 7, 8, 11 of the 5th section of the first Chapter.
(*e*) Text No 2

by reason, perhaps, of the character of the property and of the superior position of the father relatively to the sons. There appears to be a conflict of opinion with respect to the father's power of disposal of ancestral movables, owing to the seeming conflict between two passages of the Mitàksharà, (*f*) the first of which seems to deal with the legal power, and the second with the moral duty. According to one view the power is limited only by his own discretion, and according to the other, the power is not absolute but can be exercised only for family necessity and certain prescribed purposes. A bequest by a father to one of his two undivided sons of the bulk of ancestral movables, to the exclusion of the other, has been held to be invalid, as being an unequal distribution prohibited by Hindu law (*g*) Hence, it has been held that a father governed by the Mitàksharà law cannot make a gift of the movable property to one son to the detriment of the other, not on account of affection for that son, but to punish and disinherit the other son. (*h*) The Hindu law seems to contemplate alienation to strangers, while conferring on the father the power of disposal in question, and not an unjust and undue partiality to a co-heir for the power is subject to the theory that the sons are co-owners of the movable property, with the father, the co-ownership therefore should prevail when the question arises between the co-owners and no outsider is concerned.

Son acquires right over father's self-acquired property,

Son's right in father's self-acquired property—It has already been said that according to the Mitàksharà a son acquires a right by birth to the father's self-acquired property in the same way as to ancestral property. (*i*) But the father is competent to alienate the same, and the son has no right to oppose as in case of the ancestral property, the reasons assigned being that the father has a predominant interest in it, and that the son is dependent on him (*j*) The father, however, cannot make an unequal distribution of it, except

Father cannot make unequal distribution,

(*f*) Ch I, Sect 1, § 21 and § 27
(*g*) Lakshman *v* Ram Chandra, 1 B 561, affirmed by the Privy Council — Lakshman *v* Ram, 5 B 48 7 I A 181 7 C L R 520
(*h*) Nand *v* Mangal, 31 A. 359 . 6 A L J 495 1 I C 797
(*i*) Mit 1, 1, 7
(*j*) Mit 1, 1, 27 and 1, 5, 10,

in the mode of assigning specific deductions to the eldest son, and so forth. (*k*) Nor can the son enforce a partition of the same against the father's choice, as he can in the case of ancestral property.

On a consideration of all these somewhat seemingly inconsistent propositions, it would appear that the father is authorized to make a sale or the like transfer to an outsider, but he is not allowed to show an undue and capricious partiality to any one son to the injury of another.

but father can alienate it

It has been held by our Courts that the father is competent to sell his self-acquired immovable property without the concurrence of his sons, (*l*) and to make a gift to one son, to the injury of the other, (*m*) as well as to make an unequal distribution among his heirs, (*n*) or a gift by a Will, which when made to a son, is taken by him as purchaser under the Will, and not by inheritance according to the Bombay and the Allahabad High Courts (*o*) But the Calcutta and the Madras High Courts, on the other hand, hold that such property is to be deemed ancestral in the hands of the donee or devisee. (*p*) The Privy Council on a consideration of the various decisions of the different High Courts has stated that there is a great diversity of opinion of the Courts in India but put off the question for decision on a future occasion. (*q*)

if donee *purchaser*,

Bom & All. view,

Cal & Mad view,

P C keeps open

Affectionate gift

But an affectionate gift by the father to a son, of his self-acquired property, is to be distinguished from a gift amounting to an unequal distribution of it, which ought to be held invalid for the very same reason as in case of ancestral movables.

Survivorship in self acquisitions after father's death

It should, however, be borne in mind that such property if undisposed of by the father, is taken by the sons and the like, by survivorship, and not by descent.

It has already been said that the right of a son to the

(*k*) Mit 1, 2, 1 (*l*) Muddun *v* Ram, 6 W R 71
(*m*) Sital *v*) Madho, I A 394 (*n*) Bawa *v* Rajah 10 W R 287
(*o*) Jugmohandas *v* Mangaldas, 10 B 528, (578) Nanabhai *v* Achratbai, 12 B 122, Parsotam *v* Janki, 29 A 354 4 A,L J 251.
(*p*) Hazari Mall *v* Abani, 17 C W N 280, 17 C L J 38 18 I C 625, Muddun Gopal *v* Ram, 6 W R 71, Nagalingam *v* Ramchandra 24 M 429 11 M L J 210 Tarachand *v* Reebram, 2 M H C R 50
(*q*) *See ante* pp 345-346, Lal Ram *v* Deputy, 45 A 596, followed in Salakshi Doraimanikka, 48 M 827

father's self-acquired property may be called an imperfect one but it has been made more so by the Courts, by holding that the father is competent to make testamentary disposition (wholly unknown to Hindu law) of such property, and so deprive a son wholly or partially.

History of father's and son's right.—In ancient Hindu law, as in Roman law, the father of the family, or *pater familias* was the absolute master of the family property, and of the person of its members, the *patria potestas*, or the authority with which the father of the family was armed by ancient law extended to the power of inflicting punishment of death, and to absolute dominion even over the acquisition of its members. Thus Manu (viii, 416) says —

भार्या पुत्रश्च दासश्च त्रय एवाधनाः स्मृताः ।
यत् ते समधिगच्छन्ति यस्यैते तस्य तद्-धनम् ॥ ८, ४१६ ।

which means,"—A wife, a son, and a slave, these three are ordained incapable of holding property whatever wealth they earn, becomes his whose they are."—viii, 416.

The exercise of absolute power by an autocrat, in the government of a family as of a State, may be cheerfully submitted to if it is made with an eye to the happiness of all the governed, without partiality, and consistently with the principles of equity, justice and good conscience But inequality of treatment owing to caprice or whims, undue partiality of favouritism to one, to the injury of others, and undeserved severity or leniency in the award of punishment, would render such government unpopular, and the curtailing of the power desirable The usage of polygamy appars to have been a fertile source of discord in a family, and an old father under the undue influence of a young wife, would be betrayed into acts injurious to her step sons This furnishes with the reason why unequal distribution among sons is prohibited in respect of property, of which alienation is allowed There must have been frequent abuse of the particular power, by fathers, amounting to a crying evil for which a remedy was felt necessary Accordingly the Mitakshara curtailed it by admitting the son's right by birth as explained above, by conferring upon sons co-equal rights in ancestral property as well as by restraining unequal distribution, while permitting alienation, of movables and self-acquired property

Mit. curtailed his rights over property

This doctrine of the son's right by birth to ancestral property, introduced by the Mitakshara as a remedy against the abuse of the father's arbitrary power, is found in many instances to be attended with grave evils of a different description. Head strong and prodigal youths sometimes foolishly quarrel with their father, take their shares by partition, and dissipate the partimony in no time, and then the fathers have to save those sons and their families from starvation, with the diminished means at their disposal The author of the Dayabhaga appears to have, therefore, made a change in the

Daya modified son's rights

law by laying down that the sons have no right to the ancestral property during the lifetime of the father, but at the same time he laid down for the protection of the sons, that the father has no power of disposal over the bulk of the ancestral property except for legal necessity, so that the estate taken by the father in the ancestral property, is, under the Dayàbhàga, similar to the Hindu widow's estate in property inherited from the husband.

Factum Valet.

But by what appears to be an improper application of the doctrine of *Factum valet* the Courts of justice have again thrown the sons completely at the mercy of the father, as they were by the ancient law. This change does not seem to be detrimental to the interests of sons except when the father is a spendthrift, or is entirely merged in a young wife, and under her undue evil influence perpetrates the grossest iniquity to his sons by any other wife

Sub-Sec iv—WOMAN'S RIGHTS

Wife acquires right to husband's property from marriage.

Wife's right to husband's property.—The *Patni* or lawfully wedded wife acquires from the moment of her marriage a right to everything belonging to the husband, so as to become his co-owner But her right is not co-equal to that of the husband, but is subordinate to the same, and resembles the son's right to the father's self-acquired property The husband alone is competent to alienate the same, and the wife cannot interdict his disposal, but being dependent on him must acquiesce in it, provided it does not unjustly affect her right to maintenance out of it Nor can the wife enforce a partition of the property. But it is by virtue of this right that the wife enjoys the husband's property, and is entitled to get maintenance out of it, and it is also by virtue of this right that she gets a share equal to that of a son, when partition takes place at the instance of the male members. (*r*) Thus the wife also, of a male member becomes a coparcener of the family property.

partition

Unmarried daughter's right

Unmarried daughter's right—Similarly, an unmarried daughter acquires an imperfect right in the father's property by virtue of which she enjoys the same and is maintained out of it until marriage, and is also entitled to a quarter share if partition takes place before her marriage, that is to say, when she continues as member of the family. (*s*)

(*r*) *See ante* p 319 and Jamna *v* Mackul, 2 A 315, Becha *v*. Mothina, 23 A 86 20 A W N 210

(*s*) *See* Subbyya *v* Ananta, 53 M 84, 97 1929 M 585

Mr Justice Ramesam and Mr Justice Reilly of the Madras High Court (t) on a careful deliberation of original texts and giving due considertion to the above passage of this book, have come to the conclusion, that unmarried daughter of the father is entitled to a quarter share in a partition between father and sons. Mr Justice Jackson, however, in an equally learned judgment has differed from his above-named colleagues and put a construction on the above passage of this treatise to mean what was not intended. The words *father's property* have been used to indicate that when partition takes place between father and sons or between brothers after the death of the father, the father's daughter is entitled to a quarter share, *i. e*, brother s daughter, uncle's daughter and the daughters of other members who are entitled to shares in a partition of joint property, are not entitled to such shares, although their marriage expenses might be charged on the joint family property so long the family remained joint (u) There cannot be any room for a possible difference between cases of partition among father and sons and among brothers after father's death, on a construction of the passage in question. Besides the particular passage under discussion appears in connection with the subject of rights and liabilities of members of a joint family and the family in this case meant to consist of only father and sons or brothers only and not of any other member who is entitled to a share.

M d. view on the last para

Reason for recognising these imperfect rights—A person's son, wife, unmarried daughter and the like dependent members living jointly with him, use and enjoy his property. This is accounted for by the Hindu lawyers by assuming a right in them , otherwise, they should be guilty of theft or misappropriation every time they use the property, by taking food, giving alms, and the like The sons again continue to live with their father even after marriage which is brought about by the father himself and not by them, and the

Imperfect rights to self-acquired property why recognised.

(t) *Ibid*

(u) *See ante p* 162 *foot notes* (*k*), (*l*), (*m*) and (*n*). Page 147 of 5th Ed *foot notes* (*u*), (*v*), (*w*) and (*x*)

father's property is accordingly, by immemorial custom looked upon as the source of maintenance of the sons' wives and children, and is, by the father's conduct, rendered common to all the members of his family, in the same manner as self-acquisition of a member is thrown into the common stock.

There is good reason, therefore, for curtailing the father's power of voluntary alienation (v) and unequal distribution of his self acquired property, and so of depriving a dependent member of the means of his livelihood.

Sub-Sec v—ENJOYMENT OF PROPERTY

Member's right in the joint family property

Joint family property, right and enjoyment—From what has been said above, it appears that a member of a joint family, whether male or female, acquires a right to the joint property on his or her becoming a member by birth, adoption or marriage, and conversely his right ceases on his or her ceasing to be a member of the family by death, adoption or marriage. The property belongs to the family: any one acquiring and retaining the status of being its member exercises certain rights over the family property, and his rights cease on the extinction of that status. A joint family, therefore, is like a corporation, individual rights are all merged in the family or the corporate body, and no member has any definable share in the joint property previous to partition. (w) Every member, male or female, has the right to enjoy the family property without any restriction, and each joint owner is entitled to joint possession of every part of the property equally with every other member. (x) A member entitled to get the least share on partition, may, by reason of having a large family of his own to support, consume, during jointness, the largest portion of the proceeds of joint property, without being liable to be called upon to account for the excess consumption at the time of

(v) See Mit on gifts

(w) Sankar v Madan, 14 C W N 298. 11 C L J 61: 5 I C 298; *see* Gharibullah v Khalak, 25 A 407, 416. 30 I A 165. 7 C W N 681: 5 Bom. L. R 478

(x) Raghoba v Ziboo, 11 I C. 687. 7 N L R 82, *see also* Jankibai v. Shrinivas, 38 B 120, 122.

partition The question of shares does not arise before partition no member can bring a suit for his share of the profits of joint property so long as the family is joint, (*y*) though separate maintenance and allowance for separate residence can be allowed in some cases charging the joint family property. (*z*) He can apply for a Succession Certificate under Act VII of 1889 even when he alleges to have succeeded to the estate by survivorship (*a*) So Letters of Administration cannot be granted to the estate of a member when the family is joint. (*a1*)

Appovier v Rama Subba

The following observations of the Judicial Committee in *Appovier's* case(*b*) should be carefuly read in this connection --

"According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share, which he may claim the rights to receive and to enjoy in severalty, although the property itself has not been actually served and divided." (*c*)

Adverse possession by member.

A member of joint family may under certain circumstances acquire rights to joint family property adversely against the other members (*d*) The law on the subject has been explained by the Privy Council in the following way.

(*y*) Pirthi *v* Jowahir, 14 C 493 14 I A 37
(*z*) Bhagwan *v* Kewal, 8 L 360
(*a*) Banwari *v* Maksudan, 52 A 252, Mathura *v* Durgawati, 36 A. 380 12 A L J 525 24 I C 182, present Act XXXIX of 1925
(*a1*) Gopalaswamy *v* Meenakshi, 7 R. 39
(*b*) 11 M I A 75 8 W R P.C 1 Suth P C 657
(*c*) *See also*, Pranjivandas *v* Ichharam, 39 B 734, 751 17 Bom L R 712 30 I C 918, Parbati *v* Naunihal, 31 A 412 36 I A 71 6 A L J 597 10 C L J 121 13 C W N 983 19 M L J 517 11 Bom L R 878 3 I C 195, Gulab *v* Gokul Das, 40 C 784 17 C L.J 619 40 I A 117 17 C W N 918 : 25 M L J 179 15 Bom L R 613 19 I C 521
(*d*) *See post* Sec 9, Sub-Sec v and Ch VIII, S 5, "Adverse possession"

"***It is important to bear in mind certain facts with regard to the possession of joint property, which distinguish it from property seprately held In the former case the phrase 'exclusive possession' has an equivocal meaning, in the latter it has not If by exclusive possesssion of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members *Maharaja Sir Luchmeswar Singh Bahadur* v *Sheikh Manowar Hossain and others* (e) and *Corea* v *Appuhamy* (f) If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former The fact, therefore, that this village * * * has been occupied for many years by the defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence " (g)

A member of a joint family, inorder to successfully resist the claim of the other members, on the plea of adverse possession, must prove that he has been in exclusive possession for more than the statutory period from the time he set up such a right to the knowledge of the other members.

Partible and Impartible—properties are dealt with elaborately in Chapter XV of this treatise

Partition.—A member's right to demand partition and to obtain shares in the property with consequential rights and liabilities are discussed in Section 11 below.

Sub-Sec vi—VESTING AND DIVESTING

Member's share varies by birth, adoption, marriage and death

Extent of right, or share, vesting and divesting.—The extent of a member's right in the family property, or the share to which he is entitled cannot be ascertained before partition, for it is liable to variation by birth or death of members, it is increased or diminished respectively by the disappearance or addition of a co-heir

It is worthy of remark in this connection that the strict rule of vesting and divesting, such as is laid down in the *Blindman's son's* case and the *Unchastity* case, does not apply to a Mitákshará joint family in which partial vesting and

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(e) 19 I A 48 19 C 253.
(f) (1912) A C 230, 236
(g) Hardit v Gurmukh, 28 C.L J 437, 438 24 M L T. 389 20 Bom L R. 1064 47 I C. 626

divesting continually take place on birth, adoption, marriage, or death of a member. There is, however, a conflict of decisions on the question whether a member is divested of his co-parcenary interest by subsequent disqualifications, such as *insanity* (*h*)

Amount of share

But the amount of share to which a particular member would be entitled, if partition were to take place at a particular time, may be ascertained by having regard to the rules of distribution, the principles of which are —(1) that the division among the descendants of the common ancestor is to be made *per stirpes* and not *per capita*, (2) that the first division must be made by dividing the partible property into as many shares as would satisfy the claims of the members entitled to participate, such as the common ancestor, his wife or wives, and his sons and their descendants,—the individuals composing each of the different branches descended from the common ancestor, together getting one share; and (3) that the partition may stop by the division of the branches, or if a member of a branch desires, the share so obtained by that branch is to be subdivided between its members on the same principles, *i e.*, between the common ancestor of that branch, his wife, and each of the sub-branches descended from him, the members of it collectively getting one share and so on.

Manager of joint family or *Karta*;

It has been held that where a member of one of the three branches of a joint family separated having taken his $\frac{1}{12}$th share of the property, the others remaining joint and subsequently the family again divided, the partition should be made *rebus sic stantibus* as on the date of suit and the branch from which a member had already gone out with his share will get a full $\frac{1}{3}$rd share and not $\frac{1}{3}$rd *minus* $\frac{1}{12}$th. (*i*)

Sec 6—MANAGEMENT OF FAMILY

Sub Sec 1—MANAGERS

Manager needed

Necessity of manager.—The affairs of a joint family. corporation, consisting as it does of *Purdanashin* ladies and

(*h*) *See* Ram *v*. Lalla, 8 C 149 & Ram Soonder *v* Ram Sahye, 8 C 919 & Tirbeni *v* Muhammad, 28 A 247 3 A L J 4

(*i*) Pranjivandas *v* Ichharam, 39 B 734 17 Bom L R 712 30 I C 918

infants, cannot be managed by all the members of it, nor are they managed jointly by all the adult male members, probably by reasen of the inequality in their rank, but ordinarily they are, by the tacit consent of all, managed by a single male member who becomes the head of the family, by reason of his seniority and superior rank and is called the *karta* (*actor or agent,*) of the family. But the manager of a joint family is not an agent in the strict sense of the term. (*j*)

Management of charities

Management of charities.—The *karta* of a family is entitled to manage not only the family properties in which the family has a beneficial interest but also properties absolutely dedicated to charities, of which the management only is vested in the family. The *karta* being the senior member is alone entitled to exercise the right of management as the representative of the family, so long as it remains undivided, and in the absence of any agreement, no junior member is entitled, until partition is effected, to claim the management of the charity properties by rotation on the ground of convenience. (*k*)

He is not bound to economise expenditure,

Economy of expenditure—Although the *karta* of a joint family administers its properties for the purposes of the family as its accredited agent, yet so long as he does so manage its affairs, he is not under the same obligation to *economise* or to *save*, as would be the case with a paid agent, or partner in trade, or a trustee He, as the head of the family has control over the income and expenditure and is the custodian of the surplus if any. If he manages the family affairs honestly and in an unselfish manner, no objection can be taken on the ground that expenses were incurred by him in an extravagant scale, nor is he liable to be called upon to defend the propriety of past transactions. (*l*) A certain discretion must be allowed to the manager, (*m*) but he is expected to deal with the family property as a reasonable person

(*j*) Kandasami *v* Somaskanda, 35 M 177 20 M L J 371 5 I C. 922 7 M L T 165

(*k*) Thandavaraya *v* Shunmugam 32 M 167 19 M L J 59

(*l*) Bhowani *v* Juggernath, 13 C W N 309 9 C L J 133 3 I C 241

(*m*) Vembu *v* Srinivasa, 23 M L J 638 17 I C. 609

would deal with his own. (*n*)

If unjust expenditure on property followed,

But if the manager of a joint family chose to expend the *income* of joint property upon his mistress in making improvements on her property, there is no rule of law which would enable the survivors of the joint family to follow these monies into the property, still less to sue for possession of the property. (*o*)

He can borrow for family purposes,

Manager's rights—A *karta* or manager cannot alienate or burden the estate *qua* manager except for purposes of necessity and is, therefore, competent to pledge the credit and the property of the family for the purposes of the family, *i.e.*, for legal necessity and benefit to the estate. (*p*)

But an alienation of joint family property by a junior member is not invalid merely because he is not the *karta*. (*q*)

As to what are legal necessities and benefit to the estate and what are the various circumstances under which a *karta* can act to bind the joint family property, see Sub-Secs. iii and ii below.

Money raised in excess of necessity—*See* Sub-Sec. iv below, topic "Alienation by manager in excess of necessity".

As to manager's powers of alienation, *see* Sub-Sec. ii below.

Liability of members.—The liability of the members of a joint family for the debts contracted by the managing member are to the extent of the family property and the liability cannot be enforced personally against them. (*r*) This liability does not cease on partition if the debt was incurred before partition for the benefit of the family. (*s*)

Manager's liability for damage,

Manager's liability—A manager is personally liable for damage for failure to perform the contract for sale of im-

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(*n*) Ram *v* Narain, 35 I C. 326 (A)
(*o*) Debi Rai *v* Pahlad, 21 L W 183 : 86 I C 251 1925 P C 38
(*p*) Brij Narain *v* Mangal Prasad, 46 A 95 51 I A 129 21 A.L J 934 28 C W N 253 41 C L J 232 46 M L J 23 5 P L T 1 11 O L J 107 : 1924 P C 50 · 26 Bom L R 500 77 I C 689, Sheikh Jan *v* Bikoo, 7 P 798 (*q*) Ram *v* Tanak, 1928 P 557
(*r*) Rama *v* Viswanatha, 41 M L J 567 15 L W 130 66 I C 155, Bishan *v* Kidar, 2 L 159 62 I C 800
(*s*) Muthu *v* Chinnaswami, 39 M L J 485 28 M L T. 308 12 L W 403 59 I C 685, *See* Sec 8, Sub Sec iv, topic "Remedy against extravagant father."

movable property when it is found that the contract is not binding on the minors. (*t*) He cannot alienate property for the purposes of speculative nature, (*u*) or borrow money for carrying on a speculative litigation. (*v*) The manager, however, will be personally liable for damages for negligence and misconduct, (*w*) and under Section 73 of the Indian Contract, Act for failure to perform the contract of sale of joint property when it is found that the proposed sale is not binding on the minors. (*x*)

Speculative transaction, negligence, misconduct, not performing contract

Lease

A permanent lease by brother as manager is an alienation not binding on the members of the family unless the permanent lease or the cash premium was for the benefit of the family. (*y*)

Borrowing on usual terms

The managing member has authority *to borrow money upon reasonable commercial terms* for necessity and all terms of contract in excess of this necessity are beyond his authority. (*z*) The expression *to borrow money upon reasonable commercial terms* is in contradistinction to such terms as may be in excess of necessity and therefore in excess of manager's authority. (*a*) *Commercial terms* are relative expression, relative to the time and the place where the money is borrowed, the kind of security that is offered, the possibilities of realising such security, the supply of capital and the opportunities of finding persons willing to lend for possibly a considerable time. (*b*)

Commercial terms

(*t*) Adikesavan v Gurunatha, 40 M 338 F B 39 I C 358 32 M L J 180

(*u*) Sheo v Drig Pal, 8 O L J 314 63 I C 554, *see ante p* 357 foot note (*k*)

(*v*) Bhagwan v Mahadeo, 45 A 390 21 A L J 271 1923 A 298

(*w*) Raya v Gopal, 11 I C 666 (*m*)

(*x*) Adikesavan v Gurunatha, 40 M 338 F B : 32 M L J 180 39 I C 358,

(*y*) Basdeo v Md Yusuf, 51 A 285 : 1928 A 617, see Banwari v Ram 1929 A 387

(*z*) Ram Bujawan v Nathu, 2 P. 285 : 50 I A 14 4 P L T 29 38 C L J 25 : 44 M L.J, 615 : 25 Bom L R 568 . 1923 P C. 37, *see* Nazir v Rao. *post "Onus"* in Sec. 9 Sub-Sec iv.

(*a*) Sunder v Satya, 7 p 294, 300 55 I A, 85 · 32 C.W N 657 47 C L. J 03 1928 P C. 64.

(*b*) *Ibid*

In cases of borrowing money by the manager two things are well settled, *viz.*, that the authority of *karta* to borrow on the security of family property is limited and that the burden of proof in the first instance is upon the lender to show that the borrowing and the terms were within the authority which the *karta* can exercise. (*c*)

Karta's authority,

Onus on lender

Father Manager.—"The father is in all cases naturally and in the case of infant sons, necessarily, the manager of the joint family estate." The relative position of the father and the sons in a joint family is still regulated by the ancient rule that sons are dependent on the father (Mit. 1, 5, 9 and 10) with whom the government of the family rests, and whose word is still the law as regards the management of the affairs of the family. Although the sons are co-owners with the father, of the ancestral property with co-equal rights, yet so long as they continue to live joint with the father and do not enforce a partition which they are at liberty to do whenever they please, they cannot interfere with the father's management of the family and its property. So a transfer of property by father is valid until avoided by the son. (*d*) They have no doubt the power of interference in the case of an unauthorized alienation by the father of ancestral immovable property, but their enjoyment of the same is subject to other dispositions lawfully made by him, and if dissatisfied, the son's remedy is partition. Accordingly, a suit for ejectment brought by a father against his son who had against the will of the father taken possession of a house vacated by a tenant, which was partly ancestral and partly the father's self-acquired, has been allowed, and it has been held that, "while the son's interest is proprietary, it lacks the incident of dominion," when the sons live jointly with the father. (*e*)

His power,

cannot be interfered with without partition

The Privy Council (*f*) has thus explained the father's powers as manager of the joint family:

P C on father as manager.

(*c*) *Ibid*, 7 P 294, 296
(*d*) Lachmi Prosad *v* Lachmi, 1928 A. 41.
(*e*) Baldeo *v* Sham, 1 A, 77
(*f*) Sahu Ram *v* Bhup, 39 A 437 : 44 I A. 126 : 21 C W N 698, 702 : 26 C L J 1 39 I C 280 : 33 M L.J. 14 : 19 Bom. L R 498 : 1 Pat. L.W 557

"The Law of the Mitākshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property The general principle in regard to the matter is' that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or *Mutt*, or of the guardian of an infant In all of the cases where it can be established that the estate itself, that is under administration, demanded, or the family interest justified, the expenditure, then those entitled to the estate are bound by the transaction It is not accurate to describe this as either inconsistent with or an exception to the fundamental rule of the Mitākshara. For where estate or family necessity exists, that necessity rests upon the coparceners as a whole, and it is proper to imply a consent of all of them to that act of the one which such necessity has demanded"

His power over movable and income,

The father has the power of disposal over property other than immovable (*g*) and consequently also over the income of the family property. It has already been said that there is a difference of opinion with respect to his power of disposal of the ancestral movables (*h*)

as guardian in suit,

When in a suit the father is a party and is himself the next friend or guardian of his minor son, a party to the same suit, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court (*i*)

of alienation extended,

The father's power of alienation of the family property has been considerably extended by modern decisions (*j*), excepting for new business, (*j1*) purporting to be founded on the doctrine of the son's liability to pay off the father's debts.

These decision have practically changed the Mitakshara doctrine of the co-equal ownership of father and son in the ancestral property These decisions are really, though not professedly, based on the following principle Sons cannot have a better friend than their own father, when, therefore, a father of even adult sons living with him, raises money by alienating property or otherwise, he must always be presumed to have done so for the benefit of the family, unless it can be proved by the sons that the father was addicted

(*g*) Mit 1, 1, 27 (*h*) pp 366 367, *ante*

(*i*) Ganesha v Tuljaram, 36 M 295 40 I A 132 17 C W N 765 · 18 C L J 11 A L J 589 15 Bom L R (26 25 M L J 150 19 I C 515.

(*j*) See foot notes (*f*), (*g*), (*h*) and p 357 and (*p*) p 377. Surendra v. Sambhunath, 55 C 210 1927 C, 870

(*j1*) Benares Bank v Ha i, 36 C W N 826 P C.

to wine, women or wager, and the money was wanted for these illegal or immoral purposes

His power to alienate son's property as guardian is limited to the need and benefit of the estate.(*k*) In the absence of necessity, the father has no general power to alienate lands in any way he pleases for any thing that may be of general benefit to the family, (*l*) nor can he mortgage the family property for other than antecedent debt. (*m*)

but not as gurdian

A sale by the father on his behalf and on behalf of his minor son who were the members of a joint family with a counterpart document by the vendee empowering the father to call for a reconveyance of the property after certain time, is a covenant available to both and their representatives. (*n*) An alienation, otherwise good, will not be vitiated merely because the father who made the alienation, was not described as manager of the family. (*o*)

Effect of sale with condition of repurchase

Manager, other than father—It often happens that the eldest son is allowed by the father to look after the affairs of the family under his direction, and sometimes he becomes the *karta* even during the lifetime of the father who is old and incapable, (*p*) or religiously disposed and unwilling to remain concerned with wordly matters. When the father is no more, the eldest brother generally becomes the manager or *karta*, and sometimes a younger brother who is capable governs the family. In a family consisting of brothers, the elder brother, in the absence of any evidence to the contrary, should be presumed to be the manager of the family. (*q*) It is seldom, if ever, that a manager is elected by all the members or even by those that are adults, or that more members than one act as joint managers of a family. Although there is nothing to prevent any member from taking part in the management, yet, as a general rule, one member only

Eldest son

Eldest brother

(*k*) Ragho v Zaga 53 B 419 1929 B 251
(*l*) Venkatraman v Janardhan, 52 B 16, 267 : 1928 B 8
(*m*) Venkatraman v Janardhan, 1928 B. 8, Abdul v. Sansar, 1928 L 101.
(*n*) Sakalaguna v Chinna, 32 C.W.N 850 P.C.
(*o*) Ram v Kanhaiya, 1930 A 73.
(*p*) Parma v Mahadeo, 49 I C 907. (Pat.)
(*q*) Sant v Hira, 1930 L. 719.

Minor cannot be *karta*

acts as the *karta* or managing head of the family. But a minor cannot be a *karta* or manager of a joint family. (*r*)

Not entitled to remuneration.

Manager's remuneration.—The managing coparcener of a joint Hindu family is not entitled to any special remuneration, as the property which he manages is one, of which he is a joint co-owner, and therefore in order to look after his own undivided coparcenery interest in the joint property, he cannot but look after the whole of it, that is to say, the management of the whole is inseparable from that of his own interest, and does not require any additional time or trouble for which compensation in money may be claimed, while on the other hand he is amply compensated by the enjoyment of the power exercised and involved in the management as well as in the control over the expenditure of the income of the property (*s*)

Sub Sec. ii—ALIENATION BY MANAGER

Causes for alination

Manager's power of alienation when other members minors.—When the other members are minors, the manager whether the father or a brother, may make a sale, mortgage or the like alienation of joint immovable property, which is rendered necessary by any calamity affecting the whole family, or for the support of the family, or for indispensable religious duties such as obsequies of the father (*t*)

Alone can alienate

The manager alone is, therefore, competent to charge or alienate family property for a family purpose, when the other members are minors, even if he is not the guardian of the minor. (*u*) The power of a manager for an infant to charge his property is a limited and qualified power as is pointed out by the Privy Council in the leading case of *Hunooman Persaud Panday*, (*v*) thus —

P C on his power of alienation

"It, the power can only be exercised rightly in a case of need, or for the benefit of the estate But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate The

(*r*) Mohideen v Mahomed, 30 M L J 21

(*s*) Krishnasami v Rajagopala, 18 M 73, 86.

(*t*) Mit 1 'i, 28 and 29

(*u*) Rrm v Mihin, 36 A 153

(*v*) 6 M I A 393, see Drg v. Bhan, 9 A.L J. 63 : 13 I C. 945.

actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded There Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting, in the particular instance, for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money"

The principle applicable to alienation by widow

This passage should be carefully read, as it enunciates a very important general principle applied also to other cases such as an alienation by a Hindu woman of property in which she has a Hindu widow's estate, and it has been adopted and embodied by the Legislature in Section 38 of the Transfer of Property Act IV of 1882. This section if deemed to enact a rule as to reasonable enquiry in excess of what is required by the Privy Council in *Hunooman Persaud Panday's* case, cannot override the Hindu law as settled by the Privy Council. (*w*)

Rule in *Hunooman Persaud* applied to, mortgage,

The rule of law laid down by the Privy Council in the case of *Hunooman Persaud Panday* (*x*) is not restricted to cases of mortgage or other partial transfer, (*y*) nor is it restricted in its application to cases of secured loans (*z*) or of *necessity* alone. (*a*) It applies to cases of sales as well. (*b*)

sale

The *necessity* is not to be understood in the sense of what is absolutely indispensable but what according to the notions of a Hindu family would be regarded as reasonable and proper. (*c*) So a minor cannot impeach an alienation made for his benefit and with due regard to his interests. (*d*) But an alienation for the purpose of purchasing lands for the family

(*w*) Bobbili, Maharaja of *v* Zamindar of Chundi, 35 M 108, 112 21 M L J 593 9 M L T 155 8 I C 860; Transfer of Property Act (Act IV of 1882, Sec 2 cl (d)

(*x*) 6 M I A 393 18 W R 81

(*y*) Mohanund *v* Nafur, 26 C 820 8 C W N 770.

(*z*) Bobbili, Maharaja of *v* Zamindar of Chundi, 35 M 108, Bobbili, Maharaja of *v* Venkataramajulu, 39 M 265 27 M L J 409 25 I C 585

(*a*) Krishna *v* Ratan, 20 C.W N 645 23 C L.J 432 35 I C 673

(*b*) Ramalingam *v* Muthayan, 26 M L J 528 24 I C 356, see Mohupalli *v* Paluri, 28 I C 673 1 L W 249

(*c*) Kameswara *v* Veeracharlu, 34 M 422 20 M L.J 855 9 M L T 26. 8 I C 195

(*d*) Dedar Singh *v* Bansi, 85 I C 741 1925 L 520.

does not bind the other members as the alienation is not for necessity. *(e)*

See 41 Tr Property Act.

In a suit by a member who was minor at the time of alienation, to set aside an alienation made by the *karta* of a joint family consisting of major and minor members, the alienee cannot take his defence under the provision of Section 41 of the Transfer of Property Act as the minor could not give his consent, express or implied. *(f)*

Power of manager other than father, when members majors

When other members majors—As to the power of the manager when the other members are majors, the law is thus explained —

"The result of these cases in our opinion, is, that an alienation made by the managing member of a joint family cannot be binding upon his adult co-sharers unless it is shown that it was made with their consent, either express or implied In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family, and the latter in entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate, to consult them and obtain their consent before pledging such credit or estate" *(g)*

The Privy Council thus explains the law —"The *karta* cannot alienate joint property, unless he obtains the consent of the other members of the joint family, if they could give it, or unless there was established necessity to justify the transaction *(h)*

Accordingly it has been held that the compulsory sale of the joint family property mortgaged by the managers of a trading or money-lending business of the family for the purposes of that business during the minority of the other members, in execution of a decree obtained in a suit brought against the managers only, is binding on the other members

(e) Subramania *v* Ramasami, 25 M L J 563 21 I C 656
(f) Sankar *v* Daooji, 34 C W N 693, 699 P C. 54 C L J 24
(g) Miller *v* Ranga, 12 C 389, 399, *see* Tamireddi *v* Gangireddy, 45 M 281 42 M L J 570 16 L W 55 70 I C 337 1922 M 236, Kamta *v*, Bhagirath, 27 I C 517 2 O L J 30
(h) Sankar *v* Daooji, 35 C W.N 698 54 C L J 24,

who cannot impugn the sale solely on the ground of their not being made parties to the suit, when it appears from the proceedings that the whole property was sold and bargained for.(i) The managers were held to represent the whole family, in the suit. This subject will be re-opened when dealing with the topic, "Judicial Proceedings."(j) The powers of manager other than the father is limited, so far as his power of alienation is concerned The Privy Council has explained it thus · "The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the family purposes."(k) And the alienee must prove the existence of necessity (l) or benefit to the estate ; and the question of benefit must be determined by reference to the nature of the transaction and not by reference to the result thereof.(m)

The expression *benefit to the estate* is explained below in Sub-Sec. iii. (n)

Sub-Sec iii—LEGAL NECESSITY AND BENEFITS

Legal necessity for alienation by holder of widow's estate—*See* Chapter XII, Sec. 5, Sub-sec. iii.

Legal necessity—The expression 'legal necessity' is very often used, to signify the causes for which, or the circumstances under which, a single member of a joint family, or a like person, having a limited interest in property, is authorised to transfer it so as to pass to the transferee a right to the entire property, and this principle applies both to Mitàksharà and Dàyabhàga schools.(o) It comprises maintenance and support of the family, preservation of the family estate, management of the family business, if any, performance of

What it signifies

(i) Daulat *v* Mehr, 15 C 70 14 I A 187, and Sheo *v* Saheb, 20 C 453, Sheo *v* Jaddo, 36 A 383 41 I A 216 18 C W N 918 20 C L J 282 16 Bom L R. 810 12 A L J 1173 16 M L T 175 24 I C 504, on appeal from 33 A 71, Halli *v* Bhyia, 21 C L J 454 27 I C. 425

(j) *See* Sec 9 below

(k) Anant *v* Collector, 22 C W N 484, 486 40 A 171 27 C L J 363 34 M.L J. 291 20 Bom. L R 524 4 Pat L W. 226 44 I C 290, *see* Gaya *v*. Ram, 28 I C 21 13 A L J 246

(l) Naraindas *v* Khatanmal, 88 I C 916 (*S.*)

(m) *See ante p* 360 *foot note* (i)

(n) *See ante p* 360

(o) Dwarka *v* Bungshi, 9 C W N 879, Ramgopal *v* Dhirendra, 54 C 38›

necessary religious rites such as marriage and the like initiatory ceremonies, exequial rites and Sraddha ceremony, and the payment of debts contracted for the above purposes. (*p*)

The Calcutta High Court thus explains the term: "That phrase, (legal necessity) though sanctioned by usage, is not perhaps a very apt one If the two expressions 'legal necessity' and 'legitimate family purpose' are treated as interchangeable and as having the same legal significance in reference either to a father as *karta* or to a brother or other relation as *karta* or to a widow in possession of a widow's estate, nevertheless the law was to be applied to those different states of the facts and some difference of result must ensue. A father, with minor sons, must have some discretion. He 'is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate'. (*q*) 'Family necessity' is an expression that must receive a reasonable construction." (*r*) It is not to be understood in the sense of what is absolutely indispensable, nor is actual compelling necessity; if the transaction as a whole was beneficial to the family it is binding on the members. (*s*) It depends on the facts of each particular case (*t*)

P C view,

Benefit of the estate —Their Lordships of the Judicial Committee in the case of *Palaniappa Chetty* v. *Deivasikamony* (*u*) have given illustrations of what in the ordinary course would be likely, to be accepted by a Court as instances of 'benefit to the estate' They stated "The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits."

(*p*) *See* Kameswara *v* Veeracharlu, 34 M 422, 424 20 M L J 855 9 M L T 26 8 I C 195

(*q*) Suraj Bunsi *v* Sheo Persad, 6 I A 88, 101 5 C 148

(*r*) Lala Mukti *v* Iswari, 24 C W N 938, 944-5 57 I C 858

(*s*) Shaikh Jan *v* Bikoo, 7 *P* 798 1929 P 130, Sadhu *v* Chimna, 1929 L 397

(*t*) Palaniappa *v* Deivasikamony, 40 M 709, 714 44 I A 147 33 M L J 1 21 C W N 729 19 Bom L R 567 15 A L J 485 26 C L J 153 39 I C. 722 affirming 34 M 535, Chandrika *v* Ram, 12 O L J 565 89 I C 567 1925 O 459, *see* Suraj Narain *v* Chandar, 2 O W N 904 1925 O 743

(*u*) See foot note (*t*) above

There was difference of opinion in the Allahabad High Court regarding the true significance of the term *benefit of the estate*. In some of the decisions wider meaning had been given (*v*) while in others the expression had been taken in a narrower sense. (*w*) A Full Bench of the same High Court has held that the expression means such acts as a prudent owner would have done with the knowledge available to him at the time and is not limited to transaction of *defensive nature*, e g., to avert some threatened injury to the estate, (*x*) and it is to be judged by what might have been expected at the time when the act was done and not by the result thereof. (*y*) But a Division Bench of the Allahabad High Court has in effect doubted the soundness of the general proposition laid down by the Full Bench regarding the significance of the expression *benefit of the estate* (*z*) The Bombay High Court, (*a*) after the decision of the above-mentioned Full Bench (*b*) and perhaps before it was reported, on a consideration of all the important decisions of various High Courts and of original texts, has held that *benefit to the estate* was to be of a protective character and that it would not include an alienation of the property for the purpose of investing the proceeds so as to yield a better return and would not imply vast powers of management which might amount to an authorisation to embark on speculative ventures. In this Bombay case the property alienated was the separate property of the minor son This Bombay decision relied also on a decision of the Calcutta High Court, (*c*) which has been referred to by the Privy Council, (*d*) and which practically

Allahabad,

Bombay,

Calcutta, P C,

(*v*) Jado Singh *v* Nathu, 48 A 592 24 A L J 633 1926 A 511, Tula Ram *v* Tulshi, 42 A 559, Mahabir *v* Amila, 46 A 364

(*w*) Shankar *v* Bechu, 47 A 381 23 A L J 204 86 I C 769 1925 A 333; Bhagwan *v* Mahadeo, 45 A 390 21 A L J 271 1923 A 298: 71 I C 959, Inspector *v*. Kharak, 50 A 776 1928 A 403

(*x*) Jagat *v* Mathura, 50 A 969 F B 1928 A 454

(*y*) Jagat *v* Mathura, *supra*, Shaikh Jan *v* Bikoo, 7 P 798 1929 P. 130, Inspector *v* Kharak, *supra*

(*z*) Kishan *v* Raghu, 51 A 473 1929 A 139

(*a*) Ragho *v* Jaga, 53 B 419, 424 1929 N. 251

(*b*) Jagat *v* Mathura, *supra*

(*c*) Pursid *v* Honooman, 5 C 845

(*d*) Doulut *v*. Mehr, 14 I A. 187 15 C. 70.

held that the touch-stone of manager's authority is necessity. In the Central Provinces it is held that *benefit to the estate* must be of a defensive character. (*e*)

C P

Evidence

Evidence of Legal Necessity – In the absence of evidence of legal necessity, the fact that all the adult members of a joint family executed the deed of transfer, is not sufficient evidence of necessity. (*f*)

Necessity:

Karta's powers, necessity.—The *karta* can raise money for the purpose of an ancestral business which he has to manage. (*g*) The father or manager other than the father, cannot do so for the purpose of embarking in a business that is not ancestral, (*h*) though it was so held (*i*) The power of the father to borrow money as the *karta* of the family is wider than other managers. (*j*) Where a business like money-lending has to be carried on in the interests of the family as a whole, the managers may properly make contracts, give receipts and compromise and discharge claims ordinarily incidental to the business. (*k*)

business debt,

suits,

The manager can maintain suits on behalf of the joint family (*l*) and can represent the entire family so as to bind minor members who were not made parties, (*m*) and can discharge decrees, (*n*) execute decrees, and can receive pay-

(*e*) Nagraj *v* Ganpat, 1930 N 85

(*f*) Salamat *v* Bhagwan, 52 A 499 1930 A 379

(*g*) Wadhawa *v* Rattan, 30 I C 813 126 P W R 1915 189 P L R 1915; Dayal *v.* Bahal, 60 I C 610, Subbaray *v* Tangavelu, 45 M L.J 44. 1924 M 33, Babu *v* Bansraj, 27 I C 567 (O) *see p* 356

(*h*) McLaren *v* Verschoyle, 6 C W N 429, 458, *see* Sheothal *v* Arjun, 1 P L J 135 56 I C 879 *see p* 357

(*i*) *See ante pp* 356 357

(*j*) *See ante pp* 379-380

(*k*) Kishan *v* Har, 38 I A 45 33 A 272 13 C L J 345 15 C W N 321: 9 I C 739 21 M L J 378 13 Bom L R 359, *see* Pulukkavandy *v* Periyakaruppa, 2 I C 203 (M)

(*l*) *See post*, Sec 9, Sub-Sec 1, 'Suit by manager or single member", Sheikh Ibrahim *v* Ram, 35 M 685 21 M L J 508 10 I C 874, Sheo *v* Jaddo, 35 A 383 12 A L J 1173 41 I A 216 18 C W N 968 20 C L J 282 16 Bom L R 810 on appeal from 33 A 71, Subramani *v* Ramakrishna, 70 I C 165 15 L W 31, Lalji *v* Keshowji, 37 B 340 14 Bom L R 840 17 I C 193, Hori *v* Manman, 34 A 549 F B: 15 I C 126

(*m*) *See post*, Sec 9, Sub Sec 1, "Suit against manager alone," Tribani *v.* Ramasaran, 10 P. 670, 753 F B

(*n*) Jai *v.* Ram, 1929 L 270.

ments (*o*) and give valid receipts which will be binding on the family. (*p*) He can compromise a suit for the benefit of the family, (*q*) and refer a dispute to arbitration. (*r*)

criminal proceedings,

The expenses of defending the head or any other member in a criminal charge (*s*) for prosecuting a litigation relating to the abduction of the wife of the alienor (*t*) or in a suit for defamation, (*u*) are valid necessities. But it is an illegal and immoral act of the father to lodge a maliciously false criminal case against another, hence the decree passed against the father for having done such tortuous act is not binding on the sons. (*v*)

discharge and acknowledge debts,

He can give a valid discharge under Section 7, (*w*) and an acknowledgment under Section 19 (*x*) of the Limitation Act, (*y*) but not after he ceased to be the manager (*z*) He can make endorsement of part payment on a bond and thereby

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(*o*) Jhakhri *v* Phagu, 1927 P 329

(*p*) Achhaibar *v* Ram, 35 A 380 19 I C 645 11 A L J 463

(*q*) Surendra *v* Sambhunath, 55 C 210 1927 C. 870, Ram *v* Brij, 1928 L 235 (*bona-fide* entered into by father), *see post* Sec 9, sub-sec ii "Compromise and family arrangement by father"

(*r*) Nanak *v* Banarsi, 12 L 65 1930 L 425, Jagannath *v* Kanhai, 6 I C 123 (A), Shib *v* Mohan, 1930 L 388 [*but see ante p* 356 foot-note (*b*)]

(*s*) Beni *v* Man, 34 A 4 11 I C 663 8 A L J 1015, Ramalingam *v* Muthyyam, 26 M L J 528 24 I C 356, Nobin *v* Khirode, 6 C W N 648, Dhanukdhari *v* Rambirich, 1 P 171 70 I C. 391, Hanumat *v* Sonadhari 4 P L J 653 52 I C 734, *but see* Nathu *v* Dindayal, 2 P L J 166 39 I C 665, Chuman *v* Ram, 39 I C 861 (P.), Nimbaji *v* Kisan, 65 I C 688 (N)

(*t*) Anokh *v* Sapuran, 1923 L 660

(*u*) Sumer *v* Liladhar, 33 A 472 8 A L J 306 9 I C 624

(*v*) Sunder *v* Raghunandan, 3 P 250 5 Pat. L T 235 1924 P 465

(*w*) Doraisami *v* Nondisami, 38 M 118 F B 25 M L J 405 21 I C 410, *see post* Sec 9, Sub sec v "Minority saving of limitation", Duraisawmi *v* Venkatarama, 21 M L J 1088 12 I C 503, Kandasami *v* Irusappa, 41 M 102 33 M L J 309 40 I C 664, Mahableswar *v* Ramchandra, 38 B 94 15 Bom L R 882 21 I C 350, Palaniandi *v* Papathi, 22 I C 76, Anantarama *v* Shrinivasa, 7 I C 267 8 M L T 71, Sapdu *v.* Sakharam, 52 B 441 Asutosh *v* Sashi, 48 C L J 555 Santiprosad *v* Kalipada, 27 C W N 372

(*x*) Har *v* Bakshi, 19 C W N 860 31 I C 30, Bhaskar *v.* Vijalal 17 B 512, Surayya *v* Subamma, 1928 M 42, *see* Chandra *v* Behari, 52 I C 436 (C)

(*y*) Act IX of 1908

(*z*) Kodandarama *v* Arunachala, 32 I C 997 (M), Venkatarkrishnayya *v.* Rangayya, 1928 M 865.

save limitation (*a*) But he cannot give up valuable claim without any return or consideration (*b*)

sign Hundi, register shares,

He can also sign a Hundi payable in the course of management (*c*) to bind all the members, (*d*) can have his name registered as holder of shares of a limited company belonging to the joint family (*e*) and can execute in his sole name promissory notes which will bind the family. (*f*) A manager is competent to make gift of family property to an idol (*g*) or to a temple (*h*) on the occasion of the performance of religious obsequies, but cannot give up substantial portion of a mortgage debt out of charity to the mortgagor, (*i*) nor can the *karta* give away any portion of joint property in charity. (*j*)

execute promissory note,

religious purposes,

particular debt,

He can recover the sum paid for such debts only which were for purposes of the family necessity and not the entire sum paid to clear off all debts against an agreement with all the members of the family (*k*)

withdrawing compensation for land acquired,

The managing member of a joint Mitakshara family consisting of minors also, has been held to be a person competent to alienate property as contemplated in Sections 31 and 32 of the Land Acquisition Act (I of 1894) and hence he can withdraw the whole compensation awarded under the said Act (*l*) A *karta* can alienate joint family property only for legal necessity and for benefit to the estate, and consequently a compulsory acquisition under this Act cannot come under this category, it seems, therefore, the manager cannot withdraw the compensation which, unless intended to meet some legal necessity or some benefit to the estate, is not within

(*a*) Bajrangi *v* Kesho, 6 P 811, 815
(*b*) Konduru *v* Indoor, 1928 M 601, Dasaratha *v* Narasa, 51 M 484
(*c*) Narayanan *v* Chidambaram, 12 I C 410 (M)
(*d*) Raghunath *v* Sri, 45 A 434 21 A L J 323 1923 A 424
(*e*) Piari *v* Muir Mills, 41 A 619 51 I C 322 17 A L J 783
(*f*) Krishnanand *v* Raja, 44 A 393 20 A L J 233 66 I C 150 1922 A 110, Ramgopal *v* Dhirendra, 54 C 380 1927 C 376
(*g*) Ramalinga *v* Shivachidambara, 49 I C 742 36 M L J 575 9 L W 224 25 M L T 253 see Lalta *v* Sri, 42 A 461, *see also* Gangi *v* Tammi, 50 M 421 54 I A 136
(*h*) Avdiyappa *v* Muthulakshmi, (1925) M W N 653 1925 M. 1281
(*i*) Dasaratha *v* Narasa, 51 M 484
(*j*) Amar *v* Saradamoyee, 57 C 39, 42 33 C W N 690 1929 C 787
(*k*) Pokhar *v* Jagu, 25 C W N 745 (P C) 2 P L T 587 (1921) M W N. 66 61 I C 681
(*l*) Dindayal *v* Ram, 32 C W N 815 this followed in Daya *v* Bhim, Civil Rev No 1512 of 1928 (Cal)

the powers of the manager. Besides the spirit of these Sections to protect the interest of such minors, will be frustrated if the *karta* be allowed to withdraw the compensation as a general rule of law applicable to all cases.

revenue,

The money borrowed for payment of Government revenue, (m) for meeting the expenses of the marriage of a member of a family (n) and the expenses of the second marriage of a co-parcener are legal necessities. (o) So also the expenses of a *gowna (or Dwiragamana)* (p) or *Mundan* (q) ceremony are legal necessities, but the quantum of expenditure must depend on the means of the family and the social customs and sentiments, *i. e.*, on the status of the family. (r) The absolute alienation, in lieu of maintenance of joint family property in some cases is a valid necessity, (s) but alienation for future maintenance is not sanctioned by law, (t) this latter rule, however, is not inflexible. (u) The debt incurred for paying off another debt which was his pious duty to pay, (v) is also a legal necessity.

marriage,

gowna and *mundan* expenses and the amount,

maintenance,

pious duty,

lease,

A permanent lease is an alienation and in order to support the grant of such a lease by the manager it is necessary to prove legal necessity or benefit of the family, (w) just like the grant of a similar lease by a *Shebayet* of an endowment. (x) He can, however, give a valid consent to a transfer of a non-occupancy holding by a tenant of the joint family. (y).

(m) Gaya v. Ram, 28 I C. 21 13 A L J 246, Ranjit v Ram, 1 P L W 197. 37 I C. 833, Sagar Singh v Mathura, 87 I C 1035 1925 O 750

(n) *See pp.* 161-163, Seeni v Angamuttu, (1912) 1 M W N 99 13 I C 802, Dedar Singh v Bansi, 85 I C 741 1925 L 520.

(o) Bhagirathi v Jokhu, 32 A 575 6 I C 465

(p) Bajrangi v Padarath, 1930 A 504

(q) Shyam v. Badri, 51 A 1039 1929 A 789, (*Mundan* is a ceremony which the shaving of the head is the main feature)

(r) Bajrangi v Padarath, *supra*

(s) Sundaram v Subbammal, 29 I C 23 (M)

(t) Sucha v Pal, 1924 L 298, Bala v Gurdit, 3 L L J 484; *see also* Kuthalinga v Shammunga, 1926 M 464 (widow's alienation), Beli v Ram, 1929 L 678

(u) Ralla v Govardhar, 1930 L 697, Moti v Sobha, 30 I C 968 9 S L R 69.

(v) Ram v Mangal, 60 I C 219 23 O C 327 8 O L J 87

(w) Basdeo v Yusuf, 51 A 285 1928 A 617

(x) Palaniappa v Deivasikamony, 40 M 709 44 I.A 147 33 M L J. 1 21 C W N 729 26 C L J 153 19 Bom L R 567 15 A L J 485 39 I C 722

(y) Golapdi v. Purno, 21 C W N 774 27 C L.J 129 41 I C. 37.

sell lands,

He can enter into a contract to sell immovable property of the joint family, (z) but such contract is not specifically enforceable with respect to the share of a minor in Bengal. (a) He is also competent to sell (b) the joint property or mortgage (c) family lands for the purpose of purchasing other lands if the sale or the mortgage as the case may be, does not injuriously affect the interests of the other members of the family. He can sell land for better land or land convenient for use (d) But a sale on the ground that the property is at a great distance and malarial in climate, is not binding on the family (e)

pre-emption,

The money raised to safeguard the interest of the family by exercising the right of pre-emption, is a valid necessity, (f) but ordinarily a father cannot encumber family property to pre-empt other property. (g)

buildings

The sale of a dilapidated house which is not habitable and does not fetch any rent, (h) and the sale intended to avert future continuous loss to the family, (i) are justifying causes. The erection of a building in a more extensive scale with money raised for the purpose, is within the powers of the *karta*, if it fetches large income and would have otherwise been disastrous, (j) but the father cannot sell joint family property for acquiring another better house. (k) The money borrowed to build a house for the education of the children, is not a legal necessity (l)

Sub-Sec iv.—CREDITORS AND ALIENEES

Enquiry of necessity.

Duty of creditor dealing with manager.—The lender or purchaser dealing with a manager is bound to enquire into

(z) Hargobind v Mehtab, 18 N L R 67; Hari v Kaula, 2 Pat. L J. 513 F. B 40 I C 142
(a) Nripendra v Ekbarali, 57 C 268 34 C W N 272 1930 C. 457, in this connection *see* Sub Sec vi topic 'powers of Guardian'
(b) Krishnasawmi, *In re* 13 I C 648 11 M L T 182
(c) Subramania v Chidambara, 41 M L J 459 (1921) M W N 740 14 L W 495, *see* Pitambar v Sital, 25 I C 263 12 A L J 64, Atar v Raghu, 55 I C 974 2 U P L R 118 (A) (d) Mathuswami v Saudana, 1927 M. 649
(e) Bhagwat v Anandrao, 22 N L R 136 86 I C 515 1924 N 302
(f) Chotkanu v Ganga, 1927 A 219. *see post* Ch XVI, Sec 2, Sub-Sec iii.
(g) Sankar v Baichu, 47 A 381 1925 A 333
(h) Nagindas v Mahomed, 46 B 312
(i) Ishani v Ganesh, 23 C W N 858, Suraj v Gurcharan, 1925 O. 743.
(j) Jago v Nilkanth, 1928 N 78
(k) Lajja v Abdul, 1928 L 437 (l) Jogesh v Chapala, 90 I.C 594 (C)

the necessities for the loan or sale, and to satisfy himself as well as he can, that the manager's act is for the benefit of the family.(*m*) He is to prove legal necessity for the greater part of the consideration(*n*) which will raise a presumption of necessity for the whole (*o*) The onus is on him to establish that the contract was for the benefit of the family (*p*) He must establish that he was dealing with the manager.(*q*) Mere fact that the alienation is made by the manager does not bind the family and the person relying on the transaction is not relieved of the burden of proof imposed on him.(*r*)

necessity for greater part.

Onus on creditor

If he does so enquire as to the existence of necessity, and acts honestly, he is safe · he is not affected by the precedent mismanagement of the family property, nor by the subsequent non-application of the money to the purpose for which it is borrowed,(*s*) nor even by the non-existence of the alleged necessity if it is reasonably credited and is legally sufficient (*t*) But if the creditor is familiar with all the circumstances of the family and if he knew whether any necessity arose or not, then he is to prove the actual existence of necessity (*u*) And if he knew that the alienor is a spendthrift and there is reasonable apprehension that the money to

Precedent mismanagement

Non-application of money.

Creditors knowledge of family affairs,

(*m*) Gajadhar *v* Ambika, 47 A 459 41 C L J 450 49 M L J 238 87 I C 292 1925 P C 169; Dirg *v* Bhan, 13 I C 945 9 A L J 63, Annamalay *v* Na U Ma, 17 I C 909 5 Bur L T 157, Tirbeni *v* Ram, 11 A L J 713 20 I C 951, Raghunatha *v* Damodra, 6 I C 720 7 M L J 384, Savumian *v* Narayanan, 15 M L T 372 : 23 I C 248; Mandil *v* Megh, 1 P L J 39 34 I C 742; Girdhari *v* Kishen, 5 L 511 85 I C 463 1925 L 240, Jokhu *v*. Ganesh, 1928 P 54 (*purchaser*)

(*n*) Khushal *v* Labhan, 1928 N 232

(*o*) Hitendra *v* Sukhdev, 8 P 558 1929 P 360

(*p*) Sotam *v* Parduman, 8 L 673 1928 L 103, *see* Sub-Sec iv "Onus" in Sec 9 *below*

(*q*) *See* Sitaram *v*. Doma, 1929 N 270

(*r*) Subashini *v* Habu, 89 I C 100 (C)

(*s*) Raghubans *v* Indarjit, 45 A 77 20 A L J 886 1922 A 526, Vishvanath *v* Mallappa, 49 B 821 27 Bom L R 1103, 1106 92 I C 628 1925 B 514 and Ramayya *v* Suryanarayana-murthi, 1927 M 830 (non application), *see* Indar *v* Nanak, 32 I C 454 (P), Gajanan *v* Sitaram, 1929 B 55

(*t*) Hunooman *v* Babooee, 6 M I A 393 18 W R 81, Sri Thakur Ram *v* Ratan, 53 C L J 561, 572 P C 35 C W N 841, Anant *v* Collector, 40 A 171 22 C W N 484 27 C L J 363 34 M L J 291 20 Bom L R 524 4 Pat L W 226 44 I C 290, Jai *v* Bajrang, 56 I C 826 7 O L J 330 (*See* 5 O L J 691 48 I C 914), Mandil *v* Megh, 1 Pat L J 39 34 I C 742, Shankar *v* Pandurang, 1927 N 65

(*u*) Rambhan *v* Woman, 1928 N 251

be raised will not be spent for the purpose of the necessity then it is his duty to see to the application of the money. *(v)*

Representation of necessity to lender, as held by All.

But in a case, where the managing members represented to the lender that the money wanted was for the purchase of a zamindari, the *Allahabad High Court* has held that "if he (the lender) was satisfied that the sale was about to take place and the borrowers represented to him that the money which they borrowed was needed for the purposes of the sale, it was not necessary for him to ascertain whether the money was actually needed for the purchase or whether the purchase money had already been paid or not" (w)

P C view,

It does not seem that the Privy Council ever intended that such conclusion should ever be drawn from its decision in *Hunooman Persaud's* case. The same High Court has subsequently held that the vendee may be excused from making detailed enquiries but to start with there must be certain circumstances in front of him to give him the impression of the probability of the existence of a valid necessity *(x)*

recent All view

Sec 38 Tr. Pro Act

Section 38 of the Transfer of Property Act embodies the same rule by laying down that the circumstances constituting legal necessity shall be deemed to have existed, if the lender, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

No money decree against manager.

But the creditor will not be entitled to a money decree against the manager on personal covenant if no such case was made out, and the Privy Council did not allow such an amendment being made there *(y)*

Creditor's duty when dealing with Manager carrying trade—*See* "Creditor's duty" *ante p* 360 in Sec. 4, Sub-sec. v.

Creditor's duty when dealing with Karta carrying trade—*See* "Creditor's duty" in Sub-sec. v, in Sec. 4, p. 318.

Rate of interest—*See* Sec 8, Sub-sec viii, "Interest" and Sec 9, Sub-sec iv "Onus" and Ch CII, Sec 5, Sub-sec. iv. "Interest."

Transaction with holder of widow's estate—*See* Ch. XII, Sec. 5, Sub-sec. iv "Duties of creditors and purchasers".

(v) Neki v Kure, 1928 L 526
(w) Tula Ram v. Tulshi, 42 A 559, 562 60 I C 3.
(x) Bhagwat v Salamat, 1929 A. 205
(y) Gajadhar v Ambica, 47 A 459 41 C L J 450 49 M L J 238; 87 I.C. 292 1925 P C 169

Transaction with Purdanashin lady—See Ch, XII, Sec 5, Sub-sec. v "A person dealing with a Purdanashin lady"

Whether transfer to be set aside

Transaction with Members of Joint Family—See Section 7, sub-sec. ii.

Alienation by manager in excess of necessity—The creditor is entitled to enforce his dues against the entire estate for the whole amount advanced, though an insignificant portion of it was not for legal necessity. (z) The question of necessity regarding a portion should not be allowed to be raised after a long lapse of time (a) and a sale also should not be set aside, when a negligible amount was not applied for necessity, (b) even if the portion of the consideration not required for necessity be not insignificant, (c) provided the purchaser acted honestly and made due enquiry as to the existence of necessity, (d) and if he could show that the sale itself was justified by legal necessity, (e) then he is under no obligation to see to the application of any surplus and is therefore not bound to make re-payment of such surplus to the members of the family challenging the sale (f) Therefore, an alienation should not be set aside, merely because the difference between necessity and the consideration for the alienation is large as held in some cases. (g) But when the difference is great, that is, about half and the vendee failed to prove

even necessity small

(z) Bahadur v Kamleshar, 90 I C 988 1925 A 624 F B, Chandrika v Bhagwat, 83 I C 54 1925 A 170, Khusal v Labhan, 1928 N 232, Sathapan v Vedivem, 1928 M 450

(a) Panigrahi v Chendrasekharam, 1927 M 215, *see* Joi v Sarbara, 6 L, 137 7 L L J 354 89 I C 302 1925 L 396 (20 years), *see also* Ram Sunder v Lachhmi, 51 A 430 33 C W N 690 (14 years)

(b) Angan v Saram, 1929 A 503, Jai v Khairati, 1928 O 465

(c) Ram Sunder v Lachhmi, 51 A. 430 P C 33 C W N 699 (quarter), *see* Joi v Sarbara, *supra* (quarter), Baburoo v Pandharinathi, 1930 N 43 (conditional sale—one fifth not for necessity), Gajanan v Sitaram, 1929 B 55 (Rs 1400 out of Rs 4000 excess)

(d) Srikrishan v Nathu, 49 A 149 54 I A 79 1927 P C 37 31 C W N 462 45 C L J 386, Naimat v Din, 8 L 597 54 I A 211 45 C L J 548 1927 P C 121, Suraj Bhan v Sah, 32 C W N 117 46 C L J 291, Gouri v Jewan, 32 C W N. 257 47 C L J 7 1927 P C 121, Buta v Gopal, 119 L 164 (3/10 not proved for necessity), Sri Nath v Jagannath, 52 A 391 193 A 292.

(e) Hunmanpersad Panday v Babooee, 6 M I A 393

(f) Hunmanprasad v Babooee, *supra*, & *see foot note (d) above*

(g) Shyam v Badri, 51 A 1039 1929 A 789, Mata v Surajbali, 23 A 5.2 83 I C 32, *see* Ram v Abu, 27 A 494, Gobind v Baldeo, 25 A 330.

that he had made due enquiry, the sale is to be set aside on condition that the plaintiff repays the vendee the amount required for necessity. *(h)*

Principle applies to sales,

These principles are applicable to cases of mortgages as also of sales. *(i)*

by widow, Mohunt, guardian

This principle applies equally to female heirs, *i e*, holders of widow's estate, *(j)* to the *Sebayets* or *Mohunts* or managers of endowments *(k)* and to the guardians of infants *(l)*

Matters to be looked into

In cases of sales in excess of necessity when the surplus was not insignificant, the facts whether the sale of any other property would have fetched the sum required and whether a mortgage of any property would have been proper instead of the sale of the property in question, should be gone into before upholding the sale. *(m)*

Re-fund, compensation,

Sec 51 Tr Pro Act

Remedies of parties when alienation set aside.—*When the sale made by the Karta is set aside*, the purchaser is entitled to get a refund of the sum applied for necessity, *(n)* and to compensation when the family had been benefited by the alienation *(o)* or to the reliefs under Section 51 of the Transfer of Property Act, namely, to require the person causing the eviction either to have the value of the improvement made in good faith, be paid to the transferee or to sell his interest in the property to him. *(p)* The mortgage by the *Karta* for no legal necessity, is not available to the extent of the interest of the mortgagor, unless special circumstances as in the case of *Mohabir Persad v Ramyad Singha* *(q)* were present *(r)*

(h) Sri Nath *v* Jagannath, 52 A 391 . 1930 A 292
(i) Hitendra *v* Sukhdev, 8 P 558, 566 7 1929 P 360
(j) *See* Ch XII, Sec 5, Sub-sec ii below
(k) *See* Ch XIV, Sec 9, Sub sec ii below
(l) *See* Sub sec v below
(m) *See* Murli *v* Ghammar, 51 A 61 1930 A 22
(n) *See* Deputy Com *v* Khanjan, 29 A 331 34 I A 72 11 C W.N 474 : 5 C.L J 344 4 A L J 232 9 Bom L R 591 17 M L J 233
(o) Madho *v* Harbian, 18 C 157 17 I A 194, 198-9, Mohabeer *v* Ramyad, 20 W R 192 12 B L R 90, Honooman *v* Bhagbut, 15 W R F B 6 8 B L R 358, Surab *v* Shew, 11 B L R App 29
(p) Harilal *v* Gordhan, 51 B 1040, Dattaji *v* Kalba, 21 B 749, Abhoy v Attarmani, 13 C W N 931
(q) 20 W R 192 12 B L R 90
(r) Lachman *v* Sarnam, 39 A 500 44 I A 163 21 C W N 990, 26 C L J 97 15 A L J 584 33 M L J 39 40 I C 284

When alienation made by a member of his undivided share is set aside, the remedies available are stated in Sec. 7, Sub-Sec v, *infra*, " Equity in favour of alienee of undivided share ".

Mesne profits,

Mesne-profits from the date of repudiation of the contract are to be paid by the transferee, in possession, for value from the *karta* who had no knowledge of the invalidity of the transfer. (*s*)

Void or voidable

Effect of alienation by manager without authority.— The question frequently arises whether an alienation made by the managing member not within his powers, is *void* or *voidable* The Madras (*t*) and Patna (*u*) High Courts have held that in cases of transfers for not justifiable necessities the transfers are void only and held that this principle of law applies equally to managers of joint family and to female heirs. (*v*) The Lahore High Court on the other hand has held such alienations to be voidable and not void (*w*) Lord Sinha, a member of the Judicial Committee has, in a case of an alienation by widow, laid down that an alienation in excess of her powers is not altogether void but only voidable by the reversioners (*x*) Such unauthorised alienation may be ratified or acquiesced in by the minor on attaining majority. (*y*) Though the minor can question the validity of such transfer, it cannot be challenged by a third party who has no *locus standi.* (*z*)

Mad, Patna,

Lahore

P C held voidable.

Ratification

Questioned by third party.

When void

An unauthorised alienation by some adult members of a Mitákshará joint family who were the heads, is void. (*a*)

(*s*) Bhirgu v Narasingh, 39 A 61 14 A L J 1161 35 I C 475

(*t*) Amirthalinga, *in the matter of*, 1928 M. 986 Kandasami *v* Somaskand 35 M 177 20 M L J 371 5 I C 922 (1910) M W N 580 *see in this connection* Subbee *v* Krishnamachari, 45 M 449 1922 M 112

(*u*) Nathu *v* Dindayal, 2 Pat, L J 166 39 I C 665.

(*v*) Amirthalinga, *in the matter of*, *supra*

(*w*) Tapassi *v* Raja Ram, 1930 L 136

(*x*) Ramgodwda *v* Bhausaheb, 52 B 1 54 I A 396 32 C W N 88 1927 P C. 227 *see also* Ch XII, Sec 5 Sub Sec vi

(*y*) Amar *v* Saradamayee, 57 C 39, 42 33 C W N 690 1929 C 787, Vencatachella *v*. Rungasawmy, 8 M I A 319, Rama Sami *v* Venkataramaiyan, 6 I A 196 2 M 91, *see also* Amirthalinga, *in the matter of*, *supra*, *but see aontra*, Kandasami *v* Somaskand, *supra*

(*z*) Tapassi *v* Raja Ram, *supra*

(*a*) Lachman *v* Sarnam, 39 A 500 44 I A 163 21 C W N 900 26 C L J 97 13 A L J 584 19 Bom. L R 646 40 I C 284 33 M L J. 39

Gift

A gift of immoveable property is either valid or it is not binding on the family. (*b*)

Managers interest not available, if transfer avoided

When an unauthorised alienation by the manager is avoided, the entire alienation is set aside and it will not operate to transfer the manager's own interest in the joint family property (*c*)

Sub-Sec v—FAMILY ACCOUNT

Manager's liability to account —All the adult members are entitled to take part in the management of the joint property, and if all are joint managers then no one is liable to be called upon to render an account. But such a state of thing is very rare the joint family is founded on the principle of subordination to the senior or capable member in the absence of which the disruption of the family must follow, hence one member becomes the *karta* or governor of the family, as is generally the case in practice, and as such he is in exclusive management of the joint family property, exercises control over the income and the expenditure, and is the custodian of the surplus if any The principle upon which the right to call for an account rests, is not that the manager is to be looked upon as an agent or a partner, but it is that when one of several joint owners receives all the profits, he is bound to account to his co-sharers for their shares of the profits, after making such deduction as he has the right to make, *i e.*, what has been actually spent for the family according to his pleasure But he is to make good what has been misappropriated or concealed by him

Principle on which account demanded,

In *Bhowani Prasad* v *Juggernath*, (*d*) the principles *firstly*, on which accounts have to be taken with a view to a partition of joint family properties, and *secondly*, on which settled accounts may be re-opened, have been clearly explained As regards the *first*, his Lordship observes,—

(*b*) Uma v. Mahabir, 1929 A 854

(*c*) Ashrafunissa v Sahdeo, 1929 A 479 *see* Kamtaprasad v Madhorao, 25 N L R 28 1929 N 60

(*d*) 13 C W N 309 9 C L J 133 3 I C 241

"the account which has to be taken of the entire family property in the hands of the different members is mainly an enquiry into the existing assets, the head of the family cannot in general be called upon to defend the propriety of the past transactions of the family"

Having regard to the position of the manager, the ordinary rule followed is, that members are entitled, not to accounts of past transactions, but to a division of the family property actually existing at the date of partition, except in cases of fraud, mistake, misappropriation and the like. With respect to the *second*, the learned Judge observes,—

ordinary rule

"It is well settled that, although the Court is always reluctant to reopen an account which has been settled with deliberation and with tolerable fairness, relief will be granted where fraud or mistake is established In *Varnon v Vadry*, Lord Hardwicke ruled that, when an account has been stated if *fraud* or *imposition* is established the *whole* shall be opened, but, if there are *mistakes* and *omissions*, the party objecting shall be allowed no more than to surcharge and falsify In other words, as Lord Hardwicke stated in *Pitt v Cholmondeley*, the *onus probandi* is always on the party having the liability to surcharge and falsify,—'for the Court takes it as a stated account and establishes it, but if any of the parties can show *omission* for which credit ought to be given, that is a *surcharge*, or if anything is inserted that is a *wrong charge*, he is at liberty to show it, and that is *falsification*, but that must be by proof on his side"—But—"if the Court is of opinion that errors of sufficient number and sufficient magnitude are shown, it is not necessary that the errors shown should amount to fraud, if they are sufficient in number and importance whether they are errors caused by mistake or errors caused by fraud the Court has a right to open the accounts"

The law has been very clearly explained by the Privy Council in the case of *Arulli Porrasu* v *Subbarayadu*, (*e*) in the following words —

explained by P C.

"Their Lordships desire once more to repeat the warning they have often given against attempting to apply without qualification in India the rules applicable to strict accounts between trustees and *cestuis que trusts* that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply This does not mean that breach of established duty should be less severely dealt with in India than in this country, but that there are fiduciary relationships which do not involve all the duties which are imposed upon trustees here The office of manager of a joint family estate affords an illustration of this difference In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he

(*e*) 44 M. 656 48 I A 20 34 C L J 56 26 C W. N 1 41 M L J 33 23 Bom. L. R 920 61 I C 690

is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with "(*f*)

case-law,

Case-law on karta's liability to account.—Ordinarily there can be no suit for accounts against a karta (*g*) In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for only what he received and not for what he ought to or might have received if the moneys had been frofitably dealt with, (*h*) and he would have been more prudent and less extravagant. (*i*) He is not obliged to keep account while the family is joint. (*j*) He is only to account as to the existing state of the property, (*k*) using his own discretion unfettered in any way regarding the management of the family funds, and controlled only by his own sense of right and wrong. (*l*) The members of the family have no right to look back and claim relief against past inequity of enjoyment of the members or other matters. (*m*)

Bengal.

Bengal school.—The demand for an account may be made even during jointness by a member desirous to know the actual state of the family fund (*n*) Though the co-parceners of a joint family governed by the Dayabhaga school, have their shares defined in the joint property, yet the right of a co-parcener to call for an account from the manag-

(*f*) 34 C L J 56, 63 44 M 656 48 I A 280 23 Bom L R 920 41 M L J 33 19 A I J 621 1922 P C 71 61 I C 690 *See* Rammi Reddi *v* Gangireddi, 45 M 281 42 M L J 570 70 I C 337 1922 N 236, Nibaran *v* Nirupama, 26 C W N 517 34 C L J 563 69 I C 476. In connection with the subject *see* the discussion "No difference in two schools" in Sec 9 Sub sec. ii

(*g*) Jyotibati *v* Lakshmeshwar, 8 P 818, 828 1930 P 230

(*h*) Arumilli *v* Subarayadu, *supra*

(*i*) Suraj *v* Iqbal, 48 I C 543 5 C L J 676

(*j*) Ramnath *v* Goturam, 44 B 179, 183 21 Bom L R 179 54 I C 115

(*k*) Ramabhadra *v* Virabhadra, 22 M 470 26 I A 167 3 C W N 533 1 Bom L R 388, Parmeshwar *v* Gobind, 43 C 459 20 C W N 25 . 33 I C 190 (Final decree by Patna High Court 2 P L T 365) this followed in Sri Ranga *v* Srinivasi, 50 M 866, 873 1927 M 801, Jyotibati *v* Lakshmeshwar, *supra*

(*l*) Jyotibati *v* Lakshmeshwar, *supra*

(*m*) Parmeshwar *v* Gobind, *supra*, Sri Ranga *v* Srinivasa, *supra*

(*n*) Obhy *v* Pearee, 13 W R F B 75 5 B L R 347, Sarat Kumar *v*. Bholanath, 15 I C 616 15 O C 244

ing member is the same as laid down by the Privy Council in the above case. (*o*)

Right to get account,

Right to account.*—It should, however, be observed that a member of a joint family cannot sue for a share of the profits of the joint family estate, as he has no definite share until partition He cannot sue for account against the manager (*p*) but may sue for partition of such estate, and then is he entitled to an account of the assets in his hand. (*q*) But if the head of the joint family does not account for the profits, the provisions of the Civil Procedure Code as to mesne profits are not applicable to a suit for partition where the plaintiff has no specific interest until decree. (*r*) They may, however, be allowed on partition, if the member was entirely excluded from the enjoyment of the joint property, or if it was held be a member otherwise than as manager of a joint family, as when he claims it as his exclusive property. (*s*) But a member of a joint family is not entitled to claim mesne profit from the managing member who all along offered a certain sum of money to the member as his allowance, but he refused to eccept as being inadequate. (*t*)

mesne profits

Limitation

The Article 120 of the Limitation Act applies to a suit for accounts against a *Kartá* of a joint family. (*u*)

Sub-Sec vi—GUARDIANS AND MINORS

No guardian of minor member,

Guardian for minor member of family — No guardian can be appointed under the Guardians and Wards Act, of the property of a minor member of a joint family governed by the Mitàksharà, if he is not possessed of separate property, (*v*) So also no guardian of the property of a lunatic

of lunatic

(*o*) *See* Nibaran *v*. Nirupama, 26 C.W N 517, 528 : 34 C L J 563 : 69 I.C. 476
(*) *See post* Sec 11, Sub-Sec iii
(*p*) *See* foot notes (*f*)&(*j*) *p* 400 (*q*) *See* foot note (a4) note *p* 345
(*r*) Ramnath *v*. Goturam, 44 B 179 · 54 I C. 115, Trimbak *v* Pandurang, 44 B 621.
(*s*) Pirthi *v* Jowahir, 14 I A. 37 14 C 493, Shankar *v* Hardeo, 16 I A 71 16 C 397, Bhivrav *v* Sitaram, 19 B 532
(*t*) Suraj *v* Iqbal, 35 A 80 40 I A 40 17 C.L J 288 17 C W N 333 24 M. L J 345 15 Bom L R 456 18 I C 30.
(*u*) Biswambar *v*. Giribala, 32 C L J 25
(*v*) Sham *v* Mohanunda, 19 C. 301 ; Jhabbu *v* Ganga, 17 A 529 15 A W N 119, Chidambara *v* Rangasami, 41 M 561 F B 34 M L.J 181 45 I C 905 ; Virupakshappa *v* Nilgangava, 19 B 309 (F.B), Kattan *v* Ram, 1928 A 447 ; Govind, *In the natter* of, 50 A. 709 ; *but see* Narsi *v* Schindranath, 54 B 75

can be appointed in respect of his interest in the property of an undivided Mitâksharâ joint family, (w) otherwise, the interference would have forced the disruption of the joint family against the will of the members thereof. If the minor's interests are imperilled by corrupt or bad management, or other cause, the same may be protected by a suit for partition. (x) The undivided coparcenery interest is not property of which a guardian, appointed by the Court, can take care. So a Court cannot appoint one member the guardian of another in respect of the joint property, (y) But a guardian may be appointed to take care of the *person* of such a minor, (z) or of his separate property (a)

but held can be appointed

In Bengal no disruption follows

In a case, governed by the Bengal school of Hindu law, it is held that there is no automatic disruption of a joint family by the appointment under the statute, of a guardian of the property of a minor, a member of a joint family consisting of adult members. (b)

In the case of *Gharib-ullah* v. *Khalak Singh*, (c) Sir Arthur Wilson observes—"It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitâksharâ family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all and that therefore a guardian, if appointed, would have nothing to do with the family property." (d)

P C view on appointment of guardian

when can be appointed

But if there be no adult male member in the family, and all the co-parceners are minors, then undoubtedly a guardian of their joint estate must be appointed until one

(w) Parma *v* Mahadeo, 49 I C 907 (Pat)
(x) Mahadev *v* Lakshman, 19 B 91, Lekhraj *v* Dyal, 25 W.R 497, Damoodar *v* Senabutty, 8 C 537, Govind, *In the matter of*, 50 A 709, 712
(y) Balbir *v* Chedi, 85 I C 276 1925 O 642
(z) Virupakshappa *v* Nilgangva, 19 B 309 (F B)
(a) *See* Banamali *v* Arjun, 36 C W N 769.
(b) Hari Mohon *v* Sourendra, 41 C L J 535 88 I C 1025 1925 C 1153
(c) 30 I A 165, 170 25 A 407 7 C W N 681 5 Bom L R 478.
(d) *See* Gulab *v* Gokuldas, 40 C 784 40 I A 117 17 C L J 619 17 C.W N 918; 25 M L J 179 15 Bom L R 613 19 I C 521, Krishna *v.* Shamanna, 17 I C 497 23 M L J 610

of them attains majority, when the entire estate is to be handed over to him as the *kartá* of the joint family. (*e*) The mother of such minors is their natural guardian in respect of their separate property; (*f*) or of property of which they are the sole owners. (*g*)

Bom holds can be appointed

The High Court of Bombay has held that it has got the power to appoint a guardian of a minor member's property of an undivided Mitákshara joint family in which there are other adult members, by virtue of the powers of the Court of Chancery being vested in it (*h*) The Allahabad High Court (*i*) has similarly expressed an opinion that the Calcutta as well as the Allahabad High Courts possess similar powers, but it followed the series of cases and properly refused to appoint a guardian of the interest in the property of such an undivided minor member. The Calcutta High Court also entertains the same view. (*j*)

so also Allahabad,

and Cal,

comment.

But whatever powers might have been vested in the various High Courts by the Letters Patent, it is doubtful whether in face of the above Privy Council decision,(*k*) a guardian for the interest of a Minor member of a Mitákahará joint family property can be appointed. The Privy Council decision embodies the true spirit of Hindu Law and when the circumstances of a case require immediate appointment of a guardian, a guardian may speedily be appointed after severing the co-percenery, (*l*) effected by the mere filing of suit for partition. In a recent decision the Privy Council has questioned the propriety of the appointment of a guardian of the property of a minor but has refrained from expressing any opinion as it was not necessary for the decision of the appeal. (*m*)

(*e*) Samdani v Kamalakant, 15 I C 424 (C), Ramchandra v, Krishnarao, 32 B 252

(*f*) Swarath v Ram, 47 A 784 23 A L J 625 89 I C 27 1925 A 595

(*g*) Shampuri v Ramchandra, 88 I C 268 1925 N 385

(*h*) Narsi v Sachindranath, 54 B 75

(*i*) Gobind, *In the matter of*, 50 A 709

(*j*) Hare Narain, *In re*, 50 C 141 1923 C 409 74 I.C 244

(*k*) Gharib-ullah v Khalak, *supra*

(*l*) *See ante p* 402 foot note (*x*).

(*m*) Sri Thakur v Ratan, 35 C W N 841, 846.

Parent guardian,

Parents as guardian.—Except the parents no other person has the absolute right to guardianship of their children. (*n*) The father is the natural guardian of the person and separate property of the sons and maiden daughters (*o*) and after him the mother is the natural guardian (*p*) But the father may deprive the mother of the guardianship of the person and separate property of such minors by appointing orally or in writing another person as guardian. (*q*)

mother after re-marriage,

Re-marriage of mother guardian.—By re-marriage according to the custom of her caste, a widow does not lose her right of guardianship (*r*) though the mother by re-marriage forfeits her preferential right (*s*) The Court under Sec 3 of Act XV of 1856 (Hindu Widow's Re-marriage Act has a discretion to remove a mother from the office of guardian of the children of her first marriage, but it must be from the point of view of the welfare of the infants

Change of religion

Change of religion of parents.—The conversion of the father into Islamism (*t*) or the mother, (*u*) into Christianity would not in itself be a ground for removing from the guardianship, unless he or she acts contrary to the obligations which the law imposes upon the guardian, namely, of bringing up the children in his old faith or that of her deceased husband, as the case may be. The duties of the natural guardian must be ragulated by considerations of what should be regarded as best for the interests of the minor. (*v*)

(*n*) Lachmi *v* Balram, 39 I C 662 2 Pat L J 190, Thayammal *v* Kuppanna, 38 M 1125 27 M L J 285 26 I C. 179, Emperor *v* Sital, 42 A 146, but *see* Suraiya *v* Subamma, 1928 M 42 (grandfather natural guardian)

(*o*) Nanabhai *v* Janardhan, 12 B 110

(*p*) Swarath *v* Ram, 47 A 784 23 A L J 625 89 I C 27. 1925 A 595, Kaulesra *v* Joragi, 28 A 233, Rangubbai *v* Gopal, 5 Bom L R 542, Shampuri *v* Ramchandra, 88 I C 268 1925 N 1, Ganpat *v* Mahadeo, 24 N L R 8, Sham *v* Umer, 11 L 312 1930 L 497 35 C W N viii

(*q*) Deb Nand *v* Anandman, 43A 213 59 I C 909, in this connection *see*, Jogannadha *v* Ramayamma, 44 M 189 62 I C 437, Budhilal *v* Morarji, 31 B 413

(*r*) Ganga *v* Jhalo, 38 C 862 13 C L J 558 15 C W N 579 10 I C 69, Putlibai *v* Mahadu, 33 B 107, 144 1 I C 659, Indi *v* Ghania, 1 L 146 53 I C 783, but *see* Panchappa *v* Sanganbasawa, 24 B 89, 91

(*s*) Ganga *v* Jhalo, *supra*, Chironji *v* Punam, 48 I C 75 (N), *see ante* p. 183.

(*t*) Mahomed *v* Kadhiban, 47 I C 817 12 S L R 14

(*u*) Dwijapada *v* Baileau, 20 C W N 608, 609 34 I C 632

(*v*) Vembu *v* Srinivasa, 23 M L J 638 12 M L T 547 17 I C. 609.

Guardians other than parents —All persons, other than the parents who have absolute right to guardinship,(*w*) must derive their authority from the Court.(*x*) But considering the habits and custom of the people of the part of the country in question, Madras High Court has held that in the absence of parents, the the parents, the paternal grand-father is the natural guardian. (*y*) Elder brother is also held to be a natural guardian. (*z*)

Others must get powers from Court,

grand-father,

brother.

Where there is no natural guardian alive steps must be taken in a proper Court representing the rights of the Crown which is paramount to even the parents, to have a guardian appointed of a minor (*a*) or a manager of a lunatic. (*b*) In a competition between relations about the appointment of a guardian of a minor, the relationship which is nearer in the view of Hindu Law is to be prefered. The Court can, therefore, on consideration of the various circumstances, appoint any person it considers fit in the interests of the minor. (*c*) The step-mother, in the absence of nearer relations is competent to act as the guardian of a minor (*d*) A married sister is not a guardian of her unmarried sister. (*e*) The Court has ample jurisdiction to pass such orders as it considers proper in the interest of the minor, (*f*) and so it can sometimes appoint joint guardians. (*g*)

Court to be moved when no natural guardian.

Nearer relation to be prefered,

step-mother,

sister,

joint guardians.

Appointment of guardian by parents —The father can orally or by writing nominate a guardian for his wards, execluding even the mother from the office , (*h*) but his power to appoint a testamentary guardian has been doubted. (*i*)

Appointment by parents

(*w*) *See foot note* (*u*) *above*
(*x*) Chandu *v* Mukandi, 26 Punj L R 120 87 I C 40 1925 L 503
(*y*) Surayya *v* Subamma, 1928 M 42
(*z*) Amar *v* Saradamayee, 57 C 39, 42 33 C W N 690 1929 C 787
(*a*) Thayammal *v* Kuppanna, 38 M 1125 27 M L J 285 26 I.C 179
(*b*) Dada *v* Chandra, 1929 N 93 (*c*) Lachmi *v* Balaram, *supra*
(*d*) Venkitaswami *v* Muthuswamy, 34 M L J 177
(*e*) Punjabrao *v* Atmaram, 87 I C 1018 1926 N 124
(*f*) Murari *v* Sraswathi, 7 L L J 30 1925 L 358 86 I C 226.
(*g*) Chironji *v* Punam, 48 I C 75 (N)
(*h*) *See* foot note (*o*) *p* 404
(*i*) Venkatraman *v* Janardhan, 1928 B 8

The mother may likewise exercise the power of nomination; but she cannot do so by Will (j) though the Court may respect her wishes, if expressed The guardianship is in the nature of a sacred trust, and they cannot therefore substitute another person in their place during their lifetime (k)

no substitute

So far as this nomination of guardian of the person and separate property of the minor is concerned there is no conflict of opinion as regards the father's power to do so

Testamentary power of father to appoint guardian,

But there is difference of opinion as to the testamentary powers of the father to appoint the guardian of the minor with regard to his interest in the joint family property to take effect after the father's death. The Bombay High Court holds conflicting opinions (l) Though this difference has been noticed by the same High Court, the question has been kept open, (m) but it leans towards the view that he has got no such power The Allahabad High Court (n) holds that a father can by word or writing nominate a guardian The Calcutta High Court (o) holds that the father has got such power because there is no such prohibition in Hindu law. The Bombay High Court (p) questions the soundness of the reasoning of the Calcutta High Court. The Full Bench of the Madras High Court (q) holds that the father has got no such power

Bombay,

Allahabad,

Calcutta,

Madras

Guardian of undivided interest in family

No member of a joint family governed by the Mitâkshara school can make a testamentary disposition of his undivided interest in the joint family because it is not definite and lapses by his death. An undivided member of a joint family governed by this school of Hindu law has got no definite share in the joint undivided property and hence no guardian

(j) Venkayya v Venkata, 21 M 401

(k) Annie Besant v Narayaniah, 38 M 807 41 I A 314 18 C W N 1089 27 M L J 30 20 C L J 253 16 Bom L R 625 12 A L J 1155 24 I C 290

(l) Harilal v Mani, 29 B 351, (no such power); Mahableshwar v Ramchandra, 38 B 94 21 I C 350, (possess such power)

(m) Venkatraman v Janardhan, 52 B 16, 30 106 I C 79 1928 B 8.

(n) Deba Nand v Anandmani, 43 A 213 59 I C 909

(o) Soobah Doorgah v Neelanand, 7 W R 74

(p) Venkatraman v Janardhan, *supra*.

(q) Chidambara v. Rangasami, 41 M 561 45 I C 905, *see* Subbarayadu v. Subbanna, 47 M L J 765 85 I C 457 1925 M. 371

for such interest of a minor member in the joint family property can be appointed (r) although some of the Courts of India, inspite of the above decisions (s) think that the High Courts created by the Charter possess such power. (t) Therefore, it cannot be said that a father can by Will appoint a guardian of his minor children who are members of an undivided joint family with respect to their interests in the joint family property.

Guardianship in marriage.—See *ante* pages 163-167.

Guardian of married minor daughters.—See page 167.

Guardian of minor adopted son.—See page 259.

Powers of guardian

Powers of guardian.—A person filling a fiduciary character like that of a guardian is authorised to perform any act which is manifestly for the benefit of the infant. (u) In Mrs. (now Dr.) Annie Basant *v.* G. Narayaniah (v) the Privy Council thus explains the law.

P C view;

"There is no difference in this subject between English and Hindu law. As in this country, so among the Hindus, the father is the natural guardian of his children during their minorities, but their guardianship is in the nature of a sacred trust, and he cannot therefore during his life-time substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian, entrust the custody and education of his children to another, but the authority he thus confers is essentially a revocable authority, and if the welfare of his children require it, he can, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising jurisdiction of the Crown over Infants, to create associations or give rise to expections on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation (Lyons *v.* Blenkeni". (w)

Court guardian's

The power of the guardian appointed by the Court is

(r) Gharibullah *v* Khalak, 25 A 407 30 I A. 165 7 C W N 681 5 Bom. L R 478

(s) *Ibid*

(t) *See p* 403 above

(u) Lakhmichand *v* Khushaldas, 18 S L R 230 1925 S. 330 88 I C 116, Seth *v* Bima, 1 N L R 66, Dayaram *v.* Motiram, 1930 N 21

(v) 38 M 807 18 C W N 1089, 1117 41 I A 314 27 M L J 30 20 C L J 253: 16 Bom L R. 625 12 A.L.J 1155 24 I.C 290

(w) Jac 245 (1821)

powers limited,

testamentary guardian also,

natural guardian's powers larger

more limited than that of a natural guardian. (*x*) Similarly the power of the testamentary guardian is limited to the terms of the Will (*y*) The natural guardian can without the sanction of the Court, alienate the property of the minor for the benefit of the minor, but a guardian appointed by the Court cannot (*z*) the father as natural guardian can enter into a family settlement (*a*) The natural mother of her son given in adoption, may express an intention to separate and demand partition of the joint property against the adoptive father. (*b*) When the mother was the guardian of the minor appointed by the Court and she mortgaged the minor's property to satisfy the debt left by the minor's father, the question whether she acted as guardian or not, does not affect the minor's liability, it is binding on the minor. (*c*) An alienation made by a guardian, if not legally justified, is voidable and not void and the minor on attaining majority may elect to stand by or avoid the alienation. (*d*)

Contracts by guardian

P C. view,

when binds Ward,

A contract by the guardian to sell the minor's property for the payment of his father's debts is not specifically enforcible. (*e*) The Privy Council has laid down that an onerous covenant cannot be imposed by the guardian upon the person and property of a minor, but where the minor's estate would be liable but for the interposition of the guardian, an undertaking by the latter of that liability would bind the estate. (*f*) This Privy Council decision did not affect the liability

(*x*) Krishnadhan *v* Sanyasi, 29 C L J 280 23 C.W N 500 51 I C 597, this not touched by P C on appeal, *see* 49 C 660 35 C L J 498 49 I A 108 43 M L J 41 24 Bom L R 700: 20 A L J 409 67 I C. 124, Krishna *v* Shamanna, 23 M L J 610, 616 17 I C 497

(*y*) *See* Sec 28 of the Guardian and Wards Act (VIII of 1890)

(*z*) Upendra *v* Shib, 23 C W N 634 52 I C 616, *see* Lalchand *v* Narhar, 89 I C 896 1926 N 31, Narayan *v* Dharma, 1925 N 134 81 I C 173

(*a*) Gajadhar *v* Luchhuman, 1927 P 339

(*b*) Jagadish *v* Sri, 1927 A 60

(*c*) Dayaram *v* Motiram, 1930 N 21

(*d*) Srinivasa *v* Earappa, 1929 M 856

(*e*) Srinath *v*. Jotindra, 30 C W N 263 89 I C 892 1926 C 445

(*f*) Waghela *v* Sheik, 11 B 551 P C

imposed by the Hindu law on a minor.(*g*) Therefore, so far as the contract by the guardian embodies the personal liability of the minor according to Hindu law, it is enforceable against the minor and so far as the covenant goes beyond that liability, it comes under the general rule that a guardian cannot bind his Ward by a personal covenant (*h*) The law may impose a liability on the minor to pay a debt but by that it does not necessarily follow that a contract to sell his property with a view to pay off his debt is binding on the minor and specifically enforceable against him, (*i*) nor is a contract for lease of immovable property enforceable against the minor (*j*) A personal liability of the guardian for damage may sometimes arise (*k*) The equitable doctrine of part performance cannot be invoked, although the transferee was put into possession by the guardian in anticipation of completing the contract, as the minor was no party to the contract (*l*) The position of the *de facto* guardian regarding the management of a minor's property is the same as that of a *de jure* guardian, so far as his acts were for the benefit of the minor. (*m*) The decisions on this point are not uniform and the Bombay High Court, therefore, holds that the matter should be settled by a Full Bench (*n*) In case of a sale by such *de facto* guardian, where it is not wholly binding on the minor, the remedy available to the latter is either *first* by setting aside the alienation conditionally on payment with interest to the vendee by the person challenging the alienation, the portion of the consideration

Personal covenant how enforceable,

specific performance,

damage,

part performance,

Position of *de facto, de jure* guardians

(*g*) Ramajoggayya *v.* Jagannadhan, 42 M 185 F B 36 M L J 29 9 L W 229 · 49 I C 872

(*h*) *Ibid.*

(*i*) Ramkrishna *v* Chidambara, 1928 M 407, Nageswara *v* Mandava, 1928 M 830, Nripendrachandra *v* Ekbarali, 57 C 268 34 C W N 272 1930 C 457.

(*j*) Monohar *v* Tarini, 34 C W N 135 1929 C 612

(*k*) Adikesavan *v* Gurunatha, 40 M 338 F B, 39 I. C 358 32 M L J 180, *see* foot note (*m*) in p 376 *supra*

(*l*) Nageswara *v* Mandava, *supra*

(*m*) Ramaswamy *v* Kasinatha, 1928 M 226 Mohanaund *v* Nafar, 26 C 820 3 C W N 770, *see* Tapassi *v* Raja Ram, 1930 L 136

(*n*) Harilal *v* Gordhan, 51 B 1040, 1045

utilised for the purposes binding on the minor, or *secondly*, by upholding the sale on payment of a further sum with interest by the vendee to the person questioning the validity of the transfer that was not applied for the benefit of the minor, or *thirdly*, by dividing the property in proportion to the benefit enjoyed by the minor. (*o*)

Principles to be followed

The principle governing these cases and those of the female heirs are the same (*p*) The Privy Council in a case of a female heir has held that the sale should not be set aside merely because a portion of the consideration money was not applied for necessity, holding that the real question is whether the sale itself was justified by necessity, and if the purchaser acted honestly and made due enquiry as to existence of necessity, he is under no obligation to see to the application of any surplus, and hence, a decree confirming the sale conditionally upon repayment by the purchaser to the plaintiff the sum not applied for necessity, is bad in law (*q*) But in case the sale is set aside, the purchaser is entitled to get a refund of the sum applied for legal necessity,(*r*) and to the benefit of section 51 of the Transfer of Property Act (*s*)

Mother guardian

The mother obtained a conditional order for the grant of certificate of guardianship under the Guardian and Wards Act (XIII of 1890), but before the condition was fulfilled she alienated a property of the Ward, the act of the mother may be deemed as made by her as natural guardian (*t*)

A person purchasing property from a mother acting as the guardian of her minor son, can validly set up a plea of legal necessity for the sale. (*u*)

Guardian *ad litem*

The powers of guardian appointed for a suit, to receive any money or other movable property on behalf of the minor

(*o*) Ramaswamy *v* Kasinath, *supra*
(*p*) Rajo *v* Zaga, 53 B 419, 422 1929 B 251, Kameswar *v* Run, 6 C 843 8 I A 8; see Ch XII, Sec 5, Sub-sec II
(*q*) Srikrishan *v* Nathu, 49 A 149 54 I A 79 1927 P C 37, Naimat *v* Din, 8 L 597 54 I A 211 45 C L J 548 1927 P C 121, Suraj Bon *v* Sah, 32 C W N. 117 P C 46 C L J 291, Gouri *v* Jewan, 32 C W N 257 47 C L J 7 1927 P C 121
(*r*) *See* Deputy Com *v* Khanjan, 29 A 331 34 I A 72 11 C W N 474 5 C L J 344 4 A L J 232 9 Bom L R 591 17 M L J 233
(*s*) Harilal *v* Gordhan, *supra*
(*t*) Sham *v* Umar, 11 L 312 1930 L 497
(*u*) Sheik Muhammad *v* Ramchandra, 90 I C 74 1926 N 179

is subject to the control of the Court, even if he happens to be manager of the joint family, (*v*) and Rule 6 of Order 32 of the Civil Procedure Code governs the case The contrary view of the Calcutta High Court (*w*) seems to have been, practically, over-ruled by the above decision

Extinction of power

Extinction of power of guardian.—On the marriage of a minor girl, her father who was her guardian till then, ceases to be so, and hence, he cannot present a deed executed by her after her marriage for registration (*x*)

Sub-Sec VII—PROBATE AND LETTERS OF ADMINISTRATION

See Ch. XVI, Sec. 4, *post*

Sec 7—ALIENATION

Sub-Sec 1—ALIENATION OF PROPERTY

Alienation of separate property,

Separate property of member—It should be noted at the outset that a member of a joint family may have his separate or self-acquired property not thrown into the joint stock over which he has absolute power of disposal and which can be sold in execution of a decree.

Transfer before birth of male issue,

Alienation before birth of male issue—A male issue becomes entitled by birth to property which is in actual existence at the time of his birth *i e*, at the time of conception (*y*) He cannot lay any claim to property which had, before he was born or begotten, been validly alienated by the father (*z*) or by the step-grand-mother with the acquiescence (*a*) of the father, who had no co-parceners at the time, or if he had, with their consent the alienaion cannot be impeached by him. (*b*) The property transferred by the grand-father before the birth of the grand-son cannot be questioned by the latter. (*c*)

(*v*) Ganesh *v* Tulsiram, 36 M 295 40 I A. 132 19 I C 515
(*w*) Harihar *v* Mathura, 35 C 501
(*x*) Narayana *v* Audilakshmi, 51, M 462
(*y*) Khan *v* Ahmad, 1929 L 254
(*z*) Narain *v* Har, 35 A 571 11 A L J 941 : 21 I C 830, Sheo *v*. Jitu, 9 I C 52 (A), Partab *v* Bohra, 45 A 49, Ganesh *v* Tulja, 24 I C 696 26 M L J 460, Ramchandra *v* Mahabir, 64 I C 247 P), Narayan *v* Dhudibai, 21 N L R 38 1925 N 299 92 I C 663, Hitendra *v* Sukhdev, 8 P 558, 564 1929 P 360, Bali *v* Sardari, 1929 A 613
(*a*) Bhagwan *v* Ujagar, 32 C. W N 538, 543 47 C L J 189 1928 P C 20.
(*b*) Bhola *v* Kartick, 34 C. 372 11 C W N 462, Kandhai *v* Nawab, 8 O.L J 285-62 I C 811
(*c*) Venkataramani *v*. Subranamia, 1928 M 945

Alienation without necessity by father,

But it has been held that where "a Mitâksharâ father had made an alienation without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they had ratified the transaction, and no consent given by them after his birth would render it binding upon him." (*d*) If the son, during whose life-time the unauthorised alienation is made, do not contest it within the time allowed, it will be barred by limitation also against the after-born sons (*e*)

Movables,

Father's power of alienation with respect to immovable property apply equally to transfers of movables. (*f*)

When joint property can be transferred,

Family property.—Although the female members of a joint family are entitled to certain rights in the family property, yet as their right is imperfect and they hold a subordinate and dependent position, the male members alone have the right of managing and dealing with the property. When, therefore, alienation of any property becomes necessary for a purpose affecting the whole family, the male members are competent to effect the same, and they must all join in the transaction in order to be bound by it But if some of them are minors, then those that are adults are competent to make the necessary transfer But a transfer by all the adult members will not make it binding on the family when there was no necessity (*g*) It is already seen(*h*) that the manager also may alone make an alienation with the express or implied consent of the other adult members, such consent being implied in a case of urgent necessity when it would be impossible or extremely inconvenient to obtain express consent. (*i*) The assent to alienation given by some mem-

Consent of member,

(*d*) Hazari Mall *v* Abani, 17 C W. N 280, 283 17 C L J 38 18 I C 625, *see* Bunwari *v* Daya 13 C W N 815, 822 1 I C 670, Tulshi *v* Babu, 33 A 654 8 A L J. 733 10 I C 918, *but see* Chuttan *v* Kallu, 33 A 283 ; 8 A. L J 15 8 I C 719, Soundararajan *v* Saravana, 30 M L J 59, 34 I C 794

(*e*) Lachmi *v*. Kishan, 38 A 125 14 A L J. 25 ; 33 I C 913

(*f*) Bankey *v* Nattha, 1929 A 199

(*g*) Salamat *v* Bhagwat, 1930 A 379

(*h*) *See p* 379-381

(*i*) Miler *v*. Ranga, 12 C 389, Karam *v* Ram, 1926 L. 468.

bers of the family to the manager is only evidence of necessity (j) But attestation of sale-deed does not conclusively establish existence of necessity (k)

effect of attestation of deed

The Patna High Court has held that when one branch of a joint family who always represented that branch, borrowed money for the purposes of the family, the presumption is that such members had authority to borrow (l) In another case, the same High Court, has held that any member can deal with joint family in times of distress and family necessity (m) The same High Court has again held that a member other than the managing member, may alienate family property for necessity and has propounded a too broad proposition, *viz*, "in the case of every transaction relating to joint family the presumption is that although the transaction may be carried on in the name of one or another member of the family, it is a family transaction, and the member in whose name the transaction is carried on represents the joint family" (n)

Presumption

The managers of a joint family trading or money-lending business are the accredited agents of the family, and authorised to pledge its credit for all proper and necessary purposes within the scope of the agency, (o) and to represent the family in suits brought or mortgages executed by them in that capacity The father of the family has the power of alienating the whole property for the payment of his debts which the sons are held bound to pay (p) But he cannot legally revive a time-barred debt and bind the family property to secure its payment. (q)

In carrying trade

(j) Kalka *v* Ganga, 12 O L J 306 88 I C 127 1925 O 435

(k) Sri Nath *v* Jagannath, 52 A 391 1930 A 292

(l) Inder *v* Bidyadhar, 5 Pat L J 744 60 I C 282 1921 P 107

(m) Dhanuk *v* Rambrich, 1 P 171 1922 P 553

(n) Ram *v* Tanak, 1928 P 557

(o) Daulat *v* Mehr, 15 C 70 14 I A 187, Sheo *v* Saheb, 20 C 453, *see* pp. 356, 357 *ante*

(p) Nanomi *v* Modhun, 13 C 21 13 I A 1, *see* Chandradeo *v* Mata, 31 A 176 (F.B) 6 A L J 253 1 I C 479.

(q) Dalip *v* Kundan, 35 A 207, 209 18 I C 726 11 A.L J 244, in this connection *see* Naro *v* Paragauda, 41 B. 347, 352—3 . 19 Bom. L.R. 69. 39 I C 23, *see post* p 463.

Alienation of family property by manager.—*See* Sec. 6, Sub-Sec. ii, *supra*.

Legal necessity for valid alienation—*See* Sec. 6, Sub-Sec iii *supra*

Alienation in excess of necessity—*See* Sec 6, Sub-Sec. iv *supra*, "Alienation by manager in excess of necessity" and "Remedies of parties when alienation set aside"

Effect of alienation by manager without authority.—*See* Sec 6, Sub-Sec ii *supra*.

Pre-emption right of Hindus.—*See* Ch. XVI, Sec 2, Sub-Sec. iii.

Sub Sec ii—ALIENATION OF UNDIVIDED INTEREST

Alienation of undivided interest not allowed,

Alienation of undivided co-parcenary interest of a member.—The members of a joint family governed by the Mitākshara hold the joint property as joint tenants and not as tenants-in-common as in the Bengal School The Mitākshara theory of the tenure of joint property by members of a joint family, is, that each co-parcener's right extends to the whole, whereas the Dāyabhāga doctrine is, that each member's right extends only to the share to which he would be entitled on partition, and not to the whole From these theoretical conceptions of the nature of joint right, important legal consequences are deduced by the two schools According to the Mitākshara, one member cannot alienate his undivided interest in the family property, for he has no definite share in it, and when he dies his interest passes by survivorship, for he has no specific defined share such as might be claimed by the heirs of his separate property The Privy Council has explained that the joint family property "cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid, the estate is wholly unaffected by it, and it stands entirely free of it." (r)

P C view

(r) Sahu v Bhup, 39 A 437 44 I A 120 15 A L J 437 21 C W N 698 26 C L J 1 19 Bom L R. 498 33 M L J. 4 39 I C 280 *this approved* Chet Ram v. Ram, 44 A 368 49 I A 228 21 A L J 114 27 C W N 150 37 C.L J. 79 24 Bom L R 123 43 M L.J 98 67 I C. 569 1922 P C 247.

So a member cannot create a charge on the joint family property so as to survive him, (s) but he can, with the consent of all the co-sharers, mortgage or charge the share to which he would be entitled on a partition of the joint family property. (t) But a father who is a co-sharer with a minor son cannot give such a consent for his minor son. (u)

Charging undivided interest

But the Dâyabhâga controverts these doctrines by setting up a different theory of co-ownership as stated above, and maintains as incidents of this theory, that a single co-sharer, is competent to deal with his undivided share, and that such share does not pass by survivorship, but devolves on the heirs succeeding to his separate property

Dayabhaga doctrine

The member's power of alienating his undivided interest, is different in different Provinces —

Rule not uniform

In Bombay Madras, the Central Provinces and Berar— the strict ante-alienation rule of the Mitâksharâ has been departed from, and it has been held that a co-parcener can for *valuable consideration*, sell, encumber, or otherwise alienate his interest in undivided family property, (v) though it can be challenged that the transfer was not for *valuable consideration.* (w) But colourable conveyance, intended to prejudice the interest of a member without any real object to transfer either for consideration or for necessity, is not binding on the family. (x) Hence specific performance of a contract to sell by a co-parcener of his share in the family property is maintainable

Bom, Mad, C P, & Berar,

(s) Jwala v Maharajah Protap, 1 Pat L. J 497 37 I C 184

(t) Seth Lakshmi v Anandi, 43 C L J 513, 520 (P C)

(u) Subbarami v Ramamma, 43 M 824

(v) Vasudev v Venkatesh, 10 B H C R 139, Virasvami v Ayyasvami, 1 M H C R 471, Ranga v Ganapa, 15 B 673, Shivaji v Vasant, 33 B 267 10 Bom L R 778, Pandu v Goma, 43 B 472 21 Bom L R 213 50 I C 765, Aiyyagari v Aiyyagari, 25 M 690 F B, Nanjundaswami v Kanagaraju, 42 M 154 36 M L J 242, Narayanah v Kadigar, 5 I C 826 7 M L T 116, Bhojraj v Nathuram, 37 I C 498 12 N L R 161 *The law applied in Bombay, Madras and the Central Provinces has been recognized by the Privy Council* Balgobind v Narain, 15 A 339, 351 20 I A 116, 125, Lakshman v Ramchandra, 5 B 48, 62 7 I A 181, 195 affirming 1 B 561, Suraj Bunsi v Sheo Persad, 5 C 148, 166 4 C L R 225, 234 6 I A 88, 101-2, Pandu v Goma, 43 B 472 50 I C 765 21 Bom L R 213, Kissanlal v Nathu, 16 N L R 131 56 I C 44, *In Berar,* Ramkisan v Abdul, 24 N L R 186 32 C W N 1149 48 C L J 570 1928 P C 165

(w) Muthusamy v Palani, 1927 M 950

(x) Krishna Reddi v Gandavaram, 32 C W N 3 P.C

but not for his interest in any specific property. (*y*) The Madras High Court, following some decisions of the Calcutta High Court (*z*) in cases governed by the Dàyabhàga school, has held, in a case where the co-parceners held the property as tenants-in-common, that a suit for partition of a specific property of joint family is maintainable.(*a*) A purchaser can compel the co-parceners of his vendor to make a partition *inter se*, (*b*) of the joint family properties and get the share in the specific property, if possible, but cannot get joint possession (*c*) An alienee cannot claim a partial partition of the joint property against the other members (*d*) But the creditor can not ask for partition in the same suit in which he wants to enforce his mortgage (*e*) When, however, an agreement was entered into by the managing member to sell the family property which is not binding on the other members no specific performance of the contract will be allowed even against the share of the managing member.(*f*)

Bengal, B & O, N W P, Oudh & Punjab

In Bengal, Behar & Orrissa, the North Western Provinces, Oudh and the Punjub—the ante-alienation doctrine of the Mitàkshàrà is stictly followed so far as voluntary alienation by a co-parcener, of his undivided interest, is concerned. The question was considered by a Full Bench of the Calcutta

(*y*) Subba *v* Venkatrami, 38 M 1187, 1191 26 I C 983 and Manjaya *v* Shanmuga, 38 M 684 26 M L J 576 22 I C 555 dissenting from Nagiah *v* Venkatarama, 37 M 387 26 M L J 576 15 M L T 186, Maharaja of Bobbili *v* Venkataramanjulu, 39 M 265 16 M L T 181 27 M L J 409 25 I C 585

(*z*) Radhakanta *v* Bipro, 1 C L J 40, Syed Hobibar *v* Ashita, 12 C W N 640, Uma *v* Benode, 34 C 1026

(*a*) Harkristna *v* Venkata Lakshmi, 34 M 402 5 I C 491 20 M L J 323

(*b*) Dhulabhai *v* Lala, 46 B 28 23 Bom L R 777, 64 I C 115 1922 B 137, Subba *v* Krishnamachari, 45 M 449 42 M L J 372 1922 M 112, Mohanlal *v* Tek, 18 I C 825 9 N L R 18, Nanhusao *v* Ganapati, 53 I C 231 (Nag)

(*c*) Pandu *v* Goma, 43 B 472 21 Bom L R 213 50 I C 765

(*d*) Padala *v* Madavarapa, 12 I C 408 (M)

(*e*) Lalchand *v* Balkrishna, 15 Bom L R 944 (Note) 21 I C 689

(*f*) Nagiah *v* Venkatarama, 37 M 387 15 I C 623, disagreeing from Kosuri *v* Ivalury, 26 M 74 12 M L J 400 and Srinivasa *v* Swarama, 32 M 320, Govinda *v* Apathsahaya, 37 M 403 22 M L J 257 (1912) M W N 87 13 I C 471, Subba *v* Venkatarami, 38 M. 1187, *see* also Poraka *v* Vadlamudi, 33 M 359 20 M L J 328 5 I C 79 *see* Section 15 Specific Relief Act

High Court in the case of *Sudaburt* v *Fullbash* (*g*) and it was held that a member of a joint Hindu family governed by the Mitâksharâ law, has no authority to mortgage his undivided share in a portion of joint family property, in order to raise money on his own account and not for the benefit of the family. In the case of *Balgobind* v. *Narain*, the Privy Council has laid down that under the Mitâksharâ, as administered by the High Courts of the North-Western Provinces and Bengal, an undivided share in ancestral estate, held by a member of a joint family co-parcenary, cannot be mortgaged by him on his own account without the consent of his co-parceners (*h*) This has been adopted by the Patna High Court (*i*) So also in a case from Oudh, the Judicial Committee has held that a nephew was entitled to recover from a purchaser from his uncle the latter's undivided share after his death, which had been sold without the former's consent (*j*) The same view is held in the Punjab (*k*) Hence, the specific performance of a contract for lease by some members of an undivided Mitâksharâ joint family cannot be enforced (*l*)

P C held, In N W P & Bengal member cannot,

followed by, Patna,

Oudh,

Panjab

When an alienation of a co-parcenery property is set aside on the ground that it was not for legal mecessity nor for payment of antecedent debt of the vendor, his son is entitled to a decree without any condition being imposed upon him for the repayment of the consideration money to the vendee (*l*1)

When set aside, money not returnable.

An alienation of undivided share of a co-percener in a Mitâksharâ joint family in these parts of the country is

Void,

(*g*) 12 W R F B I, see Sheik Abdul *v* Jadunandan, 18 C L J 344, Janaki *v* Jamini, 22 I C 612 (C)

(*h*) 15 A 339 20 I A 116, see Sahu *v*. Bhup, 39 A 442 21 C W N 698, 702 26 C L J 1. 44 I A 126 33 M L J 14 19 Bom L R 498 39 I C 280; Jogi v Ganga 21 C W N 957 P C 42 I C 791, Kali Sankar *v* Nawab, 31 A 507, Tulshi *v*, Babu 33 A 654 10 I C 908 8 A L J 733, Muktabal *v* Haran, 6 I C 841 7 A L J 783, Budh *v* Kawal, 19 I C 430 (A)

(*i*) Jwala *v*, Maharaja Protap, 1 Pat L J 497 37 I,C 184, Amar *v* Har, 5 Pat L J 605, 618, Sukuru *v* Sri, 4 Pat, L J 354 51 I C 896

(*j*) Madhu *v* Mehrban, 18 C 157 17 I A 194, *see* Srikrishna *v* Lakhpat, 39 I C 287 4 O L J 73 *also* Dukhi *v* Sarju, 1928 O 113

(*k*) Piare *v* Ram, 11 I O 443 112 P W R 1911, *see* Daya Ram *v* Harcharan, 8 L 678

(*l*) Jadu *v* Abdul, 11 I C 892 (C)

(*l*1) Daya Ram *v* Harcharan, 8 L 678

Voidable.

void, (*m*) except those within the jurisdiction of the Allahabad High Court where it is voidable (*m*1) But an "agreement by members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution". (*n*) Although a private alienation of a co-percener's interest is not legal, yet a creditor in execution of a simple money decree can sell his interest (*n*1) But the purchaser is not entitled to joint possession but to sue for partition. (*o*) A coparcener can alienate his undivided interest in the joint family property during a "season of distress." (*p*)

Salable under decree

and in distress.

Transferee from another member cannot question transfer.

When joint family property is transferred by one member to another member, the letter cannot maintain a suit for declaration that the property is not liable to attachment and sale against the holder of a decree against his transferrer. (*q*)

Undivided share salable by decree,

Involuntary sale in execution before death.—Upon the same principle of equity, is founded the doctrine settled by judicial decisions that the undivided co-parcenery interest of a member in the joint property may be seized and sold in execution of a degree against him for his personal debts, (*r*) but the interest in the undivided ancestral money-lending business cannot be attached in execution of a decree against him personally. (*s*) A Hindu is bound, not only legally and

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(*m*) Lachhman *v* Sarnam, 39 A 500, 504 44 I A 163 15 A L J 584 21 C W N 990 33 M L J 39 19 Bom L R 646 40 I C 284 26 C L J 97, 101, Baran *v* Rup 11 I C 654 (A) but see Debi Prasad *v* Sheo, 21 I C 581 (O), Sahu *v* Bhup, supra, this approved in Chit Ram *v* Ram, 44 A 358 49 I A 228 21 A L J 114 27 C W N 150, 153 37 C L J 24 Bom L R 1231 43 M L R 98 67 I.C. 569 1922 P.C. 247 Shambhu *v*. Nand, 58 I.C. 963 23 O.C. 284.

(*m*1) Madan *v* Chiddu, 53 A 21, Madan *v* Gajendrapal, 51 A. 575, Jagesar *v* Deo Dat, 45 A 654

(*n*) Madho *v* Mehrban, 17 I A 194 18 C 157

(*n*1) Madan *v* Chiddu, supra

(*o*) Medni *v*. Nand, 2 Pat 386

(*p*) Thakurji *v* Nanda, 55 I C 317 2 U P L R 120 (A) See Thakurji *v* v Nanda, 63 I C 546 43 A 560

(*q*) Ram *v* Mathura, 19 A L J 299 60 I C 895

(*r*) Deendayal *v* Jugdeep, 3 C 198 4 I.A 247, Rai Balkishen *v*. Rai Sita, 7 A 731, Bailur *v* Lakshmana, 4 M. 302

(*s*) Umraosingh *v* Suganchand, 10 N L R 17 23 I C 156

morally but also religiously, to pay off the debts contracted by him, he is also in a position to pay when he has an interest in joint family property, provided that interest be severed by partition from that of his co-parceners,—but not otherwise, the severance again depends entirely on his will, for partition may take place by the desire of a single co-sharer, the debtor therefore, ought to have come to a partition, and applied his share to the payment of his debts, he cannot in equity and good conscience, be permitted to defraud his creditors or to escape his liability under a contract (*t*) by choosing to continue joint, and to enjoy the same · his undivided co-parcenery interest, therefore is allowed to be seized and sold in execution of a money-decree against him, and the purchaser is entitled to get his share on partition. But this can be done only during the debtor's lifetime, and the interest must be attached before his death, otherwise the right by survivorship would operate and defeat the creditor's equity.(*u*) An attachment before judgment will not operate to defeat the right by survivorship if the debtor dies after decree but before the application for execution is made,(*v*) but it has been held in Madras that if the debtor dies after decree but before sale, it will defeat the accrual of title by survivorship.(*w*) But a compulsory and involuntary sale in execution of a deceased member's share attached before his death is taken to operate as a partition, in so far as regards the division of interest, and the purchaser is entitled to what the debtor would get if a partition were *then* made; though partition, in so far as it means division of possession, may be effected by a suit subsequently brought for the same. (*x*) Where joint family property has been taken possession of by the purchaser in execution of a collusive decree against some

but during that member's life-time,

execution of decree before death

Possession by transferee

(*t*) Sadasiva *v* Hajee, 44 M L J 395 37 C L J 569, 599 72 I.C 48 1922 P C 397

(*u*) Surajbunsi *v* Sheo Persad, 5 C 148, 6 I A 88, Madhu *v* Mehrban, 18 C 157 17 I A 194, Jagritdas *v* Bhagisao, 28 I C 362 11 N L R 45, Jaganath *v* Shama, 18 I C 819 (C)

(*v*) Subrao *v* Mahadevi, 38 B 105 15 Bom L R 848 21 I C 330

(*w*) Muthusami *v* Chunammal, 24 I C 320 26 M L J 517, Thadi *v* Moola, 24 I C 667 16 M L T 123, (1914) M W N 733

(*x*) Hardi Narain *v* Ruder, 10 C 626 11 I A 26.

co-parceners, the other co-parceners cannot recover the whole property but their share in the property (*y*)

Co-sharer may set aside sale under Or 21, R.89, C.P C

When the share of one brother is sold in execution, another brother can apply under Order XXI, rule 89 of the Civil Procedure Code, to set aside the sale on depositing the amount payable under the rule, as he is a person interested in the property sold (*z*)

Interest of transferee

Rights of purchaser of undivided share—It is already said that the interest of a member is liable to variation according as existing co-parceners die or new co-parceners are born, until it is adjusted by partition, but a Full Bench (*a*) of the Madras High Court, disagreeing with a previous Full Bench decision, has laid down, that "the alienee is entitled to the interest alienated, and that such interest would neither be diminished by an increase, nor increased by diminution in the number of co-sharers" The Bombay (*b*) High Court has followed the principle laid down by the above Full Bench, and has to some extent held a different view than that expressed in a previous case of the same High Court. (*c*) In case of a sale of the complete undivided share of a co-parcener, a division in status takes place and the alienor ceases to be a member of a joint family (*d*) The Madras High Court seems to be not unanimous on this point (*e*) A purchaser is not entitled to mesne profit from the date of his purchase from other co-parceners (*f*)

If variable, Madras,

Bombay

When both the brothers mortgaged a specific item of their joint property and subsequently one of them sold his interest in that item to the mortgagee and the other brother sold his interest to the plaintiff, the plaintiff cannot claim to redeem

Right to redeem

(*y*) Nadhamuni v Appu, 48 I C 799 (M)

(*z*) Ramchandra v Srinivasam, 51 M 246

(*a*) Chinnu v Kalimuthu, 35 M 47 F B 21 M L J 245 9 I C 595

(*b*) Naro v Paragauda, 41 B 347, 353-5 19 Bom L R 69 39 I C 23

(*c*) Gurulingapa v Nandapa, 21 B 707, 805

(*d*) Soundararanjan v Saravana, 30 M L J 592, 595 34 I C 794, Soundararanjan v Arunachalam, 39 M 159, 172 F B 29 M L J 816, Srinivasa v. Krishnaswamy, 15 I C 354 11 M L I 312

(*e*) Bobbili, Maharaja of Venkataramanjulu, 39 M 265, 268 27 M.L J. 409 25 I C 585, Ganesh v Tulja, 26 M L J 450 24 I C 696.

(*f*) 39 M 265.

the whole property and compel the mortgagee to sue for partition, but can redeem only the interest purchased by him. (*g*) So also when the mortgagor's interest vested in three brothers, members of an undivided family and afterwards two of them agreed to sell the entire property to the mortgagee in possession, the third brother cannot claim to redeem the entire mortgage but his one third share. (*h*)

Not entitled to joint possession

The purchaser, who is a stranger to the family, at an execution sale of undivided co-parcenary interest in a dwelling house of a member of joint family, is entitled to delivery of possession by partition in execution proceeding or to have his remedy by a separate suit for partition, but he is not entitled to joint possession, (*i*) nor is he entitled to separate possession without partition (*j*) The same view has been held by the Calcutta High Court in a recent case governed by the Bengal School of Hindu law. (*k*)

View followed in Bengal

Specified property allotted on partition to alienee

In allotting the shares in a partition suit the Court should, as far as possible, allot the alienated lands to the share of the alienor so that the alienee may remain in possession of the same. (*l*) But it would be unfair to allot the whole of the immovable property to the vendor's share and the outstandings of the estate to the other member notwithstanding that the values of the shares are thus equalized. (*m*)

Other co-sharer may enforce sale of dwelling house to him

In a suit for partition of a dwelling house of an undivided family at the instance of the transferee, any member or members of the family may exercise his or their right to buy that share under the provision of Section 4 of the Partition Act. (*n*)

(*g*) Ganapathi *v* Beeru, 1927 M 1039

(*h*) Ramappa *v* Yellappa, 52 B 307

(*i*) Sec 44, Transfer of property Act (Act IV of 1882), Balaji *v* Ganesh, 5 B 499; Kota *v* Khetra, 31 M L J 275 37 I C 168, Medni *v* Nand, 2 Pat 383, Pandu *v* Goma, 43 B 472 21 Bom L R 213 50 I C 765; *see* Madan *v* Chiddu, 53 A 21, Kamtaprasad *v* Madhorao, 1929 N 60 25 N.L R 28

(*j*) Mamuji *v* Dalpat, 1928 N 37

(*k*) Girija *v* Mohim, 20 C W N 675; but see Rajani *v* Ram, 10 C 244

(*l*) Veerasami *v* Sivagurunatha, 21 L W. 111 85 I C 234 1925 M. 793, Narayan *v* Dhudabai 21 N L R 38 1925 N 299 · 92 I C 663.

(*m*) Varadarajulu *v*. Velayuda, 22 L W 230, 90 I.C. 743 1925 M. 1160.

(*n*) Act IV of 1893

He retains status,

Position of vendor co-parcener—It should, however, be observed that the co-parcener does not become divested of his status as a member of the joint family, by the mere sale of his undivided co-parcenary interest for value, nor can the purchaser have the status of a member of the family, so as to become benefited by survivorship on the death of a member without leaving male issue. Hence it appears that although the vendee may be a loser by birth of a member before partition is carried out by him, still the vendor is to be benefited by the death of a co-parcener. (*o*) But these questions that arise by reason of the departure from the Mitákshara law and introduction of innovations destructive of the joint family system, are beset with considerable difficulty (*p*) In Bombay aud Madras it has now been held that the interest of the alienee is not liable to such variation (*q*)

Bombay and Madras.

Sub-Sec iii—GIFT

Gift of small portion by father to relation,

Affectionate gift *— The father of a joint family is competent to make a gift of small portion of the property out of affection in favour of a male or female member of the family, (*s*) and this has been held allowable in favour of daughter but not of widow or mother, (*t*) and not in favour of one who is not a near relation (*u*) But he cannot alienate any considerable portion by way of affectionate gift to the members of the family, (*v*) even within the limits of his share. (*w*) A gift of the whole ancestral estate by a sonless proprietor to his married daughter for past and future services

not large,

not his share

(*o*) Gurulingappa *v* Nondapa, 21 B 797

(*p*) Aiyyagiri *v* Aiyyagiri, 25 M. 690 (F B), Bithal *v* Nand, 23 A 105

(*q*) Chinnu *v* Kalimuthu, 35 M 47 F B 21 M L J 246 9 I C 595, Naro *v* Paragauda, 41 B 347, 353-5 19 Bom L R 69 39 I C 23

(*) *See*, post Sec. 12, (2) and for general discussion on gifts, see, Ch XVI, Sec 3

(*s*) Bachoo *v* Mankorebai, 31 B 373 34 I A 107 11 C W N 769 6 C L J 1 17 M L J 343 9 Bom L R 640 on appeal from 29 B 51 6 Bom L R 208, Hanmantappa *v* Jivubai, 24 B 549 2 Bom L R 478, Vettor *v* Pooch, 22 M L J 321 13 I C 474, Sundararamayya *v* Sittamma, 35 M 628 21 M.L J 695 10 I C. 56

(*t*) Subba *v* Ademma, 47 M L J 465, 83 I.C 72 1925 M 60.

(*u*) Uma *v* Mahabir, 1929 A 854

(*v*) Kamakshi *v* Chakrapany, 30 M 452 · 17 M L J 405, Pitra *v* Srinivasa, 40 M 1123 32 M.L J 304 40 I C. 118, see in re Subba 30 I C. 781. 2 L W 754 (M)

(*w*) Subba *v* Ademma, *see* above

is not supported by custom in Nawan Shahr within Jullundur in the Punjab (*x*)

Gift invalid to stronger even in Bom. and Madras

Gift in favour of volunteer.—Although on grounds of equity, the strict ante-alienation doctrine of the Mitakshara has been departed from in Bombay and Madras, in favour of purchasers for value, whom equity regards with considerable affection, yet equity does not thus act in favour of volunteers. Accordingly, it has been held that a Hindu cannot make a valid gift of his interest in undivided property, (*y*) such gift is void and cannot prevent survivors from taking the share (*z*) A gift of family property to a coparcener by the members of a joint family for the performance of the Sraddha of a deceased sonless member of the family is valid, (*a*) so also a gift by the manager of the family property to a diety on the occasion of the performance of religious obsequies is binding on the family (*b*)

Gift for Sraddha, to deity,

to relation,

Similarly, a gift to a near relation of a reasonable portion who has some sort of moral claim, is binding on the members, but the quantum of the gift varies according to the nature of relationship (*c*) The manager of a joint family cannot make a gift of a part of the immovable property of the family to a person who is not a near relation nor when the gift was not for pious purpose or spiritual benefit, even though he was under deep debt of obligation to the donee. (*d*) A gift of one eighth share of the whole property by the father to a Brahmin who is richer than the former, is not a reasonable portion for a charitable purpose and is not binding on the family (*e*)

to obligee, to Brahmin

(x) Dhanna *v* Nami, 10 L 676, 678
(y) Sea Krishno Reddi *v* Gandavaram, 32 C W N 3 P C.
(z) Babu *v* Timma, 7 M 357 (F B), Ponnusami *v* Thatha, 9 M 273, Virayya *v* Hanumanta 14 M 459, Lakshman *v* Ramchandra, 5 B. 48, 61 7 I A 181 affirming 1 B 561, Visalakshi *v* Mahalinga, 8 M L T 200 7 I C 800, Chinnaya *v* Collector 8 M L T 250 8 I C 391, Aiyavier *v* Subramania, 32 M L J 439
(a) Bagirathi *v* Bagirathi, 50 I C 597 25 M L T 358 (1919) M W N 350,
(b) Ramlinga *v* Sivachidambara 49 I.C. 742. 36 M L J 575 25 M.L T 253, 9 L W 224
(c) Mukundrao *v* Wamanrao, 1927 N 97.
(d) Uma Shankar *v* Mahabir, 1929 A 854
(e) Sohan *v* Peare, 1925 A 865

Voidable.

A gift, made by the father, on his own **behalf and on** *behalf of his minor son, is voidable at the instance of the* minor son and not *ab initio* void. (*f*)

Sub Sec iv—WILL **

Undivided share cannot be devised,

Devise of undivided interest —A testamentary gift also, of the undivided interest stands on the same footing as a gift *inter vivos*. For, as regards testamentary power, it is now *settled law that no Hindu governed by the Mitákshará can make a testamentary disposition of his undivided interest in the joint family property, which interest passes, on the* moment of his death, by survivorship, to the surviving male members so that there is nothing left on which his Will can operate (*g*)

The father of a joint family can, with the consent of his adult sons and with the consent of relations who are interested in a minor son, bequeath a reasonable portion of ancestral property to his daughter, (*h*) but not his entire share. (*i*) He can, in any case, bequeath his self-acquired property. (*j*) But a Will made by the father bequeathing certain family property to his widow for her mainteance, is inoperative as against the son (*k*) So also a bequest by the adoptive father, even with the consent of the adopted son, is invalid (*l*) The father cannot exclude the son by a Will to defeat his right of survivorship. (*m*) But there is an *obiter* of the Madras High Court in which it is held that a statement in the Will to the effect 'I want to get myself divided and want to execute the Will may be effective. (*n*) The law on the subject has been explained by the Privy Council in the case of *Lahshman Dada Naik* v. *Ram Chandra Dada Naik*, thus.—

P. C View,

(*f*) Sheo Ghulam v Badri, 19 I C 560 11 A L J 798
(**) For general discussion, see Ch XVI Sec 4 specially Sub-Sec. iii
(*g*) See Deivachila v Venkatachariar, 49 M L J 317 1925 M 46 88 I C 967
(*h*) Patra v Srinivasa, *see above*
(*i*) Bhikhabhai v Purshottam, 50 B 558 1926 B 378
(*j*) Tavva v Ranga, 1929 M 785
(*k*) Subbarami v Rammamma, 43 M 824 5 9I C. 681
(*l*) Shivram v Ramkrishna, 1930 B 59
(*m*) Tara Singh v Ram, 1928 L 499
(*n*) Lakshmamma v Sreeramalu, 1927 M 1066.

"It has been ingeniously argued that partial effect ought to be given to the Will, by treating it as a disposition of the one-third undivided share in the property to which the father was entitled in his lifetime The argument is founded upon the comparatively modern decisions of the Courts of Madras and Bombay, which have been recognised by this Committee as establishing, that one of several co-parceners has, to some extent, a power of disposing of his undivided share without the consent of his co-shares

its reasons,

"Those cases have established that such a share may be seized and sold in execution for the separate debt of the sharer, at least in the lifetime of the judgement-debtor, and that it may be also made the subject of an alienation by a deed executed for valuable consideration The Madras High Court has gone further, and ruled that an alienation by a gift or other voluntary conveyance, *inter vivos*, will also be valid against the non assentient co parceners And assuming this latter proposition to be law, the learned Counsel for the apellant has insisted, that it follows as a necessary consequence, that such a share may be disposed of by Will, because the authorities which engrafted the testamentary power upon the Hindu law, have treated a devise as a gift to take effect on the testator's death, some of them affirming the broad proposition that what a man can give by act *inter vivos* he may give by Will.

"To this argument there are two answers. Their Lordships have to apply to this case the law as it is received at Bombay The decisions of the High Court of Bombay have ruled that a co-parcener cannot, without the consent of his co-shares, either give or devise his share, that the alienation of it must be for value, and if this be law the whole argument in favour of testamentary power over the undivided share fails

"Again, the High Court of Madras, though admitting that a co-parcener can effectually alienate his share by gift, has ruled that he cannot dispose of it by Will Its reasons for making this distinction between a gift and a devise are, that the co parcener's power of alienation is founded upon his right to a partition, that right dies with him, and that the title of his co-sharers by survivorship vesting in them at the moment of his death, their remains nothing upon which the Will can operate (*p*) This principle was invoked in the case of *Sùrajbunsi Koer*, and was fully recognised by their Lordships although they decided the particular case, which was one of an execution against a mortgaged share, on the ground that the proceedings had been gone so far in the life time of the mortgagor, as to give, notwithstanding his death a good title against his co-sharers to the execution purchasers. It follows from what has been said, that the weight of positive authority at Madras, as well as at Bombay, is against the proposition of the learned Counsel for the appellant

"Their Lordships are not disposed to extend the doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers beyond the decided cases In the case of *Surajbunsi Koer*, above

conclusion

(*p*) This is quoted in Lakhmi *v.* Anandi, 43 C L J 513 48 A 313 P C

referred to, they observed —'There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided family (governed by the Mitakshara law); and the law, as established in Madras and Bombay, has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition' The question, therefore, is not so much, whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence?" (q)

No partition by devise

The head of the joint family has not even the right to make a partition by Will of joint property among the various members of the family except with their consent. (r)

Devise voidable

A testamentary bequest is not void *ab initio* but only voidable. (s)

Inoperative Will may be evidence

The Privy Council, following its earlier decision (t) has laid down that a Will, which did not operate as a Will at all, was good evidence of a family arrangement contemporaneously made and acted upon by all the parties. (u)

Sub-Sec v—SETTING ASIDE ALIENATION

Persons entitled to share can question alienation,

Who can challange.—An invalid alienation of co-parcenary property can be challenged by the son (v) including adopted son (w) or any co-parcener (x) who is entitled to a share on partition. But the contest can be made by a person who was born, begotten or adopted before the alienation was completed or before a valid ratification of the alienation by all the co-parceners was made (y) A purchaser at a subsequent valid sale, can also contest previous invalid alienation. (z) So also a successor-at-law of one undivided member can

born before transfer,

purchaser,

(q) 5 B 49 7 I A, 181, *see also* Faizuddin v Tincowri, 22 C 565, 571

(r) Brijraj v Sheodan, 35 A 337, 346 40 I A 161 17 C W N 949 18 C L J 57 15 Bom L R 652 19 I C 826, Harkesh v Hardevi, 49 A 763 1927 A 454

(s) Kishan v Narinjan, 10 L 389 1928 L 967

(t) Brijraj v Sheodan, see above

(u) Lakhmi v Anandi, 43 C L J 513, 520 48 A 313 53 I A 123, Sadasivam v Shanmugam, 1927 M 126

(v) *See* p 411 above

(w) *See ante* pp 273, 279

(x) *See* p 411 above

(y) *See* p, 411 above

(z) Muhammad v Mithu, 33 A. 783 F B, Madan v Gajendra, 51 A. 575: 1929 A, 243, Brijbashi v Gopal, 2 A W N. 200,

successor,

creditor cannot

challenge an invalid alienation made by another deceased member. (*a*) An attaching creditor of the father cannot challenge the validity of a gift by the father of a joint family to his wife although the other members can (*b*)

Bom, Mad, C P except alienor's share,

Extent to which alienation set aside.—In Bombay, Madras and the Central Provinces a co-parcener can set aside an invalid alienation of the co-parcenary property except the share of the alienor. (*c*) But in Bengal including Behar, the United Provinces and the Punjab, the co-parcener is entitled to set aside the whole alienation. (*d*) In cases where alienation of undivided share is allowed (*e*) and where the alienation is partly valid, it is equitable to distribute the whole of the consideration for the sale, over the whole of the property sold in proportion to the value of the shares of the co-parceners and the alienor (*f*) Similarly where legal necessity has been proved for a part of the consideration and where property composed of several separate plots of land out of which some one or more could be sold to cover the amount needed, the sale can be maintained and with respect to some and set aside with respect to others (*g*) A sale cannot be converted into a mortgage where the existence of necessity and the sale at the market price have been proved and when

Bengal, Behar, U P, Punjab whole alienation

(*a*) Sarju *v* Mangal, 47 A 490 23 A L J 254 87 I C 294 1925 A 339.

(*b*) Saraswati *v* Mahabir, 1928 A 476

(*c*) Ramappa *v* Yellappa, 52 B 307 1928 B 150, Naro *v* Paragauda, 41 B 347 19 Bom L R 69 39 I C 23, Marappa *v* Rangasami, 23 m 89, Shiva-nath *v*. Tulshi, 23 A L J 865 89 I C 480 1925 A 801, *see* p 415-16

(*d*) Madho *v* Mehrban, 18 C 157 17 I A 194, Honooman *v* Bhagbut, 15 W R F B 6 8 B L R 358, Amar *v* Har, 5 Pat L J 605 58 I C 72, Ram Bilas *v* Ramyad, 5 Pat L J 622 58 I C 303, Mathura *v* Rajkumar 9 Pat L J 526 (F B) Ashrafunissa *v* Sahdeo, 1929 A 479, Lachhman *v* Sarnam 39 A 500 44 I A 163 1 C W N 990 40 I C 284, Sahu Ram *v* Bhup, 39 A 437 44 I A 126 21 C W N 698 15 A L J 437 39 I C 280 33 M L J 14, Ram Sahai *v* Prabhu 43 A 655, Jai Narain *v* Mahabir 2 Luc, 226 95 I C 857 1925 Luc, 470 Churanju *v* Kartar, 1925 L 130, Daya Ram *v*, Harcharan 8 L 678 107 I C 781 1928 L 111

(*e*) *See* "Alienation of undivided interest in Bombay, Madras and C P and Berar *pp* 415 416

(*f*) Vadivelam *v* Natesam, 37 M 435, 437 16 I C 835 23 M L J 256, but see Marappa *v* Rangasami, 23 M 89, Surajmal *v* Bapurao, 1929 N. 311

(*g*) Ram Karan *v* Shiva, 1930 A 95

there was no suggestion that the money could have been raised by mortgage. (*h*)

Equity in favour of alienee

When the alienation is set aside, the transferee for valuable consideration is entitled in equity to compensation when the family has been benefitted by the alienation, (*i*) or when such transferee has made improvements of the property, (*j*) to the knowledge of and without protest (*k*) from the persons challenging the alienation, or without their knowledge believing it in good faith, to be a valid transfer. (*l*) But the Allahabad High Court has doubted whether a transferee who did not make proper enquiry he was bound to do, can claim the protection afforded by Section 51 of the Transfer of Property Act (*m*) But an innocent transferee for value from the managing member without the knowledge of the invalidity of the transfer is liable for mesne-profits from the time of the repudiation of the contract (*n*) When an ancestral property was mortgaged as self-acquired property by the father, it is to be deemed that not only his self-acquired property was mortgaged but that he mortgaged it as manager of joint family applying the principle that the Court should incline to the view that a transferer alienated the property most favourly to a *bona fide* purchaser (*o*).

Sec 51, Tr Pro Act,

mesne profits

Three possible cases when sale for small necessity:

It is held in Madras that in a case of sale by the father, a member of a joint family consisting of himself, his father and his son, the following three possible cases arise when the son sues to set aside the sale on the ground that a valuable property was sold for inadequate consideration to meet a small family necessity. (*p*)

(*h*) Ishar *v* Bhikoo, 1929 L 809

(*i*) Madho Parshad *v* Mehrban, 18 C 157, 163-4 17 I A 194, 198 9, Mohabeer *v* Ramyad, 20 W R 192 12 B L R 90, Honooman *v* Bhagbut, 15 W R F B 6 8 B L R 358, Surab *v* Shew, 11 B L R App 29

(*j*) Lachmi Prasad *v* Lachmi, 1928 A 41

(*k*) Dittaji *v* Kalba, 21 B 749

(*l*) Transfer of Property (Act IV of 1882) Sec 51, Abhoy Churn *v* Attarmani, 13 C W N 931

(*m*) Lachmi Prasad *v* Lachmi, 1928 A 41, 43 (Transferee a party to false recital)

(*n*) Bhirgu *v* Narsingh, 39 A 61 14 A L J 1161 35 I C 475

(*o*) Seetharamamurthi *v* Rangayya, 1928 M 293, Andimula *v* Alemelu, (1916) 4 M W N 115 36 I C 365

(*p*) Venkatapathi *v* Pappu, 51 M 824, 831 1928 M. 788

"1. Where the whole of the consideration, even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction may have to be set aside making the consideration proved a charge on the family property. That would be a case resembling *Rottala Runganatham Chetty* v. *Pulicate Ramaswami Chetty*. (*q*)

first,

"2. Where the whole consideration is not grossly inadequate and can be regarded the price of the alienor's share but is less than the value of such share, the transaction may be up-held as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity. The case would then resemble *Marappa Gounden* v. *Rangaswami Goundan* (*r*) In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction, he or his heirs may have a right to contribution.

second,

"3. Where the consideration proved exceeds the value of the alienor's share, the transaction may be up-held as a sale of the alienor's share only and for the excess a charge may be given over the shares of the other members."

third,

Equity in favour of alinee of undivided share—When an alienation made by a member of his undivided share, is set aside at the instance of another member, the Court may order that the property should be thenceforth possessed in defined shares, and that the share of the transferrer should be subject to a lien for the return of the purchase money (*s*) For, equity looks on that as done, which ought to have been done and as a coparcener may make his share available for payment of his just dues by coming to partition with his co-sharers, and as he ought to do it and fulfil his obligation, the Court of equity declares it done (*t*) But such a course would be precluded in Bengal by the death of the transferrer

Return of purchase-money

(*q*) 27 M 162

(*r*) 23 M 89

(*s*) *See* Mahanth Ram *v* Barhamdeo, 14 C W N 552 2 I C 986, the parties came to Court again, Mnhanth *v* Nathuni, 15 C W N 748

(*t*) Mahabeer *v* Ramyad, 20 W R 192 12 B L R 90

and by the accrual of the right by survivorship before a judicial partition could be enforced in that way. (*u*)

Remedies of creditors and members when alienation set-aside.— *See Sec.* 6 *Sub-sec.* iv." *Remedies of parties when alienation set aside, pp. 396-397.*"

Sec 8—DEBTS

Sub-Sec. 1—DEBTS CONTRACTED BY MANAGER

Debts binding on family

Family Debt—When a debt is contracted for a family purpose by any member of the family, it is payable by the family or all the members It is seen that the manager of a joint family (*v*) or of its trading or money-lending business, (*w*) is competent to charge or alienate the family property for a legal necessity or for benefit of the family (*x*) falling within the scope of his authority

Legal necessity —*See* Sec 6, Sub-Sec iii *Supra*

Creditors and Debtors:—*See*, Sec 6, Sub-Sec. iv *Supra*.

Sub-Sec ii—PERSONAL DEBT OF MEMBER.

Original Mit law,

Personal debt of a Member—According to the strict theory of the Mitákshará law, the family property is not liable for the personal debts of a member. But a course of decisions has introduced two innovations destructive, to a great extent, of the Mitákshará system, one of which is the conversion into legal liability, of the son's pious duty to pay off the father's personal debts, and the consequent liability of the entire family property to satisfy the father's debts if not proved to have been contracted for immoral purposes, (*y*) and the other is, the compulsory sale of a member's undivided co-parcenary interest in the family property in execution of a money decree against him (*z*)

departed from

But while the Courts have gone far beyond Hindu law to help the father's creditors, they do at the same time over-

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(*u*) Madhu *v* Mehrban, 18 C 157 : 17 I A 194

(*v*) *Ante, p* 382 385, Sub-sec. ii and 388-392, sub Sec iii Sec 6

(*w*) Sub-sec v in Section 4, p 356

(*x*) What is legal necessity *see* section 6, sub sec iii, *supra*

(*y*) Girdharee Lall *v* Kantoo Lall, 1 I A, 321 22 W R 56, P C.

(*z*) Deendayal v Jugdeep, 3 C 198 4 I A 247

look and refuse to enforce the rule of Hindu law in favour of the creditors of members other than the father.

Failure to attach before death of member,

For though a debtor's co-parcenary interest is allowed to be sold during his lifetime in execution of the creditor's decree, yet it has been held that if the debtor dies before the attachment of his undivided interest, the creditor cannot follow it into the hands of the collateral male members to whom it passes by survivorship and who are considered not liable for the debts.

effect of attachment

Attachment has the effect of making the decretal debt a legal charge on the debtor's undivided interest Accordingly, after the attachment of a son's interest in execution of a decree against him, the father cannot alienate that interest to pay off his own debts. (*a*)

Sub-Sec iii—LIABILITY OF HEIRS FOR DEBTS

Liability for debt,

explained b Mit

Liability of the heir by survivorship—The Hindu law declares the heir of a person, whether taking by survivorship or by succession, to be liable for his debts. The rules on the subject are contained in three slokas of Yájnavalkya (*b*) and are explained in that part of the Mitákshará, where the Action for Recovery of Debts, is dealt with, and may be summarised as follow.—

1. That the male issues are liable to pay off the debts of their father and paternal grandfather, whether they inherit any property from or through them, or not But the grandson is not liable to pay interest, (*c*) and the great-grandson as such is not liable, though he is liable to pay the great-grandfather's debts when he inherits the latter's property.

2. That their liability arises only when the ancestor is dead or gone to a distant place and not heard of for twenty years, or laid up with an incurable disease.

3. That they are not liable for debts incurred for indulgence in women, wine, or wager or for other unlawful purposes.

(*a*) Subraya v Nagappa, 33 B, 264 10 Bom L R 1206

(*b*) Text No 18, p 316

(*c*) But *see* Ladu Narain v Goberdhan, 4 P 478 6 P L T 497 86 I C 721: 1925 P 470

4 That he who takes the *riktha* (rights) or heritage of a person, *i e*, his heir by survivorship or by succession, is bound to pay off his debts. The term *riktha* means heritage *obstructed* or *unobstructed* that this word signifies *unobstructed* heritage or co-parcenary interest lapsing or devolving by survivorship on a collateral relation, is beyond all doubts (*d*)

Payment of debt as held by Hindu Law,

The Hindu law discloses a high sense of morality as regards the payment of debts, which is declared to be religiously necessary for the salvation of the debtor's soul.

by Court

The Courts are certainly right in so far as they do not allow creditors to follow the co-parcenery interest passing by survivorship to an heir other than the male issue For Hindu law nowhere contemplates a compulsory sale of immovable property in execution of decrees The policy of Hindu legislators appears to have been rather against depriving people of ancestral land, the hereditary source of their maintenance. But when that policy has been departed from to an unwarrantable extent, in the case of father's debts, to the prejudice and injury of the male descendants, there is no cogent reason why the remoter heirs should be exempted from a just liability and permitted to appropriate the deceased debtor's undivided interest free from the charge of paying his debts

Liability of co-parceners

Collateral co-parcener's debts —It should be noticed that the debts of the male-ancestors in the male line stand on a different footing from those of collateral co-parceners of the same rank with them, accordingly a fraternal nephew is not bound to pay the debts of his paternal uncle, nor is his undivided co-parcenary interest liable to be attached and sold in execution of a personal decree against the uncle, though he is the head of the family (*e*)

Sub-Sec. iv—FATHER'S DEBT

Son's liability,

Father's debts and son's liability —The son's liability to pay his father's debts has undergone a gradual change by

(*d*) *See* Mit 1 1, 13

(*e*) Ram *v* Lachman, 30 A 460 5 A L J 417 A W N (1908) 191,

judicial decisions. The pious duty of a son as such, to pay off his father's debts is independent of his inheriting any property from or through him (*f*) whereas the liability of an heir as such, must be limited by the extent of the inherited property. It is not the pious duty of the grandson to pay the debt of the grandfather during the life time of his father, (*g*) nor is it the pious duty of a son given in adoption to pay his natural father's debt. (*h*) The pious duty to pay the debt of the ancestor, when he is dead, is not concerned with the question whether the debt is secured or unsecured, (*i*) or for the benefit of the son, (*j*) but only with the question whether it is incurred for illegal or immoral purposes This liability of the son, as now developed, is certainly not a joint liability with his father nor a joint and several liability as ordinarily understood in English law. (*k*)

urdergone change: son, heir, grandson,

The son's liability arises the monent the father fails to pay, (*l*) or the father's share in the joint property or his self-acquired properties are found insufficient to meet the debts. (*m*)

when liability arises,

It is already seen that as regards ancestral property there is no distinction between the father's and the son's interest, either in extent or in character.

Son's liability when father alive.—The son's pious duty to pay off his father's legal debts arises after the father's death as a general rule. This was so observed in the case of *Sahu Ram Chandra* v. *Bhup*, (*n*) and followed in some cases. (*o*) The Courts of justice have, long before these

General rule, liability on father's death,

(*f*) *But see* p 450-451 *post*, "Extent of son's liability"

(*g*) Chet Ram *v* Ram 44 A 368, 375 376 27 C W N 150 37 C L J 79 21 A.L J 114 24 Bom L R 1231 43 M L J 98 3 P L T 363 67 I C 5 69 1922 P C 347, on appeal from 41 A 529

(*h*) Shri Sitaram *v* Shri Harihar 35 B 169 12 Bom L R 910 : 8 I C 625

(*i*) Ram *v* Mangal 60 I C 219 23 O C 327 8 O L J 87

(*j*) Nathuni *v* Baijnath, 2 Pat L J 212 1 P L W 300 : 39 I C 352

(*k*) Narayanan *v* Veerappa 40 M 581, 584 31 M L J 386 35 I C 918

(*l*) Champa *v* Sham, 13 I C 530, (A,

(*m*) Sama Rao *v* Vnnnajee, 46 M 64 43 M L J 745 32 M L T 9 1923 M [illegible] Nanhusao *v* Ganpati, 53 I C 231 (N), Kishun *v* Tipan, 34 C 735 5 C L J 569 11 C W N 613, *see* Ramdeo *v* Gopi, 15 C L J 256 16 C W N [illegible]

O L J 330 56 I C 826, Manna *v* Bhagwandin, 5 Shivrao *v* Laxmibai, 1924 B 523 76 I C 638

but held present liability,

decisions, transformed the future pious duty of sons to pay off the father's debts, into a present legal liability annexed to both the father's and the son's interests in the ancestral property, if the father's debts were not contracted for illegal or immoral purposes. (*p*) And consequently even after the decision of the Privy Council in *Sahu Ram Chandra's* case, the Bombay (*q*) and the Madras (*r*) High Courts and perhaps the Calcutta (*s*) High Court also, have held that the creditor's remedies against the ancestral property are the same whether they are sought for in the life-time or after the death of the father. Subsequent to these decisions, the Judicial Committee by its Full Board in *Brij Narain* v. *Mangal Prasad* (*t*) has held that there is no rule that the son's liability is affected by the question whether the father, who contracted the debt or burdened the estate, is alive or dead, and thus it modified its own decision in *Sahu Ram Chandra.*

and affirmed by P C.,

result.

And accordingly an alienation by sale, mortgage or the like, of the family property by the father of the family, for his lawful debts, is valid and binding on the sons. (*u*) The same principle is applied also to a sale in execution of a decree against the father, at which ancestral property was sold to a *bona fide* purchaser for value. (*v*)

Antecedent debt — Referring to the case of *Muddun* v. *Kantoo* (*w*) the Judicial Commitee made the following observations in *Suraj Bunsi Koer's* case —

Suraj Bansi's case,

"This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions.—

(*q*) Hanmant *v* Ganesh, 43 B 612 21 Bom L R 435 51 I C 612, see Govind *v* Sakharam, 28 B 383 6 Bom, L R 344
(*r*) Sama Rao *v* Vannajee, 46 M 64 43 M L J 745 32 M L T 9 1923 M 36 71 I C 153, see *foot note* (z) p 437 *post*
(*s*) Lala Mukti *v* Iswari, 24 C W N 938 57 I C 858, Madhusudan *v* Iswari, 48 C 341 24 C W N 949 61 I C 25
(*t*) 46 A 95 51 I A 129 21 A L J 934 28 C W N 253 41 C L J 232 46 M L J 23 5 P L T 1 11 O. L J 107, 1924 P C 50
(*u*) Girdharee *v* Kantoo, 1 I A 321 22 W R P C 56, Surja *v* Golab, 27 C 762
(*v*) Muddun *v* Kantoo, 1 I A 321, 333.
(*w*) 1 I A 321 333,

"1st—that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an *antecedent* debt, or in order to raise money to pay off an *antecedent* debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted, and 2ndly, that the purchasers at an execution sale, being stranges to the suit, if they have no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings" (x)

Nanomi Babuasin's case

In the case of *Nanomi Babuasin,* (y) their Lordships observe,—

"Destructive as it may be of the principle of the independent co parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an *antecedent* debt, or against his creditor's remedies for their debts if not tainted with immorality On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority"

Girdharee Lal's case

Antecedent debt, a lawful one.

Some nice questions then arose as to the validity or otherwise of a mortgage or the like alienation, made by the father when there was no *antecedent* debt, but it was contended that having regard to the principle enunciated in *Girdharee's* case, the consideration money paid to the father for such alienation, if not proved to be taken or spent for immoral purposes, must itself constitute a lawful debt payable by the sons, and accordingly it has been held that although the mortgagee is not entitled to mortgage decree yet the debt being *antecedent* to the suit on the mortgage, he is entitled to a money decree directing the debt to be realised out of the whole ancestral estate inclusive of the mortgaged property. (z) A Full Bench of the Calcutta High Court (a) has made it clear that the decision of the Full Bench in the case of *Luchman* v *Giridhur* (b) has not been overruled by the decisions of the Privy Council in *Nanomi Babuasin's* case (c)

Cal, F. B.

(x) 6 I A 88, 106 5 C 148, 171
(y) 13 I A 1 13 C 21
(z) Luchmun v Giridhar, 5 C 855 F B, Gunga v Ajudhia 8 C 131, Khalilul v Gobind, 20 C 328
(a) Brijnandan v Bidya 42 C 1068 F B 19 C W N 849 21 C L J 543 : 29 I C 629
(b) 5 C 855 (c) 13 I A. 1 13 C 21.

and *Bhagbut Prosad's* case (*d*) nor has it been superseded by Section 85 of the Transfer of Property Act, now substituted by Rule 1 of Order 34 of the Code of Civil Procedure.(*e*)

The conclusions, deduced from the principle that the pious obligation of the son extends to all debts of the father, if not tainted with illegality or immorality, were conflicting Some Courts (*f*) held that the father can, even in the absence of any antecedent debt, charge the family property with any debt if not tainted with illegality or immorality, others held a contrary view (*g*) The Privy Council in the case of *Sahu Ram Chandra* v *Bhup Singh* (*h*) laid down that a sale or mortgage of the joint family property, made by the father, can bind the son in two cases only, namely, (1) where the alienation is for family necessity, (2) where the alienation is made to discharge a debt which (i) was antecedent to the alienation, (ii) was "incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate," and (iii) is not proved to have been incurred for immoral purposes

Sahu Ram's case,

its effect,

In deciding the case of *Sahu Ram Chandra* their Lordships of the Judicial Committee expressed the *obiter dicta* which if followed, would have unsettled the principle which was considered as settled law The principle referred to above in (2), (ii), would have debarred a mortgagee from enforcing his second mortgage executed in satisfaction of the first mortgage made for a consideration of a cash payment of money and would thus have unsettled the settled state of law, which allowed such a mortgagee to enforce re-payment

Cal, Bom

The Calcutta (*i*) and the Bombay (*j*) High Courts and a

(*d*) 15 I A 99 15 C 717

(*e*) For further discussion see pp 473-477 post

(*f*) Maheswar *v* Kishun, 34 C 184 11 C W N 294, 5 C L J 441, Biswanath *v* Jagdip, 40 C 342 17 C W N 1025 17 I C 577, Chidambara *v* Koothaperumal, 27 M 326, Chintaman, *v* Kasinath, 14 B 320, Ramchandra *v* Fakirappa, 2 Bom L R 450, Debi *v* Jadu, 24 A 459 22 A W N 123, Babu Singh *v* Bihari, 30 A 156 5 A L J 175 A W N (1908) 61

(*g*) Brijnandan *v* Bidya, 42 C 1068 F B 19 C W N 849 21 C L J 543 29 I C 629, Krishna *v* Rampershad 20 C W N 508 33 I C 990, Kishun *v* Tipan, 34 C 735 11 C W N 613 5 C L J 569, Venkataramanaya *v* Venkataramana, 29 M 200 F B, Sami *v* Ponnammal, 21 M 28, Chandra *v* Mata 31 A 176 F B 6 A L J 263 1 I C 479, Jamna *v* Nain, 9 A 493

(*h*) 39 A 437 44 I A 126 21 C W N 698 26 C L J 1 15 A L J 437 33 M L J 14 19 Bom L R 498 1 Pat L W 557 39 I C 280, this was followed by P C in Narain *v* Sarnam 39 A 500 44 I A 163 21 C W N 990 and in Jogi *v* Ganga 21 C W N 957 P C (1917) M W N 739 42 I C 791 also in Dileshwar *v* Nohar 48 I C 193 (N) Badagala Jogi *v* Bendalam 35 M L J 382 48 I C 289 Brij Narain *v* Mangal 41 A 235 see P C decision n 46 A 95 and see p 437 438 *post*, Sukhdeo *v* Jhapat 5 Pat L J 120 54 I C 946, Pudai *v* Baijnath, 56 I C 745 7 O L J 273 23 O C 264, Muhammed *v* Hazari, 52 I C 108 6 O L J 297 (overruling Ramman *v*. Ram 47 I C 987 5 O L J (29)

(*i*) Madhusudan *v* Iswari, 48 C 341 24 C W N 949, 952 61 I C 25, Lala Mukti *v* Iswari, 24 C W N 938 57 I C 858

(*j*) Hanmant *v* Ganesh 43 B 612. 21 Bom L R 435 51 I C 612.

Full Bench of the Madras High Court (*k*) on a careful consideration of various decisions came to the conclusion, that the decision of the Privy Council in *Sahu Ram Chandra*, did not overrule the long line of cases according to which a creditor, who obtained a personal decree for money against a Mitàksharà father, is entitled to levy execution against the entirety of the joint family property.

and Mad. on this case

The decision in *Sahu Ram Chandra* has now been made clear by a subsequent decision of a Full Board of the Privy Council in *Brij Narain* v. *Mangal Prasad* (*l*)

Sahu Ram explained by P C

The expression *antecedent debt* or more accurately the *old precedent debt* was first used by the Privy Council in the case of *Hunooman Persaud Pandy* (*m*) After having obtained various constructions at various Courts, *antecedent debt* has been explained by the Privy Council(*n*) thus

The phrase first used in *Hunooman Persaud's* case,

"As to matter of antecedency of debts, it is clear beyond question that the antecedency is antecedency to the mortgage itself And it is more than that - it is disconnection with the mortgage in fact as well as in time In no other way can the law of Indian joint family property protect itself against being undermined"

P C explains

In the latest case of *Brij Narain* v. *Mangal Prasad* (*o*) the Privy Council decides that the *antecedent* debt means "antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the same transaction impeached." So the previous debt need not necessarily be a simple debt but may also be a mortgage debt. (*p*) The Privy Council has held that *antecedent debt* does not include a contract for loan which was never completed, to

Latest P C view

(*k*) Armugham *v* Muthu 42 M 711 37 M L J 166 51 I C 525, *see* Vinjamampati *v* Vadalamamali 41 M 136, Sama Rao *v* Vannajee, 46 M 64 43 M L J 745 32 M L T 9 1923 M 36

(*l*) 46 A 95 51 I A 129 21 A L J 934 28 C W N 253 41 C L J 232 46 M L J 23 26 Bom L R 500 5 P L T 1 10 O L J 107 1924 P C. 50 77 I C 689

(*m*) 6 M I A 393, 420 18 W R 81

(*n*) Chet Ram *v* Ram 44 A 368, 374 49 I A 228 27 C W N 150 : 37 C L J 79 24 Bom L R 1231 43 M L J 98 67 I C 569 3 P L T 363 1922 P C 347 on appeal from 41 A 529, see Umrao *v* Gaya, 60 I C 647 23 O C 374, Ram *v* Lalta 53 I C 664 6 O L J 504.

(*o*) 46 A, 95 51 I A 129 *see infra*, *see* also Gauri *v* Sheo, 46 A 384 22 A L J 369 78 I C 911 1924 A 543, Chitnavis *v* Nathu, 20 N L R 106 7 N L J 170 79 I C 1002 1925 N 2,

(*p*) Lal Bahadur *v* Ambika, 47 A 795 : 52 I A 443 : 2 O W N 913 1925 P. C 264 30 C W N 701, Sanmukh *v* Jagarnath, 46 A. 531 . 22 A L J 417. 1924 A 708. 83 I C. 838

pay off a previous debt otherwise discharged (q)

Antecedent and present mortgage debt,

It may be asked why should there be any distinction between an *antecedent* debt and a *present* debt, with respect to the validity of a mortgage executed by the father to secure the same, and as to its binding character on the non-executant sons, if the debt is not tainted with immorality? The distinction appears to be logically inconsistent, and accordingly it appears to be held by some judges that a mortgage by a father for his *present* debt is binding on his sons (r)

distinction,

But a different answer to the above question should be given according to the principle enunciated by their Lordships of the Judicial Committee in the following passage,—

"The question, therefore, is not so much whether an admitted principle of Hindu law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence," (s)

should be accepted,

It seems, therefore, that as the doctrine of son's liability for father's debt is of the same character, the distinction cannot be disregarded but should be accepted, though it might appear illogical.

There was however a conflict of decisions on this point in the Calcutta High Court The argument, that the distinction between the *antecedent* and the *present* debts as laid down in the Full Bench case of *Luchman Dass* v *Girdhur Chowdhry* (t) had virtually been abolished by the Judicial Committee by their decisions in some cases,—though not accepted by the learned judges deciding the case of *Surjaprasad* v *Golabchand*, (u)—was held to be correct in the case of *Maheswar Dutt* v *Kishun Singh*, (v) which was however, dissented from in the case of *Kishun Persad* v *Tipan Persad* (w) in which the law as laid down by the Full Bench was held to be still in force These differences were set at rest by a Full Bench of the Calcutta High Court referred to above (x) It has been already observed that the Privy Council in the case of *Sahu Ram Chandra* made a great departure, which the

(q) Jawahir v Udai 43 C L J 371, 378 30 C W N 698

(r) Debi v Jadu 24 A 459, Chidambara v Koothaperumal 27 M 326, Vinukonda v Kontalapalli, 21 M L J 443 9 M L T 302 9 I C 22, Gur v Girdhari, 52 I C 75 22 O C 84 6 O L J 411, Peda v Sreenivasa, 41 M 136 33 M L J 519 43 I C 225

(s) Lakshmi v Ramchandra, 7 I A 181, 195 5 B 48, affirming 1, B 561

(t) 5 C 855

(u) 27 C 762

(v) 34 C 184 11 C W N 294 5 C L J 441, followed in Sheo narain v. Mokshoda, 17 C W N 1022 19 I C 878, Biswanath v Jagdip, 40 C 342 17 C W N 1025 17 I C 577

(w) 34 C 735 11 C W N 613 5 C L J 569

(x) Brijnandan v Bidya, 42 C 1068 19 C W N. 849 21 C L J 543 29 I C 629

High Courts in India did not follow holding some of the observations as *obiter dicta* (y)

Sahu Ram reconsidered in Brij Narain

The decision of *Sahu Ram Chandra,* (z) has since been reconsidered by their Lordships of the Privy Council in a Full Board in the case of *Brij Narain* v. *Mangal Prasad,* (a) and it is said that, —"There are, however, some observations in *Sahu Ram's* case which are not necessary for the judgment but which their Lordships are bound to say that they do not think can be supported." Their Lordships after a very careful consideration of the law added —

P C on son's liability,

Privy Council on son's liability—" Their Lordships may sum up the propositions which they would wish to lay down as the result of these authorities as follows —

(1) *The managing member of a joint undivided estate cannot alienate or burden the estate* qua *manager except for purposes of necessity.*

(2) *If he is the father and other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.*

(3) *If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest*

(4) *Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.**

(5) *There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate is alive or dead.*

effect of P C rule

Therefore, when the father purports to burden the estate by a mortgage, then unless the mortgage is to discharge an antecedent debt, it would not bind the estate as is clearly

(y) See p 436-437 ante

(z) 39 A 437 44 I A 126 21 C W N 698 26 C L. J 1 39 I C 280 : 33 M L J 14 19 Bom L. R 498 15 A L J 437 1 Pat L W 557

(a) 46 A 95 51 I A 129 28 C W.N 253 41 C L J 232, 21 A L J 934 46 M L J 23 5 P L T 1 11 O L J. 107 1924 P C 50 77 I.C 689

(*) See Karim v Darga, 35 C W N 1221 P C,

explained in clause (3) of the above Privy Council judgment; (*b*) and when the mortgage was for the discharge of an antecedent debt not tainted with immorality, the mortgagee need not prove legal necessity, (*c*) but in order to get rid of this mortgage the son is to establish the connection of the antecedent debt with immorality. (*d*) If the alienee was the antecedent creditor he is only to prove that his debts were just and he is not to prove the existence of necessity for his debt (*e*) When almost the entire consideration was for antecedent debt, the mortgagee is not to make a further enquiry as to the existence of legal necessity. (*f*) A mere acknowledgment by the manager of his liability for the debts incurred by certain junior members of the family, made in the deed of sale executed by him to satisfy these and his other debts, did not constitute those debts as antecedent debts and legal necessity is to be proved. (*g*)

It is not sufficient if a debt is merely proved to be antecedent unless the question of pressing necessity and the money being then due under the previous bond is proved, (*h*) but even if the debt for which the alienation in question is made by the father is not then demandable or enforceable in law, the son's liability remains the same when it was a trade debt (*i*) But subsequently, the Madras High Court, (*j*) disagreeing with the Allahabad High Court, (*k*) has held that the son is bound by the father's alienation in every case under such circumstances.

In Sindh in a case where the parties are governed by the Bombay School, a mortgagee can enforce his mortgage against

(*b*) *See* Abdul *v* Sansar, 1928 L 101

(*c*) Sadhu *v* Chimna, 1929 L 397

(*d*) Tulsi *v* Bishnath 50 A 1

(*e*) Waryam *v* Indar, 1919 L 242

(*f*) Ram *v* Ambaprasad, 1929 N 6

(*g*) SriNath *v* Jagannath, 52 A 391 1930 A 292, *see post p* 442 foot note (*r*)

(*h*) Bandhu *v* Ramkrishna, 21 A L J 354 1923 A 535, *but see* Narainrao *v* Seth, 1930 N 273

(*i*) Damodharam *v* Bansilal, 51 M 711 1928 M 566

(*j*) Rama Rao *v* Hanumanta, 52 M 856

(*k*) Bandhu *v* Ramkrishna, *supra*

the mortgagor father's interest in the joint family and ask for a mere money decree against the son for the balance and enforce the same against the son's interest in the joint property. (*l*)

Procedure in Sindh to to recover mortgage debt.

A pre-emption decree given to the pre-emptor to obtain the property on making payment, is not a debt and cannot constitute an antecedent debt (*m*)

Pre-emption decree is not debt.

A mortgagee obtained a decree on the strength of a mortgage executed by the father of the joint family property owned by the father and sons, and when his sons challenged the validity of the mortgage by a suit before the sale was effected, the suit was decreed, inasmuch as, the mortgagee failed to establish legal necessity although the sons had also failed to connect the debt with immorality, holding that the case is governed by the *third* and not the *second* of the aforesaid propositions, laid down in *Brij Narain's* case, because the word "debt" as used in clause 2 does not include a mortgage. (*n*)

Cl 3 of P C judgment explained

The doctrine of "antecedent debt" does not include a loan which was contracted for to pay off a previous debt otherwise discharged before the loan was effected. (*o*)

Paid off debt is not antecedent debt

The Privy Council, in a recent case, (*p*) reiterates the view laid down by it in clause 4 in *Brij Narain*. A Full Bench of the Allahabad High Court has explained the significance of the fourth clause in the above judgment of the judicial Committee thus

Cl 4 of P C judgment re-considered, explained by All

"we think that what their Lordships meant to lay down was that the two deeds must not be part and parcel of the same transaction, but that they must be distinct and separete not only in point of time but in reality There must be dissociation in time as well as in fact, If at the time when the earlier mortgage transaction was entered into the latter one was not even in

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(*l*) Gangaram v Lalumal, 1930 S 138

(*m*) Kishen v Raghunath, 51 A 473 1929 A 139

(*n*) Jagdish v Hoshyar, 51 A 136 F B 1928 A 596

(*o*) Jawahir v Udai, 48 A 152 53 I A 36 24 A L J 97 30 C W N 698 43 C L J 374 50 M L J 344 28 Bom L R 851 3 O W N 365 93 I.C. 216. 1926 P C 16.

(*p*) Karim v Dargah, 35 C W N. 1221 P.C.

contemplation, the first will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee " (q)

Taking liability for debt is not antecedent,

Where some junior members of a family borrowed money on several promissory notes, and the father, the manager, latter on, acknowledged his liability for these debts while executing a sale deed of family property for the discharge of these and other debts taken by himself, the acknowledgment did not constitute those debts as antecedent debts and legal necessity had to be proved in respect of those debts. (r) A renewal of the original transaction cannot be an alienation for antecedent debt. (s) But taking of a fresh mortgage in lieu of amounts due under previous deeds which were about to be barred by limitation and for additional amounts on a reduced rate of interest, does not take away antecedent nature of the original deeds. (t) When a father executes a mortgage for a consideration of a mortgage executed by his father in favour of the same mortgagee, it is an antecedent debt and binds the former's sons. (u) A mortgage, to pay the price of land purchased three days earlier, is not an antecedent debt. (v)

but fresh mortgage is

but not one 3 days before

Antecedent debt of other than father—The managing member of a joint undivided family cannot alienate or burden joint ancestral estate *qua* manager except for purposes of necessity. (w) The principle of law as applied to the term *antecedent debt* is applicable in case of father only and not in the case of the managing member other than the father and consequently legal necessity is to be proved (x)

Rule of antecedent debt not applicable except father

(q) Ram Rekha v. Ganga 49 A 123 1925 A 545, see Thakur Bai v. Jaspat 1926 L. 436, Gundi v Basdeo, 1926 A 690 92 I C 590, Abdul v Sansar, 1928 L 101, Raghunath v Madnarayan. 1928 p 83

(r) Sri Nath v Jagannath, 52 A 391 1930 A. 292, *see foot note (g) p 440.*

(s) Babu Mam v Mahadeo, 1927 A, 127

(t) Sheo v Balwant, 1927 A 150

(u) Sheoram v Durga, 1928 O 378

(v) Jan v Bikoo, 7 p 798 : 1929 p 130

(w) Brij Narain v Mangal, 46 A 95 51 I A 129 21 A L J 934 28 C W.N. 253 : 41 C L J 232 46 M L J 23 1924 P.C. 36 79 I.C. 592.

(x) Woman v Vishnu, 1928 N 151.

Liability of son even when father alive extending to entire estate;

Conclusion on son's liability—The father's creditor, therefore, is entitled to realise his debts not only from the father's undivided co-parcenary interest in the ancestral property during his life, but also from the entire property inclusive of his and the son's interest, either during his life or after his death (*y*) Thus the creditor has the right to proceed either against the father's interest or against the entire property during his life and it is a question of fact to be decided by having reference to the circumstances of each case, as to whether the father's interest only or the entire property was sold in execution of a money decree against the father alone. This question will be discussed in the next topic.

to be partitioned out of co-parceners;

When a joint family consists of a father and his son, and also of collateral co-parceners, then the interests of both the father and the son in the family property are liable for the father's lawful debts, and the execution-purchaser would be entitled to have their shares allotted to him at a partition with the collateral co-parceners. (*z*)

Even if it was contracted with a member.

The son's liability is the same even if the debt was contracted by the father jointly with another member of his family and the rule of law on this question as stated in the *Vivada Chintamoni*, seems to relate only to debts contracted by the ancestor with a stranger. (*a*)

Conclusion.

So the result of these various decisions is that it is the son's pious duty to pay off the father's debt unless he proves that it was contracted for illegal or immoral purposes, no matter, whether the debt was contracted for the benefit of the

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(*y*) *See* pp 434, 439; Hanmant *v* Ganesh, 43 B 612 21 Bom L R 435 51 I C 612, Ratanchand *v* Sheocharan, 51 I C 28 15 N L R 88, Gur *v* Girdhari, 52 I C 75 22 O C 84: 6 O L J 411 (but in Mysor an alienation by the father does not in the absence of proof of necessity, bind the interests of the sons during the life time of the father, Nagappa *v* Chowdappa 2 Mys L J 284)

(*z*) Gnanammal *v* Muthusami 13 M 47

(*a*) Sourendra *v*. Hari, 30 C.W N 482, 493-4 50 M,L J 1, 17: 42 C.L J 592, 610 . 52 I.A 418.

family or not, (*b*) or the father is alive or dead. (*c*) For what is illegal or immoral purpose *see post p.* 459.

Some view

But there are, however, some cases in which it has been held that a son can attack the father's alienation without proving illegality or immorality of the debt unless the sale was an execution sale or in lieu of antecedent debt, (*d*) and can challenge a mortgage which was without legal necessity and for paying no antecedent debt (*e*)

Onus.

In case of a sale by the father, the purchaser is to show on the first instance that there was either necessity or benefit or proper inquiry or an antecedent debt and then the burden of proof is shifted on the son to prove that the sale was made for illegal or immoral purposes, to set aside the sale. (*f*)

Avyavaharika debts —See p. 457 post "Vyavaharika"

Case-law on son's liabilities—*Breaches regarding other's property*.—The sons are liable to pay the money, which the father is directed to pay for having spent temple funds without authority (*g*) and for breach of civil duty, (*h*) he is also liable for the debts created to pay the money received by him

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(*b*) What is benefit to the estate, *see ante p* 385-388

(*c*) Brij Narain *v* Mangal Prasad, see *above*, See Bhagat Mal *v* Abdul, 20 C W N 797 (Pat) Dattaraya *v* Vishnu 36 B 68 13 Bom L R 1161 12 I C 949, Indar *v* Imperial Bank, 37 A 2 4 28 I C 593, Pokhpal *v* Chhidu 15 I C 903 (A), Samanmal *v* Maghanmal, 19 I C 378 6 S L R 150, Panaru *v* Baldeo, 21 I C 46 (A), Virabadram *v* Jagannadha, 21 M L J 443 9 M L T 30? 9 I C 22, Ram Lal *v* Maharaja, 11 C L J 362 5 I C 146, Nathuni *v* Baijnath, 2 Pat L J 212 1 P L W 300 39 I C 352, Shri Sitaram *v* Shri, 35 B 169, 181 182 12 Bom L R 910, Mohan *v*. Bala, 44 A 649 1922 A 310 69 I C. 754, Bhurat *v* Sharasuti 7 O L J 459 23 O C 244 60 I C 137 Parthasarathi *v* Subba, 47 M L J 483 1924 M 840, Narayan *v* Sagunabai, 49 B 113 26 Bom L R 1200 85 I C 181 1925 B 193, Bhagawati *v* Maharaj 27 O C 111 81 I C., 15 Kanhaiya *v* Niranjan, 47 A 351 Abdul *v* Ram, 47 A 421, but see Baldeo *v* Bhagwan, 1925 A 241 78 I C 595 and Bansidhar *v* Behari, 12 O L J, 359 89 I C 67 1925 O 626, Ranjit *v* Ramman 87 I C 654 1925 A 781 Sri Kishen *v* Kanhaiya 12 O L J 232 86 I C 877 1925 O 559, Kalka *v* Ganga, 12 O L J 366 88 I C 127 1925 O 435, Gajadhar *v* Jadubir, 47 A 122 85 I C 31 1925 A 180, Ramtahal *v*. Jagatanand, 1930 P 327, Krishna *v* Hem, 1928 L. 1?5

(*d*) Baladeo *v* Bhagwan, 1925 A 241 78 I C 595

(*e*) Kalka *v* Ganga, 12 O L J 306 88 I C 127 : 1925 C 435, Bansidhar *v*. Behari, 12 O L J 359 89 I.C 67 : 1925 O 626.

(*f*) Jokhu *v* Ganesh, 1928 P 54

(*g*) Venugopala *v* Ramanakhan, 37 M 458 23 M L J 61 11 M L T 427 14 I C 705

(*h*) Hanmant *v* Ganesh, 43 B 612 21 Bom L R 435 51 I C. 612, *see* Garuda *v* Nerella, 35 M L.J 661 48 I C 740 9 L W 1. 26. 25 M L.T. 87, Banares Bank *v*. Jugdip, 6 P.L J 198. 62 I C. 465

as agent, (*i*) the decree for mesne profit against the father (*j*) and the debt incurred to pay off the share of a person with whom the father deposited the sum, the price of a property at a Revenue sale, but withdrew the entire sum, the sale being set aside. (*k*)

Compromise · The manager's power to compromise disputes is already stated (*l*) The son is liable for the debt created to effect a compromise of a suit by the father for declaration that the mortgage executed by him was fictitious, even if in fact it was so. (*m*)

Criminal act A son is not bound to pay the debt if the liability of the father arose directly from a criminal act, which might or might not have been successfully prosecuted, but if the evidence was sufficient to prove to have been criminal act of the father (*n*) If it was originally a civil liability but subsequently the transaction becomes criminal, the son is bound by it (*o*)

Gift to relations Money borrowed to help a relative with the expectation of getting it back with some benefit in addition, is binding on the son. (*p*)

Indemnity clause in bond executed by the father binds the son with liability if any money is payable under it. (*q*)

Litigation liabilities The son is liable to pay the following liabilities of the father in connection with judicial proceedings · the costs awarded against the father in a litigation (*r*) or for improperly interfering with others' property, (*s*)

(*i*) Niddha *v* Collector, 14 A L J 610 35 I C 209, *see* Natasayyan *v* Ponnusami, 16 M 99 3 M L J 1, Krishna v Radha, 16 I C 410 (C.), *see* also Gursaran *v* Mohon, 4 L 93 1923 L 399 76 I C 907, Ratna *v* Ellammal, 1929 M 792

(*j*) Peary *v* Chandi, 11 C W N 163 5 C L J 80, *see* Zenamandra v Lanka, 27 M L J 276. 25 I C 396

(*k*) Hari *v* Sant, 32 I C 969 (C)

(*l*) *See ante* Sec 6, Sub-sec iii. "Karta's powers" *foot notes* (*k*) and (*q*) *pp*. 388-389, *see* also *post p* 478, Section 9, sub-section ii, "Compromise and family arrangement by father"

(*m*) Ram *v* Rumdasi, 35 A 428 11 A L J 645 20 I C 44

(*n*) Toshanpal *v* District Judge, 51 A 386 1928 A 582

(*o*) Toshanpal *v* District Judge, *supra*.

(*p*) Baraik *v*. Devendra, 52 I C 681 (P)

(*q*) Raghunandan *v* Chem, 27 I C 895 (A), *see* Deo Narayan *v* Lal, 20 C C 1 38 I C 821, Mata Din *v* Maharaj, 12 O L.J 33 85 I C. 959 1925 C 325.

(*r*) Paryag *v* Kasi, 14 C W N 659 11 C L J 599 6 I C 258

(*s*) Mata Din *v*. Maharaj, 12 O.L J. 33. 85 I.C 959 : 1925. O 325.

the debt contracted for defending from charges under Cattle Trespass Act (*t*) or from criminal offences in some cases, (*u*) the costs of suits for damages for defamation, (*v*) for obstructing water course (*w*) and for cutting trees and demolishing a house, (*x*) and the debt contracted for a litigation setting up an adoption, (*y*) or defending a suit unsucessfully (*z*) but not when the defence set up was false and dishonest. (*a*)

Pre-emption money The debt contracted by the father to pay the money in the exercise of his option to pre-empt in terms of a decree, does not constitute it an antecedent debt, (*b*) therefore, the father cannot encumber joint ancestral property to collect funds to pre-empt other property, (*c*) unless it was to safeguard the interests of the family. (*d*)

The right of pre-emption by a Hindu is confined only to some limited areas (*e*)

Repairs to property The sons are liable to pay the costs of repairs of a house. (*f*)

Suretyship As regards son's liability for father's suretyship, *see*, Sub-Sec. vii *p.* 455 below, "Suretyship".

Tortuous act The son is liable for the torts committed by his father during the latter's life-time only to the extent to which the family estate has been benefitted. (*g*) For son's liabilities for other tortuous act *see* above *foot notes* (*v*), (*w*) and (*x*)

Trade liabilities *See* Sec 4, Sub-Sec. v, *p.* 356 "Manager's power to start business", *ante.* The father's power to start a

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(*t*) Hanumat *v* Sonadhari, 4 Pat L J 653 52 I C 734.
(*u*) *See foot note* (*s*) p 389
(*v*) Sumar *v* Liladhar, 33 A 472 8 A L J 306 9 I C 624
(*w*) Chhakiri *v* Ganga, 39 C 862 16 C.W N 519 15 C L.J 228 12 I C 609, *but see* Durbar *v* Khachar, 32 B 348 10 Bom L R 297.
(*x*) Chandrika *v* Narain, 46 A. 617 22 A L J 468 79 I C 1036 1924 A. 745
(*y*) Khalilul *v* Gobind, 20 C 328
(*z*) Shambhu *v* Chandra, 1925 O 230 80 I C. 17
(*a*) Mohammad Ali *v* Jhoo, 1928 O 10
(*b*) Kishan *v* Raghunath, 51 A 473 1929 A. 139
(*c*) Shankar *v* Bechu, 47 A 381 86 I C 769 1925 A 333, *see contra* Nathu *v* Kundan, 32 A 242 7 A L J 1182 8 I C 836.
(*d*) Chotkana *v* Ganga, 1927 A 219
(*e*) *See* Ch. XVI, Sec 2, Sub-Sec iii
(*f*) Saligram *v* Mohan, 90 I C 143 7 L L J 470 1925 L. 407.
(*g*) Deoba *v*. Babaia, 23 N.L R. 134 : 1927 N. 337.

new business and son's liability for its debts have already been dealt with. (*h*) When the new business has been started and continued as his own and personal concern, the mortgage of the joint family property for the purposes of this firm, is not binding on the minor sons. (*i*) The debts incurred by the father for the purpose of acceptance of a bill in respect of goods imported by him is neither an illegal nor an immoral nor an *avyavahareka* debt though it might have been a reckless and imprudent management of the business. (*j*)

Vyavaharika debt · See *post* p 457.

What not binding on sons

Tansactions not binding on sons—It is not the pious duty of the son to refund the money when the sale by the father is set aside, as it was not binding on the family. (*k*) Where a father relinquished his right of redemption without any legal necessity or benefit to the family, the relinquishment does not bind the sons (*l*) The father bid at an auction sale and deposited one fourth of purchase money but failed to deposit the balance for which the property was re-sold and fetched a smaller sum, the father was made liable for the deficit but the son was not liable (*m*)

The portion of the property purchased by the sons in execution of a decree on a prior mortgage to which the father was a party, cannot be again decreed for sale in a suit by the creditor for repayment of money due on a mortgage effected by the father including this portion. (*n*)

In connection with this matter *see post* Sub-sec. vii "Debts not binding on heirs".

Son's interest if available to Official Assignee.

Insolvency of father.—On the insolvency of the father, the son's interest in the joint family does not vest in the Official Assignee under the provisions of the Presidency-towns Insolvency Act (1909); but "it may be that under the provisions

(*h*) Sec 4, Sub-sec. v "Manager's power to start new business", *pp* 356-358

(*i*) Muneshwarendra *v* Ram, 1930 C 85

(*j*) Bal Rajaram *v* Maneklal, 56 B 36

(*k*) Killaru *v* Palavarappa, 35 M L J 451 47 I C 197

(*l*) Mangali *v* Babu Ram, 51 A 659 1929 A 365

(*m*) Ratan *v* Brijbhukan, 61 I C 774 (A)

(*n*) Kanhaiya *v*. Niranjan, 47 A. 351 23 A.L.J. 52 86 I.C. 98 : 1925 A, 367.

of Section 52 or in some other way that property may in a proper case, be made available for payment of the father's just debts. But it is quite a different thing to say that by virtue of his insolvency alone it vests in the Assignee, and no such provision should be read into the act." (*o*)

All. held it does,

The Allahabad High Court on a consideration of the above Privy Council decision came to the conclusion that it did not overrule the previous dicisions of that Court and held that on the insolvency of the father, the whole co-parcenary property of the family vests in the assignee. (*p*) In the Central Provinces the same opinion is entertained. (*q*) This view of the Allahabad High Court, however, is contrary to another earlier decision of the same Court based on the same Privy Council decision, (*r*) which seems to have not been drawn to the attention of their Lordships who were parties to the later decision. However, in another recent case, (*s*) the learned judges—one of them being a party to the judgment in *Om Prakash's* case—without referring the matter to a Full Bench, followed their later ruling in *Om Prakash's* case stating that the interpretation put by them on the Privy Council case of *Sat Narayan*, has been followed by the Full Bench of the Madras High Court. It will, however, appear from the Madras judgments (*t*) of the Full Bench that the judges have not followed the interpretation put in *Om Prakash's* case, besides from the printed report it does not appear that the case of *Om Prakash* had even been referred to in the judgment.

so also in C P,

later All. view contrary,

Madras,

The Full Bench of the Madras High Court, however, on a consideration of the Privy Council case of *Sat Narain* has held that the sons' shares do not vest in the Official Receiver, but the power of the father to sell the sons' shares also for his

(*o*) Sat Narain *v*. Behary, 6 L 1 52 I A 22 29 C W N 797 47 M L J. 857 27 Bom Bom L R 135 23 A L J 85 84 I C. 885 1925 P C 18
(*p*) Om Prakash *v* Moti, 41 A 400
(*q*) Shiogopal *v* Sukhru, 87, I C 957 925 N 418,
(*r*) Allahabad Bank *v* Bhagwan, 48 A 343,
(*s*) Ram Gulam *v* Kailash, 52 A, 493
(*t*) Seetharama, Balavankata *v*. Official, 49 M 849 F B 1926 M 994.

just and proper debts vests in the Official Assignee or Receiver. (*u*) There is an expression of opinion by the Bombay High Court that this power of the father to dispose of family estate does not vest in the Receiver or Official Assignee (*v*) But the above Madras Full Bench differs from this view and follows the view of the Lahore High Court (*w*) A subsequent decision of the Bombay High Court (*x*) also has held that the aforesaid observation made in the earlier case (*y*) was not necessary for its decision and was not binding on the Court The spirit of the decision of the Privy Council and that of the Madres Full Bench, is very clear, otherwise the sons will have on protection against the father's illegal and immoral debts The difference in vesting of the property and the vesting of the father's power of alienation for his just debts in the Official Assignee, is that in the former case the question of illegal or immoral debt of the father cannot be questioned by the son, whereas in the latter case they can do so This power vested in the Receiver does not come to an end even on the death of the insolvent father before the sale (*z*) But the majority of another Full Bench (*a*) of the same Court have held that the institution of a suit for partition extinguishes the right of the Official Assignee to privately sell the shares of the son, as under such circumstances the father's right to deal with the son's interest comes to an end, (*b*) but the Official Assignee by a proper proceeding in the insolvency Court may proceed against the son's share. The power of the Receiver is subject to the same qualification as it is in the father's hand and, hence, after attachment of the son's interest in the property the Receiver cannot exercise the

Bombay,

Lahore, later Bombay view

later Mad. F B

Official Assignee's remedy,

(*u*) *Ibid*, *see* Gopalakrishnayya *v* Gopalan, 51 M 342.

(*v*) Shripad *v* Basappa, 49 B 785 27 Bom L R, 934 89 I C 996 925. B 416

(*w*) Khemchand *v* Narain, 6 L 493

(*x*) Haridas *v* Lallubhai, 55 B. 110, 115

(*y*) Sripad *v* Basappa, *supra*

(*z*) Seetharama, Balavenkata *v* Official, *supra*

(*a*) Balusami *in re*, or Official Assignee *v* Ramchandra, 51 M. 417 1928 M 775 F B

(*b*) Venkitarayan *v* Kesavan, 1929 M 778.

power of sale. (c) When the Official Receiver, on the insolvency of the father, sold the father's as well as the son's share in the family property, the purchaser is not entitled to the delivery of possession under Section 4 of the Provincial Insolvency Act of 1920, his remedy lies in a regular suit for possession in a Civil Court. (d)

purchaser's remedy

Rule same in Pres and Prov Insolvency Acts

This principle of law is equally applicable to both in the Presidency towns as also in the Muffassal. (e)

Receiver's powers.

Therefore, the Receiver can untilise the son's share obtained by them on partition made during the pendency of the insolvency proceeding, to discharge the father's debts which the sons are liable to pay. (f) If in a suit for partition brought by the Official Assignee on the adjudication of a co-parcener as insolvent no declaration was made for the payment of the debts of the insolvent out of the shares of the sons who were also allotted separate shares, the separated shares of the sons are not liable to be sold for payment of their father's debts. (g) The Receiver can also attach colourable transfers of joint family property made shortly before adjudication. (h)

In some cases it was held that when the father is adjudicated a bankrupt, his son's interest in the joint family property were not liable to be sold. (i)

Son not liable for debt made when father a Ward.

Father when Ward of Court—It is not the pious duty of the son to pay the father's debt contracted when a Ward of a Court (j)

No suit against son alone when father alive

Suit against son alone when father alive—But no suit for the enforcement of payment of the father's debt against the son alone can be instituted so long as the father is alive and the family undivided. (k)

Son's liability

Extent of son's liability—The strict rule of the Shastras, that a son is liable to pay his father's debts with interest, and

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(c) Gopalakrishnayya v Gopalan, 51 M 342
(d) Venkatram v Chokkir, 51 M 567
(e) Seetharama, Balavenkata v Official, *supra*
(f) Sita v Beni, 47 A 263 22 A L J 1097 84 I C 790 1925 A. 221
(g) Trayamkeshar v Basant, 1930 O 36
(h) Narain v Banki 46 A 912 85 I C 396 1925 A 194
(i) Official Assignee v Allu, 46 M 54, Sahaj v Wajid, 49 I C 848 (P), *see* Chairman v Sheodutt, 5 P 476, Ralia v Oficial, 69 I C 729 (L)
(j) Baldeo v Bindeshri, 44 A 388 20 A L J 241 1922 A 215 66 I C 128.
(k) Narayanan v Veerappa, 40 M 581 31 M L J 386 35 I.C 918

a grandson, those of his grandfather without interest, even though no assets have been inherited, was *legally* enforced in Bombay, until the liability was limited to assets by legislation (*l*) The son's liability is limited to the extent of ancestral property inherited by him (*m*)

to extent of assets

Remedy against extravagant father—It would seem that partition is the only remedy by which a son may now protect his interest from the liability of paying off the debts of an extravagant father, (*n*) but this remedy would be effective only against debts incurred after the partition, (*o*) as after partition there are no assets of the father in the hands of the sons, (*p*) and consequently the Official Assignee appointed on the insolvency of the father, loses his power to sell the son's share (*q*) A majority of the Full Bench of the Madras High Court, (*r*) the earlier Full Bench having kept the question open,(*s*) has, therefore, held that the son's shares allotted to them on partition, is liable for the father's pre-partition debt This is consistent with the true spirit of Hindu law which has undergone considerable modification from time to time by judicial decisions as also by legislation, minimising the son's liability to pay father's debts to a large extent. (*t*) It cannot be said that the principle laid down by the majority of the Full Bench is not to be found in any text of Hindu law. According to Yajnavalkya (*u*) son was liable to pay his father's just debt which was independent even of his getting any assets from the father This liability has

Son's remedy against father is partition,

Madras view

can be supported by authorities,

(*l*) Bombay Act VII of 1856

(*m*) Ramanand *v* Chhotey, 20 A L J 969 1923 A 124 71 I C 417, Sukhdeo *v* Madhusuddan, 10 P 305, Bhujawan *v* Ram, 65 I C 224 (P), *see* Ram *v* Nand, 4 P 469 88 I C 813 1925 P 688' *but see* Karoo *v* Rameshwar, 6 P L J 451 62 I C 905, Bed v Nakchhed, 1924 N 410 79 I C 884, Bhagwanti v Deo, 1928 A 166

(*n*) *But see* Ram *v* Mangal, 23 O C 327 8 O L J 87 60 I C 219

(*o*) This view quoted with approval in Subyamania *v* Sabapathy, 51 M 361, 413 F B 1928 M 657, 677

(*p*) Ram *v* Nand, 4 P 469 88 I C 813 1925 P. 688.

(*q*) Balusami, *in re see, ante p* 449 *foot note (a)*

(*r*) Subramania *v* Subapatti, *supra*, agreeing with Juganatha *v.* Viswesam, 47 M 621 46 M L J 590 80 I C. 228 1924 M 682

(*s*) Koduru *v* Magunta, 50 M 535

(*t*) *See* Kishan *v.* Brijraj, 51 A. 932, 938 (*u*) Text No. 18, p 316.

been reduced to the son's liability to pay his father's debt not being illegal or immoral, to the extent of the assets obtained by the son and the entire joint family property of the father and son may be sold to discharge such debt. This principle of son's liability to pay father's just debts to the extent of the ancestral property is equitable and perfectly consonant with Hindu law. It will be kicking at the ladder on the part of the Hindu son to say this liability of the son to pay his father's just pre-partition debts out of the son's share alloted to him on partition of joint family property is tantamount to taking one's property to pay another man's debt. Besides, it is unreasonable to make any difference between the position of an honest creditor who advanced money to the father for no illegal or immoral purposes but failed to enforce repayment before partition, and another similar creditor who enforced repayment before partition, although he may have advanced money subsequent to the other creditor Moreover, honest creditors advancing money to the father who was then joint with his sons, on a simple money bond for a term, may have his remedy against the joint property lost by mere partition of the joint family property before the money due under the bond becomes mature for repayment and may thus give a handle to a dishonest father to deceive creditors The Hindu point of view has been clearly explained by Mr. Justice Mukherji of the Allahabad High Court (v) who has adopted the view of the aforesaid Full Beuch of the Madras High Court.

Allahabad follows Mad,

another All view.

The Allahabad High Court in a case where the partition was effected during the pendency of creditor's suit, held a contrary view and laid down that the liability imposed on the sons only continues as long as they were joint in property (w) It appears that the true Hindu point of view and the law on the subject was not placed before their Lordships. The principle laid down by the Full Bench of the Madras

(v) Kishan v Brijraj, 51 A, 932 : 1929 A. 73C

(w) Gaya Prasad v. Murlidhar, 50 A 137 1927 A 714, Jagadish v Sridhar 1927 A. 60.

High Court (*x*) has been followed by a later decision of the Allahabad High Court.(*y*) In this Allahabad decision Mr. Justice Mukherji has clearly explained the law from the Hindu point of view which has undergone a change in the hands of "Anglo-Indian Courts" and has adopted it, disagreeing with the earlier decision of the same Court. (*z*) A few months later the same Court (*a*) again without noticing this later decision (*b*) followed the earlier one.(*c*)

Calcutta,

The Calcutta High Court (*d*) on the same principle, has held that for the father's pre-existing debt the son's separated shares are liable to be sold for its repayment. In this case the separation was effected by the conversion of one of its member to Christianity and not by actual partition.

Bombay,

The Bombay High Court also holds that son's share on partition is liable to be sold for father's pre-partition debt (*e*)

Oudh,

The same view is entertained in Oudh (*f*)

Patna

The Patna High Court,(*g*) however, holds a contrary view, namely, the son's separated share is not liable for father's pre-existing debt, following the decisions of the Madras High Court which have been over-ruled by its own Full Bench (*h*)

Bona fides of partition cannot be questioned

The *bona fides* of a partition cannot be questioned, merely on the ground that it was so effected because the father was incurring debts (*i*)

When son's share available.

If after partition the mortgagee of a pre-existing debt succeeds in obtaining personal decree against the father after exhausting his remedy against the father's share, then he would be entitled to proceed against the son's share of the family property. (*j*)

(*x*) Subramania *v* Sabapatty, *supra*
(*y*) Kishan *v* Brijraj, 51 A 932 1929 A 726
(*z*) Gaya Prasad *v* Murlidhar, *supra*
(*a*) Ram Saran *v* Bhagwan, 52 A 71. (*b*) Kishan *v* Brijraj, *supra*
(*c*) Gaya Prasad *v* Murlidhar, *supra*
(*d*) Kuladi *v*. Haripada, 40 C 407 17 C W N 102 . 16 C L J 311 17 I C 257
(*e*) Annabhat *v* Shivappa, 52 B 376 1928 B 232
(*f*) Raghunandan *v* Moti, 1929 O 406 F B Mathura *v* Shambhoo, 1928 O 225 (*g*) Ram Ghulam *v* Nand, 4 P, 469
(*h*) Subramania *v*. Sabappatty, *supra*
(*i*) Kishan *v* Brijraj, 51 A 932 : 1929 A 727, Gaya Prasad *v* Murlidhar, 50 A 137 . 1927 A 714, Kani *v* Chelluri, 40 M L J. 473 29 M. L. T 265 62 I C 980.
(*j*) Kandasami *v* Marudachala, 1928 M 105.

Sub-Sec v—MOTHER'S DEBTS

Mother's debt.

The mother mortgaged the property given to her by her husband to raise a loan to pay off previous debts binding on the family, her own debts and the debts incurred for the expenses to protect her husband from a criminal case. The decree obtained by the mortgagee against the mother was held binding on the sons except the sum raised to meet her own debt. (*k*) In this connection *see* Ch. XII, sec. 9, sub-sec. vi.

Sub-Sec. vi—GRANDFATHER'S AND GREAT-GRAND FATHER'S DEBTS

Interest

Liability to the extent of assets

Grandfather's and great-grandfather's debts.—It has already been said before that according to Yajnavalkya(*l*) and Mitákshará (*m*) the grandsons are liable to pay off the grandfather's debts, whether they inherit any property from him or through him (*n*) But the grandsons are not liable to pay interest The Patna High Court, however, has held that the liability to pay debts of a grandfather is co-extensive with the liabilitiy in the case of father's debts and, hence, interest is payable thereon, holding that the Indian Courts did not follow the texts which say that interest is not payable for grandfather's debts (*o*) It is stated above (*p*) that the son's liability is not limited to the extent of assets received by him, consequently the grandson's liability cannot be greater than that of the son. The grandsons are liable to pay the antecedent debt of their grandfather. (*q*) The pious duty will be more pressing in the case of grandfather's debts, than in the case of the father's. (*r*) The grandson is liable for the debt incurred by the grandfather

(*k*) Tara *v* Harkishen, 50 A 447 1928 A 251

(*l*) Text No 18 p 316

(*m*) Page 431 *supra*

(*n*) *See* page 431 *supra*

(*o*) Ladu Narain *v* Goverdhan, 4 P 478 6 P L T 497 86 I C 721 1925 P 470

(*p*) *See* p. 451 *foot notes* (*l*) and (*m*)

(*q*) Gauri *v* Sheonandan, 46 A 384 22 A L J 369 78 I C 911 : 1924 A 543, Madhusudan *v* Bhagwan, 53 B 444 1929 B 113 Kuldip *v.* Ram, 3 P 425 83 I C 385 1924 P 454, Madho *v* Niamat, 11 O.L J. 579 : 1925 O 185 84 I C 501

(*r*) Kuldip *v* Ram, 3 P. 425 . 83 I C. 385 1924 P 454

by giving security for a person appointed a guardian under the Guardians and Wards Act. (*s*)

Want of necessity.

A grandson is held to be entited to challenge an alienation made by the grandfather for want of legal necessity though he was not born at the date of alienation. (*t*)

Onus

In order to successfully attack the validity of a sale in execution of a decree passed against the grandfather, the onus is on the grandson to prove immorality or illegality of the transaction on which the decree is based, (*u*) but in case of alienation the onus is on the purchaser to prove the validity of the alienation.(*v*)

P C on son, grandson, great-grandson

The Privy Council has now laid down that ther ule which binds son with liability to pay his fathers debts, extends equally to grandsons and great-grandsons. (*w*)

Sub-Sec vii—DEBTS NOT BINDING ON HEIRS

It is worthy of special notice that the question as to the liability of the male issue for the debts of the father or other paternal male ancestor, is dealt with by the Judicial Cammittee as part of the Joint family law, and with respect to what may properly be called *debt* or money borrowed. It is not reasonable to suppose that the whole Chapter of the Hindu law on the topic on *form of action* called Recovery of Debts is intended by their Lordships to have the force of law now.

P C view

Civil Courts Acts

The different Civil Courts Acts do not include *Recovery of Debts* while enumerating the branches of Hindu law to be administered by the Civil Courts of the different provinces respectively. The Bombay Civil Courts Act, however, does not at all refer to the Hindu and the Mahomedan laws, but provides that the law to be observed in the trial of suits shall be *statutory law*, in the absence of such law, *local usage*, if none such appears, the *law* of the *defendant*, and

(*s*) Brij Nath *v* Bindheshwari, 6 P L T 560 85 I C 791 1925 P 609

(*t*) Balu Ram *v* Mahadeo, 1927 A 127

(*u*) Badri *v* Radhi 80 I C. 622 1925 O 199

(*v*) Badri *v* Radha, 80 I C 622 1925 O 199

(*w*) Masit Ullah *v*. Damodar, 48 A. 518: 53 I A. 204 1925 P C 105, *followed in* Jang *v*. Bhaya, 1928 O. 43.

in their absence, *equity*, *justice* and *good conscience.* The language of the Bombay Act is elastic, and any branch of Hindu law may be enforced, either as the law of the defendant, or as furnishing a rule consistent with the principles of *equity* and *justice.*

Debts not binding on sons.

Debts not binding according to texts.—Father's debts not payable by sons as enumerated by Yàjnavalkya, Ushanas cited in Mit, on ii, 47, and Vrihaspati, Gautama and Vyasa cited in Vivàda-Ratnàkara *pp.* 57-58, are as follows—(1) debts due for *spirituous liquor*, (2) for *lust*, or (3) for *gambling*, (4) un paid *fines*, (5) unpaid *tolls*, (6) *useless gifts* or promises without consideration (*x*) or made under the influence of lust or wrath,(7) debt for being *surety*, (8) debt by or for *trade* and (9) debt that is not *vhyavahàrika* or lawful, usual or customary.

Danda, fine.

Danda or Fine.—A decree for mesne profits obtained against the father is not in the nature of *danda* or *fine* and a son is under a pious obligation to discharge it. (*y*) In the absence of intention to misappropriate the money handed over to the father for distribution, the mere delay or failure to distribute it to those entitled to shares thereof, does not amount to misappropriation and the sons are liable for it (*z*)

Useless gift.

Useless gift.—The Mitàksharà on the text of Yàjnavalkya, explains *"useless gifts"* to be gifts promised to an impostor, wrestler, flatterer, or the like.

Suretyship

Suretyship—With respect to liability for *suretyship* there is a difference between the sages, according to some, the son is liable, if the father was surety for repayment of money, not in other cases, according to others, the son is not liable in any case. This is not however, a debt for which the other members of the family should be made liable. But some High Courts have dealt with this question, as if the whole Chapter on Recovery of Debts is now in force. (*a*) In the case of *Narayan* v. *Venkatacharya* (*b*) a grandson was ex onera-

(*x*) *See* Arjun *v* Chhagan, 6 N L R 185 72 I C 1044 1923 N 300

(*y*) Ramasubramania *v* Sivakami, 21 L W 606 1925 M W N 371 90 I C 165 1925 M 841

(*z*) Ganesh *v* Jot, 87 I C 1317 1925 O 719

(*a*) Sitaramayya *v* Venkataramanna 11 M 373, Tukarambhah *v.* Gangaram 23 B 454 Benares, Maharajah of *v* Ramkumar 26 A 611 and 28 B 408

(*b*) 28 B 408 6 Bom, L R 434

ted from liability for grandfather's suretyship without a consideration. It has been held that the sons (*c*) or the grandsons (*d*) are liable for the debts of the father or grandfather, incurred as a surety. But the sons are not liable for father's debt, if the father stood as surety for something illegal or immoral, (*e*) or the honesty and good behaviour of another. (*f*) If the surety was of a purely personal character such as for appearance or assurance, but not for payment of money, the son's liability ceases on the death of the father. (*g*)

Vyavaharika— as held in

Vyavaharika.—As regards the term *vyavahàrika*, Pandit Giris Chandra Tarkàlankàra, the learned translator of the whole of the Vyavahàràdhyaya or Litigation Book of the Mitàksharà, has rendered it into "*necessary for life.*" In a decision of the Bombay High Court, the original term "*not vyavahàrika*" is supposed to be *avyavahàra*, ' which," it is observed by the learned judges, "may perhaps be better rendered as *unusual*, or *not sanctioned by law or custom.* It is this word that has crept into our text books under the guise, or disguise of *illegal* or *immoral.* and it will be seen that it really bears a wider significance. Put to simple English, the texts amount to this , that the son is not to be held liable for debts which the father ought not as a decent and respectable man to have incurred He is answerable for the debts legitimately incurred by his father : not for those attributable to his failings, follies or caprices." Accordingly it is held by their Lordships that a son is not liable under a decree obtained against the father for damages caused

Bombay

(*c*) Rasik *v* Singheswar, 39 C 843 16 C W N 1103 16 C L J 107 14 I C 147, Kameswaramma *v* Venkata, 38 M 1120 27 M L J 112 24 I C 474, Ramchandra *v* Kondayya, 24 M 555, Subramania *v* Shaw Wallace, 38 M L J 402 28 M L T 107 12 L W. 117 58 I C 648, Pudai *v* Baijnath, 56 I C 745 (O), Mayaram *v* Bhairan, 19 N L R 29 71 I C 351 : 1923 N 115, Chakhan *v* Kanhaiya, 1929 A 72, Mata Din *v* Ram, 52 A 153 1930 A 87

(*d*) Mahabir *v* Siri, 3 Pat L J 396 46 I C 27, Balkrishna *v* Sham, 56 I C 962 (P)

(*e*) Satya *v* Satpir, 4 Pat L J 309 51 I C 791 38 M L J 402, see p 446, topic "Suretyship" *supra*

(*f*) Choudhuri *v* Hayagaiba, 10 P 94

(*g*) Thangathammal *v* Arunachalam, 41 M 1071 35 M L J 229 (1918) M W N 673 48 I C 76, *see* Satya *v* Satpir, 4 Pat L J 309, 311 · 51 I C 791, *see also* Jwala *v* Maharaja Protap, 1 Pat L J 497 37 I C 184

by the father's *wrongful*, though not illegal, act in erecting a dam obstructing passage of water to the plaintiff's property, the son could not be held answerable for the liability incurred by the father, from which the family estate derived no benfit. (*h*)

The learned judges do not seem to be right in thinking that this word has crept into text-books as *illegal* or *immoral* whereas the writers of the text-books use the two terms as comprising all the debts for which the sons are declared not liable.

Calcutta holds contrary view

The Calcutta High Court has not accepted the rendering made by Pandit Giris Chandra Tarkalankara and rendered "*vyavaharika*" as equivalent to "lawful, usual or customary." (*i*) So under almost the similar circumstances, as was in the last mentioned Bombay case, the Calcutta High Court has held that the sons are bound to pay the father's debt (*j*)

Madras follows Calcutta

The Madras High Court does, however, draw a distinction between a breach of civil duty and a criminal act, with respect to misappropriation of money by the father for purpose of determining the liability of sons to make good the loss caused thereby, who are held to be liable if the taking itself does not amount to a criminal act, in which case a son cannot be made liable (*k*) The Madras High Court, (*l*) dissenting from the above Bombay case, (*m*) and following the decision of the Calcutta High Court, (*n*) has held that *Avyavaharika* debt means a debt not opposed to good morals, and consequently the son of a trustee of a public charity is liable for the funds of the trust mis-appropriated by his father. (*o*) The fact that the father was guilty of a criminal offence does not affect

(*h*) Durbar *v* Khachar, 32 B 348 10 Bom L R 297

(*i*) Chhakauri *v* Ganga, 39 C 862, 868 15 C L J 228 16 C W N 519 : 12 I.C. 609, in this connection *see* Mahabir *v* Siri, 46 I C 27, 31 3 Pat L J 396, 401

(*j*) 39 C 862

(*k*) McDowell *v* Ragava, 27 M 71, Kanemar *v* Krishna, 31 M 161 17 M L J 613, Gurunatham *v* Raghavalu, 31 M 472 3 M L T 394 : 8 Cr L J 147, *see* Rallia *v* Balmokand, 8 L 117, 120

(*l*) Garuda *v* Nerella, 35 M L J 661 9 L W 1 25 M L T 68 48 I C 740

(*m*) 32 B 348

(*n*) Chhakauri *v* Ganga, 39 C 862, 869 16 C W N 519 15 C L J 228 12 I C 609, *see* Gurunatham *v* Raghavalu, 31 M 472 3 M L T 394 8 Cr L J 147

(*o*) In this connection *see*, *ante pp* 444-445, "Breaches regarding other's property"

the liability of the son. (*p*)

The Oudh Chief Court interprets *avyavaharika* to mean a debt not supportable as valid by legal arguments and in which no right could be established in a Court of law (*q*)

Oudh

The damages for wrongful misappropriation by a father of another's property cannot be deemed *debts* for which a son may be liable, there was no debt antecedent to the decree, but merely a right for damages for a wrongful and criminal act. (*r*) The proof of previous conviction of the father is not essential, the test being whether the debt was infected with an element of criminality. (*s*)

Damages for wrongful and criminal acts

It should be noticed that if a father embarks in a new trading business, his sons cannot be made liable for the debts incurred by him for the same. (*t*)

Embarking in new trade

It is not prudent for the manager to indulge in risky transactions, but an act is not *avyavaharika* merely because it involves risk to the family estate. (*u*)

Immoral debts —While explaining the text of Yajnavalkya the Mitàksharà says,—"that sons are not bound to pay to the *wine-seller* and the rest"—*i e*, to the *winning gambler*, to the *mistress*, and the others

Immorality,

This explanation shows that there should be direct connection between the debt and the immorality exonerating the male issue from the liability of paying the same The mere proof or general evidence of immorality, (*v*) that the father was grossly extravagant and selfish in expenditure, (*w*) or a man of extravagant, profligate and immoral habits, (*x*) or

connection with debt to be proved

(*p*) In this connection *see ante p* 445 "Criminal Act"
(*q*) Mohammad *v* Jhao, 1928 O 10
(*r*) Pareman *v* Bhattu, 24 C 672
(*s*) Jagannath *v* Jugul, 48 A 9 23 A L J 882 89 I C 492 1926 A 89.
(*t*) *See p* 356-357 (b) *ante*
(*u*) Narainrao *v* Seth, 1930 N 273
(*v*) Lala Mukti *v* Iswari, 24 C W N 938, 943 57 I C 858, Sri Narain *v* Lala, 17 C W N 124 P C, Shibeshur *v* Brij, 14 I C 183 (C), Jaswanti *v* Tej 120 P W R 1917 41 I C 192, Ramaswamy *v* Kasinath, 1928 M 226
(*w*) Sita *v* Zalim, 8 A 231 6 A W N 62
(*x*) Sri Narain *v* Lala, 17 C W N 124 P C 25 M L J 27 17 I C 729, Hazari Mal *v* Abani, 17 C W N 280 17 C L J 38 18 I C 625, Babu Singh *v* Bihari, 30 A 156 5 A L J 175 A W N (1908) 61, Dhulipalia *v* Kuppa, 36 M L J 295 58 I C 797, Narendra *v* Abdul, 30 I C 216 2 O L J 237, Ulfet *v* Tej, 8 L 632, 642 1928 L 83

kept a mistress, (*y*) or delighted in *nautches*, (*z*) or that he attended *nautches* or also gave *nautches* at his own expense, (*a*) will not be enough, unless some connection be shown, between the debts and the father's immoralities. (*b*) It must be proved that the particular debt was contracted for an immoral purpose (*c*)

Speculation not immoral.

Speculation is not repugnant to good morals and a debt contracted for such a purpose is not tainted with immorality. (*d*)

Debts how far bind co-parcener's wives.—The wives of co-parceners of a joint family have rights of residence in the family dwelling house and that of maintenance from the family property and the co-parceners have no right to sell the house or the property so as to deprive them of their rights, unless it were to meet claims which are paramount to their rights. (*e*) So unless the wife of one of the members prove that the debts to satisfy which the dwelling house was about to be sold, were for immoral purposes, she cannot claim that the house be sold, if at all, subject to her right of residence. (*f*)

Sub-Sec viii—INTEREST

Son's, grand-son's liability

Interest —According to the *sages* the sons are liable to pay the father's debts with interest, but the grandsons are not liable to pay interest, (*g*) but it has been held that grandsons are also liable to pay interest on grandfather's debts. (*h*)

How fair rate determined

The rate of interest must be relative to the time and place where the money is borrowed, the kind of security offered, the possibilities of realising such security, the supply of capital and the opportunities of finding persons willing to lend, and the whole terms and conditions of lending are to be regard-

(*y*) Sundara *v* Arumuga, 59 I C 390 12 L W 159
(*z*) Chintaman *v* Kashinath, 14 B 320
(*a*) Budree *v* Kantee, 23 W R 260
(*b*) Ulfet *v* Ilej, 8 L 632 1928 L 83
(*c*) Sri Narain *v* Lala, 17 C W N 124 P C 25 M L J 27 17 I C 729, Ramchandra *v* Bhagwant, 53 B 777 1929 B 465, Tulshi *v* Bishnath, 50 A I *See* Subba *v* Swamia, 7 L W 407, 47 I C 834, Bakhtawar *v* Ram, 3 O L J 289 38 I C 44, Ju *v* Kurati, 1928 O 465
(*d*) Chotkao *v* Hasan, 1929 O 458
(*e*) Mungala *v* Dinonath, 12 W R O C 35 (Bengal School), *see* also, Ch. XI Sec 3, Sub Sec, in topic "Place of residence"
(*f*) Ninki *v* Sham, 89 I C 874 1925 L 638
(*g*) *See* p 431 *ante*
(*h*) *See foot note* (*w*) p 455

ed together. (i) It is not a rule of law laid down in *Radh Kishun* v. *Jag Sahu* (j) that, where a borrower has previously borrowed under other instruments, but on similar onerous terms, this cannot be evidence that the borrowing on the occasion in question was a reasonable and proper transaction (k) Therefore, in a suit by the crerditor to enforce repayment of his money, the defendants can validly contend that there was no necessity to borrow on an exorbitant rate of interest though the necessity for the loan might have been accepted. (l) The onus is on the lender to prove that there existed circumstances to borrow at such high rate of interest, (m) and the evidence on the lender's part that the money could not, in the circumstances have been raised at lesser rate of interest would suffice to shift the onus (n) But where there is no evidence or where the lender fails to discharge the onus, the local Court may be justified in drawing its own inference as to rate of interest (o) and in reducing it. (p) There is no rule which binds the Judicial Committee, to lean to the reduction of the rate of interest or to presume that simple interest must always be judicially preferable to compound interest, or that rates, because they might seem high in England, must be unreasonable in India (q) The transaction, however, will

Onus, presumption

(i) Sunder v Satya, 7 P 294, 300, 302 55 I A 85 32 C W N. 657 47 C L J 403 1928 P C 64

(j) 4 P 19 51 I A 278 29 C.W N 293 1924 P C 307 47 M L J. 329 26 Bom L R 732 2 Pat L R 259 80 I C 791

(k) Sunder v Satya, *supra*, 7 P at p 303

(l) Nazir v Rao, 41 A 571 23 C W N 700, Hurronath v Rundhirp, 18 C 311 18 I. A 1, (widow's case) Nand Ram v Bhapal, 34 A 126, Tikait v Pandit, 6 P C T 507 1925 P 588

(m) *See* Section 9, sub-section iii, p 483, Rai Radha v Jag Sahu, 4 P 19 29 C W N 293 51 I A 278 47 M L J 329 26 Bom L R 732 22 A L J 959 80 I N 791 1924 P C 184 (case of a widow), Hurro Nath v Rundhir, *see above*, Nand Ram v Bhapal, *see above*, Harmanoje v Ram, 6 M L J 462; Stevense v Janoi, 19 C W N 80 22 I C 304, Kruthiventi v Sitaramachandraraju, 48 M I J 584 22 L W 568 90 I C 458 1925 M 897 Parmeshwar v Raj, 1925 P 59, Bajrangi v Padarath, 1930 A 504, Jan v Bikoo, 7 P 798 1929 P 130, Ram Saran v Jhullar, 1930 O 333

(n) Rai Radha v Jug Sahu, *see above*

(o) *See* Sunder v Satya, *supra*

(p) Hurronath v Rundhir, 18 C 311 18 I A 1

(q) Sunder v Satya, *supra*, 7 P at p 304, *see* Jan v Bikoo, 7 P 798 1929 P 130

not be vitiated merely because the interest fixed was higher than the Court rate. (r)

High rate no ground to set aside sale

The son cannot have a sale set aside on the ground of the rate of interest being unconsionable when he cannot challenge his father's transaction merely on the ground of want of legal necessity. (s)

Rule,

Damdupat —The rule of *Damdupat* is that the interest, exceeding the amount of the principal, cannot be recovered *at a time*, (t) though the total amount paid from time to time may far exceed the capital. This rule of law is not applied to the whole of India It applies to matters of contract (u) and only to cases where the parties or the debtors are Hindus. (v) But a Hindu by assignment of a debt in his favour from a non-Hindu (w) or a non-Hindu by similar transfer from a Hindu (x) cannot enforce this rule against the creditor.

not in whole of India,

only among Hindus,

This rule is applied to the Presidency of Bombay, (y) the Provinces of Berar, (z) and Sindh, (a) Santal Parganas (b) and the portion of the city of Calcutta within the jurisdiction of the Original Side of the High Court (c) But it does not apply to the Presidency of Bengal outside the area mentioned above (d) This rule is not applicable in Madras (e)

of Bom, Berar, Sindh Santal Perganas, Cal.,

not in Mad,

(r) Sheo Behari v Sheo, 90 I C 345 1925 O 740

(s) Sobha v Kesho, 1930 O 234 (t) Manu, Ch viii, 151

(u) Horiram v Madan, 49 C L J 335 P C

(v) Ramconoy v Johur, 5 C 867, Ram Kanye v Cally, 21 C 840, Dawood v Vallubdas, 18 B 227, Nanchand v Bapusaheb, 3 B 131, Ganpat v Adamji, 3 B 312, Ali Saheb v Shabji, 21 B 85, see 37 Geo III Ch 142, Section 13

(w) Harilal v Nagar, 21 B 38, Narayan v Syed Hafiz, 87 I C 264 1925 N 21, Abdul v Sheikh, 1927 N 249

(x) Jeewan v Manordas, 35 B 199 12 Bom L R 992 8 I C 649

(y) Sundara v Jayawant, 24 B 114 1 Bom L R 551, Suklal v Bapu, 24 B 305 2 Bom L R 18, Ali Saheb v Shabji, 21 B 85, Dagdusa v Ram, 20 B 611, Balkrishna v Hari Gobind, 15 B 84, Gonesh v Keshavrav, 15 B 625, Hari v Balambhat, 9 B. 233, Narayan v Satvaji, 9 B H C R 83, *See* Hiralal v Narsilal, 37 B 326, 338 41 I A 68 15 Bom L R 483 17 C L J 474 25 M L J 101 11 A L J 432 18 I C 909

(z) Ram Chandra v Rasha, 10 N L R 96, Narayan v Nathmal, 17 N L R 200 65 I C 275, Narayan v Khiwaraj, 1929 N 117

(a) Karamchand v Balchand, 2 S L R 10

(b) Sourendra v Hari, 5 P 135, 145

(c) Nobin v Romesh, 14 C 781, Ramcony v Johur, 5 C 867 7 C L R 204, Ram Kanaye v Cally, 21 C 840, Lall v Ihaomoney, 23 C 899, Ramlal v Haranchandra, 8 B L R (O C) 130

(d) Het Naryan v Ram, 9 C 871 12 C L R 590, Surjya v Sridhary, 9 C 825; 12 C L R 400, Pran v Jadu, 2 C W N 603, Deen Dayal v Kylas, I C 92; 24 W R 106

(e) Annaji v Raghubai, 6 M H C R 400, Subramania v Subramania, 31 M 250, *See also* Madhwa v Venkataramanjula, 26 M 662, 669

"The rule of *damdupat* only exists so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree." (*f*) It does not apply to a claim for legacy. (*g*)

It exists between debtor & creditor

The principle of *damdupat* is not applicable to a decree by puisne mortgage (*h*) nor to interest accruing due after the institution of the suit. (*i*) The interest on arrears may be capitalised by subsequent agreement, but prospective interest cannot be capitalised (*j*)

when not applicable

The rule of *damdupat* is not affected by the Transfer of Property Act and the Indian Contract Act (*k*) or the Acts relating to interests. (*l*)

Tr Pro Act, Cont Act

Sub-Sec ix—LIMITATION*

Limitation—The son's pious duty to pay the father's debt will be barred by limitation, if not enforced within six years under Article 120 of the Limitation Act.(*m*) from the moment the debt incurred by the father matures, (*n*) but in the former case it is not decided when the right to sue accrues for the purpose of this Article. If the personal remedy against the father is barred it becomes barred against the son also. (*o*)

Limt

Son's liability for barred debts—Some Courts hold that it is a pious duty of the son to pay off the time-barred debt of his father, (*p*) while others entertain a contrary view. (*q*)

Different views

(*f*) *In the matter of* Harilal Mullick, 33 C 1269, 1276 10 C W N 884 Nanda v Dhirendra, 40 C 710 21 I C 974, Narayan v Khewaraj, 1929 N 117

(*g*) Hariram v Madan, 49 C L J 335, 341 P C

(*h*) Naryan v Nathmal, 17 N L R 200

(*i*) Achyut v Ramchandra, 27 Bom L R 492 87 I C 719 1925 B. 362; Motilal v Reni, 1924 N 348 78 I C 711

(*j*) Sadasheorao v Kalusingh, 21 N L R 45 88 I C 561 1925 N 272

(*k*) Kunja v Narsamba, 42 C 826 20 C W N 110, Jeewan v Manordas, 35 B 199, 203 12 Bom L R 992 8 I C 649, *see* 37 Geo III, Ch 142 Section 13 and also Section 4 of Transfer of Property Act read with Section 37 of the Indian Contract Act, *but see* Madhwa v Venkataramanjulu, 26 M 662

(*l*) Ram Lal v Haran, 12 W R (O C) 9, Kushalchand v Ibrahim, 3 B H C R (A C) 23, Hakma v Meman, 7 B H C R (O C) 19

* *See post* Sec 9, Sub sec iv, "Limitation"

(*m*) Brijnandan v Bidya, 42 C 1068 F B 19 C W N 849 21 C L J 543 29 I C 629, Champa v Sham, 13 I C 530 (A)

(*n*) Surja v Golab, 27 C 762

(*o*) Thakur v Jagraj, 1928 A 86

(*p*) Shibnath v Alliance Bank, 25 I C 480 110 P W R 1914 215 P L R 1914 3 P R 1915, Hari v Bharat, 20 I C 590 16 O C 185

(*q*) Subramania v Gopala, 33 M 308 20 M.L J 633 8 M L T 321 7 I C 898, Achutanand v Surjanarain, 5 P 746

But the son's agreement to pay father's barred debt, is not illegal. (r)

Different view on son's liability

Renewal of barred debts —The sons are liable to pay the time-barred debt acknowledged by the father by executing a second bond, (s) that is, if the father revived the debt and made himself liable, the sons are bound by it, (t) but a contrary view has also been held (u) When according to the terms of the deed of partition the son failed to discharge the debts allotted to his share, and the father being pressed by the creditor, kept the debts alive by renewing the deed and then discharged them a personal decree can be obtained against the son in a suit brought by the father for recovery of the money. (v)

Renewal by manager

The renewal, by the managing member of a joint family, of a time-barred promissory note originally executed for the benefit of the family, after the suit for partition was filed, does not bind the other members ; but in equity they are bound to contribute to the same (w)

Extent of son's liability

When the sons executed a simple money bond in order to pay off a time-barred debt due from their father, the bond could be enforced against the sons to the extent of the family property and not against them presonally, inasmuch as, the bond was without consideration and as it did not come under Section 25 (3) of the Indian Contract Act, because the original debt, but for the limitation, could not have been recovered from the sons. (x)

(r) Rajamier v Subramaniam, 1928 M 1201

(s) Ram v Chhedi, 44 A 628 20 A L J 577 1922 A 402, Satyanarayan v Satyanarayanmurti, 50 M L J 144, *see* Hari v Bharat, 16 O C 185 20 I C 590

(t) Jagdambika v Kali, 9 P 843, 847-849, Gajadhar v Jagannath, 46 A 775 F B

(u) Indar v Sarju, 11 I C 737 (A), Jang v Bhaya, 1928 O 43, *see* Naro v Paragauda, 41 B. 347 19 Bom L R 69 39 I C 23, Giridhari v Govind, 19 A L J 456 63 I C 25

(v) Ramasami v Doraisami, 1929 M 137

(w) Viswasaukaranarayana v Kasi, 21 L W 25 85 I C 225 1925 M. 453

(x) Asa v Karam, 51 A 983

P C and legislature on money-lenders.

Indian Legislature and Judicial Committee—A student of jurisprudence would be at a loss to understand the principle on which the highest tribunals are changing the Mitākshara law which they are called on to administer Hindu law as it is, seems to be suited to the exigencies, and is conducive to the welfare and well-being, of Hindu society, and the introduction of an innovation, like the legal liability of the son to pay off the father's debt, has been attended with mischievous consequences entailing great hardship The Indian money-lenders are shrewd and astute enough to be able to protect their own interests, while men of property here are often surrounded by unprincipled servants and hangers-on who feel no compunction in robbing their masters and benefactors in collusion with money lenders not found to be endowed with honesty By the operation of the doctrine introduced by the Privy Council in *Girdharee Lall's* case many ancient families are becoming ruined and reduced to poverty But while the Judicial Committee is changing the law for the benefit of dishonest money lenders mistaken for honest bankers, the Indian Legislature is passing Enactment after Enactment for the protection of the people against the money-lenders.

Sec 9—JUDICIAL PROCEEDINGS

Sub-Sec 1—SUITS

Transaction may be in representative capacity.

Personal and representative capacity— Every member of a joint family has two capacities, one of which may be called the personal and the other, the representative. In transactions with outsiders he represents the whole family, if he acts in his representative capacity, (*y*) but if they relate to his individual interests, then he acts in his personal capacity. In all transactions and concerns with the outside world a single member such as the manager, acts as the representative of the family so as to bind the whole family, when those are for the benefit or necessity of the family : a member other than the manager can so act if he is previously authorized or his acts be subsequently ratified by words or conduct. (*z*) A property purchased in the name of a member of joint family is presumed to be family property, on the principle that he represents the family. When transactions are made in the name of one member, as for instance when a bond stands in a single member's name, that member represents the family in relation to the other party, as regards matters arising out of the transaction, and accordingly the

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(*y*) *See* Ram *v* Tanak, 1928 P 557

(*z*) Vithu *v* Babaji, 32 B 375 10 Bom L.R 505

single member is *prima facie* entitled to collect the bond debt, and payment to him would operate as a valid discharge of the debt. (*a*) How far a single member may represent the family in suits or other judicial proceedings is now considered.

Generally a person not bound if not a party in suit,

The ordinary general rule is that no person can be bound by a decree to which he is not a party, it cannot even be used as evidence against him, and that a person cannot be appointed guardian *ad litem*, if his interests be adverse to those of the minor Hence all the members must be parties to a suit relating to the property, trade or business of the family. But this rule is not followed in all cases in which the managing member alone was the party to a suit sometimes he is held to represent the whole family, (*b*) and sometimes not so. The decisions do not seem to be uniform. (*c*)

but manager alone can represent family sometimes

Suit by the manager or a single member—There are several cases in which it has been held that one member of a joint family, cannot alone sue on behalf of the family. (*d*) The managing members of a joint family business can maintain (*e*) a suit against debtors in their own names without joining all the co-parceners When, however, the other members of the family are minors, then, the manager who is the *de facto* guardian of their interests must necessarily represent the whole family, and may alone sue, (*f*) but the defendant may always insist on all the co-owners being joined as plaintiffs on the record. (*g*) Even when the other members are adults it has been held that the question of the right of the manager to sue in his own name is rather one of authority, (*h*) and the defendant desirous of bringing

(*a*) Ramanujachariar *v* Srinivasachariar, 9 M L J 103, Ramasami *v* Manikka, 9 M L J 155

(*b*) *See* Sheo Baksh v Indra, 12 O L J 239 87 I C 185 1925 O 392

(*c*) Phoolbash *v* Lalla, 3 I A 7, 25, Nathuni *v* Manraj, 2 C 149, Ramsebuk *v* Ramlal, 6 C 815, *see* pp 475 476 *infra*

(*d*) Seshan *v* Veera, 32 M 284 19 M L J 372 5 M L T 351

(*e*) *See* Kishan *v* Har, 33 A 272 38 I A 45 15 C W N 321 13 C L J 345 9 I C 739 21 M L J 378 13 Bom L R 359, *see foot note* (*y*) p 356 and *foot note* (*k*) p 388, Durga *v* Damodar, 32 A 183 7 A L J 161 5 I C 767

(*f*) *See* Lingangowda *v* Basangowda, 51 B 450 54 I A 112 101 I C 44 1927 P C 56, *see post* p 471 "*Res judicata*"

(*g*) Harigopal *v* Gokaldas, 12 B 158, Balkrishna *v* Municipality, 10 B 32, Jas *v* Sher, 25 A 152 22 A W N 223

(*h*) *See pp* 384-385 *supra*, Lingangowda *v* Basangowda, *supra*

in the other members on the record for insuring himself against further litigation should take the objection at an early stage, as the same is capable of being waived (i)

When a mortgage stands in the name of a single member, he alone may sue upon it,(j) even when the other members had joined in the deed, regarding the subject matter of the suit (k)

When single member can

Suit against manager alone—It has been held that a decree in a suit against one brother alone, based on a mortgage executed by him as manager for legal necessity even during the minority of another brother, and the sale of the mortgaged property in execution of that decree, are not, binding on the other brother (l)

Suit against manager,

The learned judges in these cases enunciate the ordinary principle that a person ought not to be deprived of his rights by judicial proceedings to which he was no party But if the debt was one payable by that person as well as by the parties to the previous suit, and the property was sold at its proper price, and there is no other ground for impugning the decree or the sale, so far as his share is concerned, save and except the mere technical objection of his not having been made a party to the previous proceedings, then, it has been held in some cases, having regard to the peculiar nature of the transaction and position of the members who alone had been made defendants in the previous suit, that all the members were bound by the proceedings although some were not joined on the record (m) Thus the managers of a joint family trade and of its money-lending business have been held to be the accredited agents of the family and to represent the whole family in transactions falling within the scope of their authority, such as borrowing money by pledging the family property, for the purposes of such trade or business, as well as in suits based on such mortgage, brought against

when representative

(i) Guruvayya v Dattatraya, 28 B. 11, 19 5 Bom L R 618

(j) Ramanujachariar v Srinivasachariar, 9 M L J 103

(k) Subrahmanya v Siva, 52 I C 931 10 L W 180 (1919) M W N 537.

(l) Abilak v Rubbi, 11 C 293, Subramanian v Subramanian, 5 M 125 (F B)

(m) *See* Tribeni v Ramasray, 10 P 670, 753 F B

them only, (*n*) and the whole family property has been held to pass to the execution-purchaser, unless it can be proved by the other members who were not parties to the suit, that there was no legal necessity or that what was intended to be sold and bargained for, was not the whole family property, but only the co-parcenery interest of the managers who alone were parties to the previous suit. (*o*) So also the member of the family in whose name a leasehold property stood represented the family in suits for rent of the property, and the decrees for rent against him alone may be realized by the sale of the whole family property. (*p*)

Having regard to the low standard of morality among the money-lenders and many other classes of people in this country, this departure from the strict rule of law appears to be likely to lead to fraud, collusion and dishonesty for the purpose of depriving men of their just rights by law-suits of which they may be ignorant, and the Courts would not be justified in extending this exceptional rule

Suit against father how far binds sons,

Suit against father — The father of the family stands on a different footing from that of a brother or an uncle, and cannot be presumed to act in fraud of his sons, and therefore he may, in a judicial proceeding, be deemed to represent the family consisting of himself and his male issue.(*q*)

P C view

The following extract from the judgment of the Privy Council in the case of *Mt Nanomi Babuasin* v. *Modun Mohun* (*r*) shows what the law is on the subject:—

" There is no question that considerable difficulty has been found in giving full effect to each of the two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his

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(*n*) Baba Din *v* Bansraj, 27 I C 567 2 O L J 55 18 O C 84, Raghunathji *v* Bank of Bombay, 34 B 72 11 Bom L R 255 2 I.C 173, Ghanshyam *v* Hardei, 32 I C 380 (O) *See* pp 356-358 *supra*

(*o*) Daulat *v* Mehr, 15 C 70 14 I A 187, Sheo Pershad *v* Saheb Lal, 20 C 453, Baldeo *v* Mobarak, 29 C 583 6 C W N 370, Sheo *v* Jaddo, 36 A 383, 386 41 I A 216 12 A L J 1173 18 C W N 968 20 C L J 282 16 M.L.T. 175 16 Bom L R 810, on appeal from 33 A 71

(*p*) Bissesur *v* Luchmessur, 5 C L R 477 6 I A 233, Hari *v* Jairam, 14 B 597

(*q*) *See* Madhusudan *v* Bhagwan, 53 B 444 1929 B 213, Sabha *v* Kishan, 52 A 1027, Kishan *v* Brijraj, 51 A 932: 1929 A 726, Sharam *v* Sadhu, 1928 L 484, Naryan *v* Dhubabai, 21 N L R 38 92 I C 663. 1925 N 299, *see* also *p* 469 *foot note* (*s*)

(*r*) 13 C. 21 13 I A. 1

father It is impossible to say that the decisions on the subject are on all points in harmony, either in India or here * * *

"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far sons can be precluded by proceedings taken by or against the father alone from disputing that liability Destructive as it may be of the principle of independent co-parcenery rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an *antecedent* debt, or against his creditors' remedies for their debts if not tainted with immorality On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority

"The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious Their Lordships do not think that the authority of *Deendyal's* case bound the Court to hold that nothing but Giridhari's (the father's) co parcenery interest passed by the sale If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit All the sons can claim is, that not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in suit of their own Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale

"If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's co parcenery interest alone (and in *Deendyal's* case there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings"

Conclusion

Conclusion, suit by or against manager—It has been held that the managing member can sue and be sued in a representative capacity so as to bind the entire family with the decree. (*s*) But there is no presumption that a suit

(*s*) *See foot notes*, (*e*), (*f*), (*h*), (*n*), (*o*), (*p*) and (*q*) above, Sheik Ibrahim *v* Rama, 35 M 685 21 M L J 508 10 I C 874, Jadoo *v* Sheo, 33 A 71 7 A L J 945 7 I C 902 on appeal 36 A 383 41 I A 216 18 C W N 968 20 C L J 282, Durga *v* Damodor, 32 A 183 7 A L J 161 5 I C 767, Kishan *v* Har, 33 A 272 38 I A 45 13 C L J 345 21 M L J

by the managing member is in his representative capacity; (t) but a contrary view has also been expressed; (u) and hence, according to to this latter view, when he is sued along with certain other members of the family no such presumption arises. (v) When the senior members of the family executed the mortgage deed and they only were impleaded in the suit, the presumption is that one of them must have been the manager and as such the decree in such a suit binds all. (w) But the other view is that in the absence of any proof that any one of them acted for the family or that any one of them acted as *de facto* manager the suit is not binding on all. (x) When the father alone executed the mortgage but in the suit the sons were also impleaded, the question of presence of legal necessity or antecedent debt ought to be tried, if raised by the sons (y)

The plaint in a suit by a manager should state that the suit is by the manager as such (z) But an *obiter* has been expressed that mere omission to describe the manager as such does not debar the plaintiff from claiming that the manager represented the family (a) The same Court in a previous decision has held that it cannot be laid down as a general

378 15 C W N 321 13 Bom L R 359 9 I C 739 Bishambhar v Indar, 10 I C 200 14 O C 127, Chajju v Nathan, 15 I C 876 (A), Kirpal v Sant, 15 I C 305 71 P R (1911), Mela v Gori, 3 L 288 66 I C 485 1922 L 200, Baijnath v Daleep, 58 I C 489 (Pat), Lal Bahadur v Abharan, 13 A L J 138 (F B) 27 I C 795, 798, Rameshwar v Bhangilal, 32 I C 996 12 N L R 45 Samu v Swaminatha, 25 I C 221 16 M L T 163 1 W. 643, Sheo Dulare v Brij, 25 I C 849 1 O L J 456, Narayan v Sagunabai, 49 B 113 26 Bom L R 1200 85 I C 181 1925 B 193, Ramchandra v Bhagwant, 53 B 777 1929 B 465, Madhusudan v Bhagwan, 53 B 444 1929 B 213, Atma v Bankee, 1930 L 561

(t) Ramasawmi v Annathurai, 20 M L J 852 7 I C 341

(u) Thakur v Jagraj, 1928 A 86

(v) Thakur v Jagraj, *Supra*; see Sethuratnam v Chinna, 1930 M. 206.

(w) Deo Narain v Fagu, 1930 A 541

(x) Padmakar v Mahadev, 10 B 21

(y) Angaraj v Ramrup, 1930 O 284

(z) Girwar v Makbunessa, 1 Pat L J 468

(a) Gobind v Baldeo, 1930 P 293 (*Obiter*)

porposition that the managing member must be mentioned as a party in that capacity, but it is to be seen whether he effectively represents the family having regard to the circumstances of the case. (*b*)

Res judicata when suit representative

Res judicata.—A suit, by other members of a joint family, is barred by the principles of *res judicata* (Explanation vi of Section 11 of the Civil Procedure Code) if in the previous suit by the managing member, the manager acted on behalf of himself and representing the minor members' interests also, and if the other members were adults, with their assent (*c*) The execution against the father is effective against the son also and if any matter in execution is barred by *res judicata* against the father, it is operative against the son as well. (*d*) The suit by a purchaser against the son, after the sale having been set aside on the son depositing a certain sum, for the recovery of the balance of the consideration money paid to the father, is not barred by *res judicata.* (*e*)

Executions against father alone,

What passes in execution against father alone.—In *Nanomi Babuasin* (*f*) and in the cases of *Bhagbut v. Mt. Girja*, (*g*) *Minakshi v. Immudi* (*h*) and *Mahabir v. Moheswar* (*i*) the Judicial Committee held that the entire family property passed in execution of a decree against the father alone, (*j*) and in the cases of *Deendyal* v. *Jugdeep* (*k*) *Suraj Bansi* v *Sheo Persad* (*l*) *Hardi* v. *Ruder* (*m*) *Simbhunath* v. *Golap Sing* (*n*) and *Pettachi* v. *Chinnatambiar* (*o*) it was held that the father's undivived interest only passed. In *Sat Narain* v.

(*b*) Lalchand *v.* Seogobind, 8 P 788 1929 P 741, *see* Sethuratnam *v* Chinna, 1930 M 206
(*c*) Lingangowda *v.* Basangowda, 51 B. 450 54 I A 112 101 I C 44 1927 P C 56
(*d*) Subramania *v* Venkatarama, 1930 M 257
(*e*) Raghunath *v* Ram, 1927 A 421
(*f*) 13 C 21 13 I A 1
(*g*) 15 C 717 15 I A 99 *But see* 32 I C 996.
(*h*) 12 M 142 16 I A 1
(*i*) 17 C 584 17 I A 11
(*j*) *See* Raghunandan *v* Parmemeshwar, 2 Pat L J 306 1917 Pat 137 39 I C 779, Gadadhar *v* Ghana, 3 Pat L J 533 47 I C 212, *see* Ganesh *v* Deo 4 Pat L J 692 52 I C 271, De Souza *v* Wamanrao, 27 Bom L R 1451 91 I C 984 1926 C 117, Abdul Karim *v* Ramkishore, 47 A 421 23 A L J 196 86 I.C 837 : 1925 A 327
(*k*) 3 C 198 4 I A 247
(*l*) 5 C 148 6 I A 88
(*m*) 10 C 626 11 I A 26
(*n*) 14 C 572 14 I A 77
(*o*) 10 M 241 14 I A 84

Bihari Lal(*p*) the Privy Council has held that in a sale in execution of a decree against the father, the son's interest also passes unless the lender knew that the debt was incurred for purposes of immorality. The following propositions appear to be laid down in these cases .—

General rule,

first,

1. The whole family property may be sold in execution of a money decree against the father alone, if the debt was not contracted for immoral or illegal purposes. But the son cannot challenge the execution sale on the ground that the debt sued on was without necessity. (*q*)

second,

2. If the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole: and the sons though not parties to the proceedings, cannot claim their shares against the purchaser except by proving that the debt was contracted for immoral or illegal purposes, and that the purchaser had actual or constructive notice of that fact. A claim preferred by the sons has been held to affect the purchaser with such notice. (*r*) When the creditor is the purchaser he is affected with notice of all the proceedings. (*s*)

third,

3. Should, however, the original transaction and the proceedings in the suit, as well as the price paid, show that what was intended to be sold was the father's co-parcenery interest only, then the purchaser cannot get more than that interest (*t*) In the absence of circumstances showing an intention to put up the entire interest of the family in the property sold in execution of a money-decree against the father, only his interest passes to the execution-purchaser. (*u*)

fourth,

4. The Court will look at the substance, and not merely at the form,(*v*) of the execution-proceedings, and therefore the

(*p*) 6 L 1 52 I A 22 29 C W N 797 47 M L J 857 27 Bom. L R 135 23 A L J 85 84 I C 883 1925 P C 18

(*q*) Gajadhar *v* Jadubir, 47 A 122 85 I C 31 1925 A 180, Sabha *v* Kishan, 52 A 1027

(*r*) 5 C 148

(*s*) 10 M 241 : 14 I A 84

(*t*) 14 C 572

(*u*) Maruti *v* Babaji, 15 L. 87.

(*v*) *See* Sirpat *v* Prodyot, 44 C 524 21 C W N 442 32 M.L.J 133 25 C L.J 220 19 Bom I R 290 15 A L J 147 30 I C 252

expression "right, title and interest of the judgment-debtor used in the sale proceedings and in the sale-certificate, is not to be taken to necessarily show that the father's interest only was sold. (*w*)

fifth

5. The points to be determined in such cases are,—

(*a*) What was the interest that was bargained for and paid for by the purchaser? (*x*) Was it the father's interest only, or was it the interest of the entire family? And if the latter, then

(*b*) were the debts, for which the decree was obtained, in execution of which the property was sold, contracted for immoral or illegal purposes? and

(*c*) had the purchaser notice that the debts were so contracted? (*y*)

Persons interested to be made parties,

Transfer of Prperty Act § 85 (now) Order 34, Rule 1, Civil Procedure Code—There is, however, no strong reason why the courts should be so indulgent to money-lenders who are found as a general rule to be unscrupulous and dishonest, as to depart from the ordinary law, and hold that members of a joint family are bound by alienations and decrees and execution-sales to which they were not parties, except in the exceptional case of the father of a family being the transferor or the judgment-debtor In a case in which the sons objected to the sale of their interests in execution of a decree obtained against the father alone, in a suit on mortgage executed by him, upon the ground of their not having been made parties to the mortgage-suit, the Allahabad High Court has held—that Section 85 of the Transfer of Property Act is imperative and applies to a suit or mortgage executed only by the father or any other manager of a joint family (*z*) But this view of the law has been overruled (*a*) and it has been held that a manager can represent the whole family in a suit though the other members were not made parties to it The Calcutta High Court also has in a similar case held that that Section is compulsory, and that the minor son was not represented by the father who was the mortgagor, and against whom alone the suit on the motgage had been brought and decree obtained But their Lordships held

But manager can represent Hindu family,

(*w*) Jugal *v* Jotindro, 10 C 985, 992 11 I A 66

(*x*) *See* Thakur *v* Ram, 22 C W N 330 (P C) 27 C L J 191 20 Bom L R 502 43 I C 268 34 M L J 97 16 A L J 33, Narumal *v* Jagatmal 1925 S 288, Dayanand *v* Daji, 1926 B 548 28 Bom L R 1022

(*y*) Krishnaji *v* Vithal, 12 B 625

(*z*) Bhawani *v* Kallu, 17 A 537 (F B) 15 A W N 12

(*a*) Hori *v* Munman, 34 A 549 F B 9 A L J 819 15 I C 125, Madan *v* Kishan, 34 A 572 9 A L J 844 15 I C 138, Kishan *v* Har, 33 A 272 38 I A 45 15 C W N 321 13 C L J 345 13 Bom L R, 359 8 A L J 256 15 I C 125 9 I C 739 21 M L J 378, in this connection see, Nathu *v*. Ram, 47 A 427 23 A L J 246 87 I C 700 1925 A 335

that inasmuch as the minor sued to declare that he was not bound by the decree nor by the mortgage, the debt having been contracted for illegal and immoral purposes, and as the latter point was found against him, and he was not willing to redeem, his suit must be dismissed though he was not a party to the decree, since the only right the minor plaintiff now had was the right to redeem (*b*)

Tr Pro Act in conflict with P C,

It should, however, be observed that this view of Section 85 of the Transfer of Property Act, namely, that according to its provisions even the father cannot be held to represent his male issue in a mortgage suit brought against him alone, and in the subsequent proceedings including sale of the family property in execution,—is in direct conflict with the law laid down and explained by the Judicial Committee in the cases of *Girdharee Lall* (*c*) *Muddun Thakoor* (*d*), *Suraj Bunsi Koer* (*e*), and *Nanomi Babuasin* (*f*) and in several others The question is not merely one of procedure but one intimately connected with the Substantive Law of Joint Families, the corporate constitution of which necessitates their representation by a single member, in transactions with outsiders It is no doubt true that the ordinary rule, that all persons should be made parties to suits that affect their interests in property, ought to be applied even when the members of a joint family are concerned, for safe-guarding their interest against the possible fraud and collusion of the managing members, and for preventing the property from being sold at an inadequate price by reason of all the interested members not being made parties to the proceedings, and by reason of the purchaser's apprehension of subsequent litigation The doctrine of representation, therefore, should not be extended to judicial proceedings as a genera lrule But when the managing member is the father of the family there is a strong, if not conclusive, presumption against fraud and collusion, there being sufficient safeguard of the interests of the other members in his natural affection and love for them

whether P C view overruled

The question is whether the exception to that general rule, laid down by the Judicial Committee on the basis of the doctrine of representation, has been repealed by the Legislature.

P C rule *re* father.

It is worthy of special remark that the Privy Council has enunciated two propositions, namely, (1) that the father may alienate the whole property for paying off his antecedent lawful debts, and (2) that the courts can do what the debtor himself could do, that is, effect a judicial sale of the whole property in execution of a decree against the father alone for his lawful debts It would be anomalous if a purchaser under a judicial sale be in a worse position than a private purchaser

There is a difference of opinion among the learned judges as to the effect of the said Section 85, which seems to be caused by the different points of view from which the question is considered Looking from a theoretical point of view, it appears to be unjust that a person having an interest in the property

(*b*) Lala Suraj *v* Golab, 28 C 517 5 C W N 640 (L P A from 27 C 724), Debi *v* Dharamjit, 41 C 727, 733 19 C L J 437 22 I C 570, Biswanath *v* Jagdip, 40 C 342 17 C W N 1025 17 I C 577, Drigpal *v* Sukhnandan, 7 O L J 164 56 I C 299

(*c*) 1 I A 321 22 W R 56 O C

(*d*) 1 I A 321, 333

(*e*) 5 C 148 6 I A 88

(*f*) 13 C 21 13 I A 1

should lose it without having an opportunity to redeem the mortgage by being impleaded in the suit brought upon it, while it strikes one who considers the question from a practical point of view, where is the fund to come from with which the son would redeem the mortgage? for, if the joint family had had funds, the father would have redeemed it, and would never have allowed the property to be sold in execution Such suits are brought not with the intention to redeem, but to get back, if possible, a portion of the property by means of this technical objection Hence it seems that Justices Chandra Madhab Ghosh (g) and Pramada Charan Banerji (h) who are perfectly familiar with the inner condition of joint Hindu families, and who look upon the question from the practical point of view, held, differing from their learned European colleagues, that even when the objection was raised by the sons before the sale, they cannot succeed merely on the ground that they were not made parties to the judicial proceedings, as they must be deemed to have been represented by their father

Cal and All view

The result of the decisions of the various High Courts is not uniform and may be classified thus The Allahabad, (i) the Madras, (j) and the Patna (k) High Courts, following the decision of the Privy Council, (l) have held that where a suit has been brought by or against the managing member, in his representative capacity, it will not fail by reason of the other members not being made parties to the suit. The Allahabad High Court, in a recent case, (m) disagreeing with the majority and agreeing with the minority of the members of the Full Bench referred to above (n) and following another decision of the Privy Council, (o) has held that a decree passed against the mortgagor father for the sale of mortgaged property, will bind the son, although he was not a party to the suit in which the decree for sale was passed

Result

All, Mad, Pat,

Recent All. view

(g) Lala Saraj *v* Golab, 27 C 724, 730, *see* L P A in 28 C 517

(h) Bhawani *v* Kallu, 17 A 537, 539 F B 15 A W N 12, (1895).

(i) Hori *v* Munman, 34 A 549 F B 9 A L J 819 15 I C 126 in this connection *see* Nathu *v* Ram, 47 A 427, Madan *v* Kishan, 34 A 572 9 A L J 844 15 I C 138; *see* Balwant *v* Aman, 33 A 7 7 A L J 852 7 I C 112; Kehri *v* Chunni, 33 A 436 8 A L J 816 9 I C 476

(j) Sheik Ibrahim *v* Rama, 35 M 685 21 M L J 508 10 I C 874, *see* Kalani *v* Rangayya, 22 M 207, Ramasamyyan *v* Virasami, 2· M 222 8 M L J 126, Annamalai *v* Muthu 5 L W 120 39 I C 427

(k) Raghunandan *v.* Parmeshwar, 2 Pat L J 306 (1917) Pat 137 39 I C 779, Girwar *v* Makbunessa, 1 Pat L J 468

(l) Kishan *v* Har, 33 A 272 38 I A 45 15 C W N 321 9 I C 739 21 M L J 378 13 Bom L R 359

(m) Jwala *v* Changa, 1929 A 553

(n) Bhawani *v* Kallu, *supra*

(o) Brij Narain *v* Mangal, 46 A 95 51 I.A 129 21 A L J 934 28 C W N 253. 41 C L J. 232. 26 Bom L R. 500 46 M.L J. 23 1924 P.C 50 77 I C 689.

Son bound even if manager not father

The question depends on whether or not the father was sued as manager of the joint family and if he was so impleaded the sons are bound by the decree obtained against the father alone. (*p*) Whether the manager is the father or a collateral relation it makes no difference The principle has been adopted in the Central Provinces. (*q*)

Bom practically the same view

The Bombay High Court, on the other hand, seems to hold that all the members of the joint family are necessary parties to a mortgage suit (*r*) But if there was a sale of the joint property in execution of a decree against the managing member in his representative capacity, then the sale cannot be set aside merely on the ground that the co-parceners were not parties to the suit, unless they can show that the debt was not binding on them. (*s*)

Cal, co-parceners necessary parties

The Calcutta High Court holds that the other co-parceners are necessary parties to a suit for enforcement of a mortgage of the joint family property. (*t*)

P C view,

The Privy Council in the case of *Sheo Shankar* v *Joddo* (*u*) has said "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound." From this judgment it seems to follow that if the mortgagor had notice that there were other co-parceners who had interests in the property mortgaged, then they are necessary parties to the suit. It should be noticed, however, that the words "provided that the plaintiff had notice of such interest" embodied in Sec. 85 of the Transfer of Property Act have been omitted from Rule 1 of Order 34 of the Civil

legislation

(*p*) Lal *v* Jagraj, 50 A 546, 552
(*q*) Gore *v* Kashiram, 9 N L R 1 : 18 I C 848; *see* Motiram *v.* Arram, 53 I C. 776, 778 (N)
(*r*) Ramchandra *v* Shripatrao 40 B 248.
(*s*) Ramkrishna *v* Vinayak, 34 B 354, Chinna *v* Sada, 12 Bom L R. 811
(*t*) Lala Suraj *v* Golab, 28 C 517 : 5 C W N. 640 (L P A. from 27 C 724); Biswanath *v* Jagdip, 40 C. 342 17 C W N 1025 : 17 I.C 577; Debi *v.* Dharamjit, 41 C. 727 : 19 C L J 437 : 22 I C 570
(*u*) 36 A 383, 385, 387 41 I A 216 18 C W N. 968 : 20 C L J. 282 : 24 I.C. 504 : 16 Bom. L R 810 : (1914) M W.N 593 on appeal from 33 A. 71,

P. Code. On a consideration of the above Privy Council decision the Calcutta High Court has held that, if the mortgagee had no knowledge of the existence of other coparceners, the decree will be binding against all. (v)

Explained by Cal,

The Madras High Court has held that a mortgagee is entitled to a decree for the sale of the father's share in the mortgaged property when the debt was neither for an antecedent debt nor for any family purpose and also to a personal decree under Order 34, Rule 6 of the Civil Procedure Code for the balance, if any, left by the sale proceeds of the father's share in the property being insufficient, and this personal decree can be executed against the entire undivided property of the father and sons if not tainted with immorality. (w)

Mad view

Sale of agriculturist's house—Under Section 60, (1), (c) of the Civil Procedure Code the houses and other buildings belonging to an agriculturist is not liable to attachment and sale in execution of a decree But if a property had been sold in execution of a decree against the father who was deemed to represent the whole family, the son who did not object to the attachment, cannot subsequently challenge the sale by a separate suit. (x)

Father's death, after decree against him alone— There was formerly a difference of opinion between the Bombay (y) and the Calcutta (z) High Courts with respect to the question whether a decree against the father alone can be executed against the sons after the father's death, the former holding that it could be, while the latter held that a separate suit must be brought But in a subsequent case the Calcutta High Court adopted the Bombay view with respect to a mortgage decree (a)

Conflicting veiw.

It is now settled by a Full Bench that a money-decree or a mortgage-decree passed against the father alone, may, after his death, be executed against his sons as his legal representatives who are, however, entitled to raise under Sec. 244 (now

as settled by Full Bench

(v) Halli v Bhyla 21 C L J 454 27 I C 425.
(w) Kandasami v Kuppu, 43 M 241 38 M L J 203 55 I C 320
(x) Sabha v. Kishan, 52 A. 1027, Lala Ram v Thakur, 40 A 680.
(y) Umed v. Goman, 29 B 385
(z) Juga v. Audh, 6 C W N 223
(a) Chander v. Sham, 33 C. 676 : 3 C.L J 131.

47) of the Civil P. Code, the question as to the lawfulness of the debt. (*b*)

Effect of decisions

The effect of the various decisions on this question however, seems to be that the entire family property is to be deemed as the father's assets for the payment of his debts, in the hands of his male issues as his legal representatives.

Secs 50, 52, 53 C P C

Sec 53 explained by All

The law on this subject is now settled by the new Civil Procedure Code, Sections 50, 52 and 53 in which the view taken by the said Full Bench has been embodied. The Allahabad High Court has explained the force of Section 53 and held that the joint family property, held by the grandfather, father and the sons, cannot be attached after the death of the father in execution of a decree obtained against the father during the life-time of the grandfather, nor even after the death of the grandfather when the sons become full owners of the joint property, as it becomes operative only on the date of the death of the father (*c*)

Lis pendens—Pending proceedings for partition by the sons, the sons mortgaged a portion of the joint family property which fell to the share of the mother, the mother's share is not bound by the mortgage on the doctrine of *lis pendens* (*d*)

How to be made

Frame of suits—When the plaintiff in a suit intends to get his remedy against the estate in the hands of a person who is either a manager or a co-parcener of a joint family or the guardian of a minor, the suit should be so framed as to indicate such an intention (*e*) So even if the money borrowed by the guardian was for paying off the father's debt without creating a charge on the property, the decree obtained in a suit against the guardian and the minor daughter personally who is, in possession of the father's estate will not be binding on the estate (*f*)

Arbitration.—The manager of a family may, in good faith, make a reference to arbitration of any dispute so as

(*b*) Amar *v* Sebak, 34 C 642, F B 11 C W N 593 5 C L J 491 2 M L T. 207, *see* Rateswar *v* Gulab, 6 I C 582 (C), Shivram *v* Sakharam, 33 B. 39 10 Bom L R 939. (*c*) Binda *v* Raj Ballabh, 48 A 245
(*d*) Munni Lal *v* Phula, 50 A 22 1927 A 679 (*e*) *See ante pp.* 472-473.
(*f*) Lalit *v.* Dayamoyi, 45 C L.J 404 P. C : 1927 P.C. 41.

to bind the other co-parceners; (g) and it cannot be set aside unless fraud is proved; (h) but some members of the family cannot in a claim by a third party, refer it to an arbitration so as to bind the family. (i) A manager of a joint-family trade cannot refer a litigation to arbitration (j)

Receiver—A receiver may be appointed of the joint family property mortgaged by the *karta* of the joint family when the debt was known to the adult members of the family and the money advanced was used for the family business. (k) The position and rights of a Receiver appointed in an insolvency proceeding is stated before.(l)

Letters of Adminstration—cannot be granted to the estate of a deceased member of a joint family governed by the Mitākshará school of Hindu law. (m)

Sub Sec. ii—COMPROMISE AND FAMILY ARRANGEMENT

Compromise how far binding on sons

Compromise and family arrangement by father.*—A consent decree, based on a compromise evidencing a family arrangement settling disputed claims set up in a previous suit instituted by the father alone, is held to be binding on the sons in a subsequent suit by them, (n) when no ground is established for setting it aside, nor is it shown to be unfair to them, not on the ground of *res judicata,* but on principles of estoppel. "The constitution of a joint Hindu family consisting of father and his sons is such that the father represents the sons. *** He may sue and be sued and may bind the family by the result of the litigation In a family arrangement settling disputed rights and liabilities, his action as representative of the family is binding on the dependent members. (o) If the compromise of doubtful claims was

(g) Uppara v Gaddam, 50 I C 471 9 L W 314, Mitha v Shiv, 60 I C 484 (P), *see foot note (r) p.* 389 *ante*
(h) Keshava v Natharavali 1928 M 200
(i) *See* Kasturi v Lajja, 60 I C 751 (L), Bhumireddi v Bhumireddi, 60 I C 615 12 L W 668 (1921) M W N 28, *see foot note (r)* p 389 *ante.*
(j) Gainda v Firm Nihal, 6 L L J 502 84 I C 726 1925 L 261
(k) Ram Kumar v. Chartered Bank, 41 C L J 203 87 I C. 375 1925 C 664
(l) *See p* 447-450 *ante* (m) Gopalaswami v Meenakshi, 7 R 39
* In this connection *see* Ch XII, Sec 4, sub-sec ii
(n) Shambhu v Dwarka, 60 I C 524 (L), Ramdas v Chabildas, 12 Bom L.R 621 7 I C 134, Daya v Hub, 37 A 105 13 A L J 21 27 I C 497
(o) *See* Mehdi v Ghanshiam, 32 C W N 93 P C 1927 P C 204

bona fide entered into, the principle laid down in *Stapilton v. Stapilton, (p)* and often followed in India [*Ram Niranjan* v. *Prayag* (q) and *Rameshwar* v. *Lachmi* (r)] would apply, as if the sons who were represented by the father were parties to the transaction. *Pitam* v. *Ujagar* (s) and *Ujagar* v. *Pitam*, (t) may be cited as affirming the rule applicable to the present case " (u)

Family arrangement

A family arrangement—is one arrived at by members of the same family in settlement of doubtful claims, *i. e*, the dispute being composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned, the mere fact that an agreement is entered into by relations of each other does not make it a family settlement (v) The Allahabad High Court (w) in a recent case has adopted the requisite of a valid family arrangement as given in Halsbury's Laws of England which runs thus "a transaction between members of the same family which is for the benefit of the family generally, as, for example, one which tends to the preservation of the family property, to the place or security of the family and the avoiding of family disputes and litigation, or to the saving of the honour of the family." (x) It should be an honest settlement of an existing dispute which must not be manifestly *ultra vires* of the parties to settle, (y) and "*bona fide* dispute" means nothing moie than that each party must intend to press his claim to the property. (z) It is a settlement of doubtful claims or rather what the parties believed to be doubtful (a) The fact that there was no other consideration to support the arrangement or that it transferred a property without any right is not sufficient

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(p) I W & T 223 (q) 8 C 138

(r) 31 C 111 7 C W N 688

(s) I A 651

(t) 8 I A 190 4 A 120

(u) Rai Gajindar *a* Rai, 12 C W N 687, 694 *see also foot note (m) p* 445; Jagdamsahay *v* Rupnarain, 5 Pat L T 375 1924 P 736, Hiran Bibi *v* Sohan 18 C W N 929 24 I C 309 27 M L J 149, Kanhai *v* Brij 40 A 487

(v) Mittar *v* Datta, 1926 A 194 reversing 1926 A 7

(w) Siadh Gopal *v* Behari, 50 A 284, 288 1928 A 65

(x) Vol 14 p 540

(y) Khantamyee *v* Hirdayananda, 48 C L J 489, 495

(z) Sidh Gopal *v* Bihari, *supra*

(a) Ichhun *v* Banwari, 1929 L 16.

ground for setting aside a family settlement.(*b*)

It is not necessary that all the parties to the suit must join in the compromise, if such a compromise can be effected amongst the parties to the settlement. (*c*)

Parties to compromise.

A family settlement need not be embodied in a registered document; it is sufficient if it is given effect to. (*d*)

need not be registered.

Sub-Sec iii -BURDEN OF PROOF*

There is no presumption that a debt contracted by a manager of a joint family was for the benefit of the joint family. (*e*) A pro-note signed by a manager in his personal capacity cannot be presumed to have been signed as such manager of joint family. (*f*) The *onus* of showing that a debt contracted by the manager of a joint family is binding on the family, *i. e.*, that there was either necessity or benefit or proper enquiry or antecedent debt, is in the first instance on the person seeking to enforce its payment. (*g*) When the transactions go back beyond the stage at which direct evidence cannot possibly be expected from the creditor, and, when evidence, tending to shake the confidence in the transactions themselves, or in the conduct and care of the manager or of the creditor, is not available, the burden is shifted on those who repudiate them. (*h*) So also when there were a long

No presumption of benefit.

Nature of evidence.

(*b*) Ichhun *v* Banwari, *supra*
(*c*) Thiruvengada *v* Thangavelu, 1928 M 594
(*d*) Balbhaddar *v* Shamsher 1929 O. 305.
* *See post* Sec 13, Sub-sec ii.
(*e*) Sotam *v* Pardhuman, 8 L 673 1928 L 103; Khazana *v* Jagan, 4 L 200: 5 L L J 236: 1924 L 44, Mela *v* Gori, 3 L 288 66 I C 485: 1922 L 200, Chintamoni *v* Satyabadi, 1 P 715 1923 P 71, 70 I C 226; Ganpat *v* Munni, 34 A 135 9 A L J 54 13 I C 34, Biswanath *v* Rampal, 3 O.L J 26 33 I C 778, Paras *v* Gian, 50 I C 36 (Paj), Ramdhan *v.* Ramji, 50 I C 215 (Paj)
(*f*) Suppai *v* Murugappa, 19 I W 605 1924 M 710
(*g*) Gajadhar *v* Ambika, 47 A 459 41 C L J 450 49 M L J 238 27 Bom L R 853 87 I C 292 1925 P C 169; Guruswami *v* Gopalasami, 42 M 629 36 M L J 568. 50 I C 775 9 L W. 547 (1919) M W N 30, Anant *v* Collector, 40 A 171 27 C L J 363. 22 C W N 484 34 M L J 291 4 Pat L W 226 1918 M W N 446 20 Bom L R 524 44 I C 290, Piari *v* Sunder, 44 A 756; Jokhu *v* Gonesh, 1928 p. 54, Amitralinga, *In re*, 1928 M 986, in this connection *see p* 393 *foot note* (*m*)
(*h*) Banga Chandra *v* Jagat, 44 C 186 43 I A 249 21 C W N 225 24 C L J 487 14 A L J 1103 18 Bom L R 868 31 M L J. 563 1 Pat L W 1 36 I C 420, Piari *v* Sunder, 44 A 756 20 A L J 658 68 I C 805 1922 A 436, Mohon *v* Bala, 44 A 649. 1922 A 310 · 69 I C 754, Vithal *v.* Shivappa, 47 B 637 · 25 Bom L R 323 1923 B. 265 (2)

series of renewals of mortgage transactions by the manager extending over a generation without any protest by any member of the joint family, the presence of valid necessity or acquiescence by the members may be presumed. (i)

Father's debt.

In case of debt incurred by the father, the person seeking to enforce it against the sons, is to prove the debt (ii) and it is for the sons to prove the immoral or illegal purpose for which the debt was contracted, in order to escape liability.(j) The alienee is to prove that there was an *antecedent debt* for alienation by the father. (k) But when the *antecedent debt* is proved the *onus* lies on the son to prove the immorality or illegality of the debt. (l)

Defference between son and co-parcener

The difference between the liability of a son and that of other co-parceners lies in the onus, the son is to prove (m) the illegal or immoral nature of his father's debts, whereas, in the other case, the burden of proof is on the creditor (n) to prove legal necessity. (o)

Immoral debt

The sons are to prove the immoral or illegal purpose or the illusory nature of the debt when a decree has been obtained against the father on a mortgage executed by him even if there was no sale.(p)

Delayed objection

Where there is delay in objecting to an alienation by the father, the burden of proving that

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(i) Inayat v Hardeo, 45 A 692 21 A L J 610 1924 A 29

(ii) Bhagwant v Tursi, 51 I C 130 (A), Jhaman v Comal, 57 I C 36.

(j) Hazarimal v Abani, 17 C W N 280 17 C L J 38 18 I C 625, Sitla v Chameli, 21 A L J 683 1924 A 111, Ram v Mahomed, 45 A 545 : 21 A L J 485 1923 A 591, Karoo v Rameshwar, 3 P L T 43 ; 1923 P 143, Biswnath v Jodhi, 1925 A 120, Gajadhar v Jadubir, 47 A 122, Babu Singh v Bihari, 30 A 156 5 A L J 175, Nathnni v Baijnath, 39 I C 352 2 Pat L J 212, see Persottam v Sheo, 6 I C 163 (A), Ram v Basant, 2 L 253 64 I C 121

(k) Seetharam v Balakrishna, 25 M L J 604 15 M L T 78 22 I C 638, Sukhdeo v Jhapat, 5 Pat L J, 120, 54 I C 946, Laik v Dina, 63 I C 515 (L)

(l) Ruthna v Veerabudra, 25 M L J 281 21 I C 93, Abdul v Shib, 2 Pat L J 572 63 I C 570, Pudai v Baijnath, 56 I C 745 7 O L J 273 23 O C 264, Chandradeo v Mata, 31 A 176 F.B 6 A L J 263 1 I C 479, Kehr v Ganga 1930 L 130

(m) *See* foot notes (j) and (l) above

(n) *See* foot notes (e) and (g) above

(o) Avaloppa v Murligappa, 36 M 325 23 M L J 658 18 I C 49

(p) Gur Narain v Gulzari, 25 I C 917 17 O C 368 1 O L J. 503, Hanmant v Ganesh, 43 B 612 21 Bom L R 435 51 I C 612

it was not for legal necessity is upon those impeaching the alienation (q)

The mortgagee must show not only that there was necessity to borrow, but that it was not unreasonable to borrow at such a rate of interest and upon such terms, and if this be not shown, the rate and terms cannot stand, even though the charge be upheld. (r) Where, however, the security offered is inadequate, the contractual rate of interest, though high should be allowed, (s) hence, those attacking the transaction must first show *prima facie* that the rate of interest is unnecessarily high in the circumstances of the case. (t)

Rate of interest

The failure by the defendants to produce their accounts, when summoned to do so, to prove a family necessity for the debt, will raise a presumption adverse to them. (u) But the onus lies on the minor who wants to set aside an alienation by the manager on the ground of want of consideration (v) The representations by the borrower are not merely evidence, but may, in particular circumstances, be sufficient to shift the onus from the lender or the alienee to the person impeaching the debt or alienation, (w) or may operate as an estoppel.(x) But generaly mere representation will not be sufficient.

Evidence : account book,

representation by borrower,

The recital in the deed by which the property is alienated cannot be relied upon for the purpose of proving the existence

recital in deed

(q) Ram v Lalta 53 I C 664 6 O L J 504

(r) *See ante* p 460, Nazir v Rao, 41 A 571 46 I A 145 50 I C 434 23 C W N 700 30 C L J 86 17 A L J 591 21 Bom L R 484 36 M L J 521, Raghunath v Sri 45 A, 434 21 A L J 323 1923 A 424, Bhikhi v Kodai 41 A 523 50 I C 814 17 A L J 580, Ram Khelawan v Ram 41 A 609, Ram Bujhawan v Nathu, 50 I A 14, 44 M L J 615 25 Bom L R 568 4 P L T 29 1923 P C 37 38 C L J 25, Mahadeo v Bissesuar, 2 P 488 4 P L T 707, Ram Sarup v Bharat, 43 A 703 64 I C 763 19 A L J 744, Ram Sarup v Jhullar, 1930 O 333, Dwarka v Prithi, 5 O L J 271 47 I C 106, Ganga v Ram, 60 I C 68 (A), Nand Ram v Bhupal, 34 A 126 13 I C 5 8 A L J 1299

(s) Jagatpal v Chandrapal, 53 I C 757 6 O L J 477

(t) Kurithiventi v Sitarama, 48 M L J 584

(u) Guruswami v Gopalasami 42 M 629 36 M L J 568 50 I C 775

(v) Krishna v Madhava, 63, I C 258 (M), Nachiappa v Dakshinamurthy, 28 I C 345 17 M L T 232 1915 M W N 217, Malayandi v Subbaraya, 21 M L J 521 8 I C 854 9 M L T 163

(w) Lala Mukti Prokash v Iswari, 24 C W N 938, 945 57 I C 858, Ganba v Vishweshwar, 4 N L J 26 17 N L R 194 64 I C 268

(x) Saroda v Gosto, 27 C W N 943

of necessity, (*y*) though it may be of some evidence. (*z*) But it may be an admission and amount to a representation of necessity. (*a*) The Privy Council, in a case in which the dispute was about the alienation made by a widow, has very clearly explained the law on this subject—

P C view.

"* * * Rectials cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain Indeed it is obvious that if such proof were premitted, the rights of reversioners could always be defeated by the insertion of carefully prepared recitals Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them.

"But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside, for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth The recital is clear evidence of the reprseentation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time "(*b*)

The above case relates to an alienation by a widow, but the Privy Council has held that the principle governing cases

(*y*) Brij Lal *v* Inda, 36, A 187 : 12 A L J 495 25 M L J 442 18 C W N. 649 : 19 C L J 469 : 23 I C 715 16 Bom L R 352

(*z*) Rajvanta *v* Rameshar, 12 O L J 235 87 I C 180 : 1925 O 440.

(*a*) Padam *v*. Reoti, 1929 A 481

(*b*) Banga Chandra *v* Jagat 44 C 186, 195-196 43 I A 249 ; 21 C W N 225 : 24 C L J 487 14 A L J 1103 18 Bom L R 868 31 M L J. 563 : 1 Pat L W 1 36 I C 420, see Somayya *v* Venkayya, 48 M L J 224

of limited owners, also governs cases in which the alienation has been made by a member of a joint family. (*c*)

Sub Sec iv—LIMITATION*

Setting aside alienation—*By guardian* A suit to set aside an alienation of property made by a guardian is to be brought within three years from the date when the Ward attains majority under Art 44 of the Limitation Act (*d*) — 3 years,

By Manager The alienation by the *karta* or manager of a joint family is different from that of an authorised guardian and twelve years limitation will apply to set aside an alienation. (*e*) So Art 44 will not apply where the transaction challenged was entered into by the brother as the manager of the joint family. (*f*) — 12 years,

By father A suit to set aside an alienation of immoveable property made by the father is to be brought within twelve years from the date when the alienee takes possession, (*g*) even by an after-born son. (*h*) — 12 years,

Suit by alienee for refund—A suit for the balance of the purchase-money on the sale being set aside on the sons depositing a certain sum in Court, is governed by Art 97 and will run from the date of the deposit of the sum and not from the date of the decree. (*i*) — 3 years,

Declaration for transfer not binding.—A suit, by a son for declaration that a certain mortgage executed by the father in favour of persons who were already in possession of the — 6 years

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(*c*) Anant *v* Collector 40 A 171 22 C W N 484 27 C L J 363 20 Bom L S 524 : 34 M L J 291 4 Pat L W 226 44 I C 290

* See, *ante*, Sec 8, sub-section ix, p 463 and *post* Sec 11, sub section vii

(*d*) Art 44, *see also* Art 91, Brojendra *v* Prasanna, 32 C L J 48 24 C W N 1016 59 I C 589, Sham *v* Gadadhar, 13 C L J 277 9 I C 377, Mahableshvar *v* Ramchandra, 38 C 94 15 Bom L R 882 21 I C 350, Bapu *v* Bala, 45 C 446 59 I C 759 22 Bom L R 1383, Fakirappa *v* Lumanna, 44B 742, 58 I C 257 22 Bom L R 680, *but see*, Mahadeo *v* Somaji, 1927 N 145

(*e*) Aftabuddin *v* Prokash, 28 C L J 496, Asaram *v* Ratansingh, 32 I C 242 (N)

(*f*) Sheo Raj *v* Ajudhiya, 1929 O 284

(*g*) Art 126, Sheo Narain *v* Mokshodi, 17 C W N 1022 19 I C 878 Maheswar *v* Kishun, 34 C 184 11 C W N 294 5 C L J, 441, Bunwari *v* Daya, 13 C W N 815 1 I.C 070, Balwantrao *v* Ramkrishna, 3 Bom L R 682

(*h*) Oudh Behari *v* Suraj 61 I C 801 8 O L J 205

(*i*) Raghunath *v* Ram, 1927 A 421

mortgaged property, is invalid, is governed by Art 120 and not by Art. 126. (j) The same Article applies when alienee never obtained possession which was in the mortgagee. (k)

6 years

Suit to enforce father's debt—A suit upon a mortgage effected by the father for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons some of whom were adults and others minors, is governed by Art. 120. (l) In this case it was not decided whether time begins to run from the date when the debt matures or the creditor fails to realise from the father, all remedies against him being exhausted or the father dies. In an Allahabad case it has been held that it begins to run when the debt matures. (m)

Minority—*Saving of limitation* A suit by a younger son within three years of attaining majority to avoid a sale by the father is not barred, although the elder son who was not the manager, the father being alive, and who attained majority long before three years but took no steps to question the alienation (n) But if the brother was the manager, he could have given a valid discharge under Section 7 of the Limitation Act, and the suit by the other brother who attained majority subsequently, will be barred (o)

Sec 7 Limit Act

Extention of time

The subsequently born son cannot claim extension of time under Sections 6 and 7 of the Limitation Act, because he cannot claim to be a person entitled to sue at the time when limitation began to run as he was not born then. (p)

In this connection see ante, Section 8, sub-sec. ix, "Limitation", *pp* 463 &c.

(j) Bindeshri *v* Sital, 53 A 163

(k) Angad *v* Bahadur, 1929 A 750

(l) Bidya *v* Bhupnarain, 42 C 1068 F B 19 C W N 849 21 C L J 543 29 I C 629

(m) Suraj *v* Golab, 27 A 762

(n) Jawahir *v* Udai, 48 A 152 53 I A 36 24 A L.J 97 30 C W N 698 43 C L J 374 50 M L J 344 28 Bom L R 851 3 O W N 365 93 I C 216 1926 P C 16, Rajagopala *v* Srinivasa, 1928 M 1055, Lachhman *v* Salu, 1927 A 188

(o) Doraisami *v* Nondisami, 38 M 118 F B 25 M.L J 405 1 21 I C 410, *see ante p* 389 (*w*)

(p) Ranodip *v* Permeshwar, 47 A 165 52 I A 69 23 A L J 176 29 C W N 666 48 M L J 29 27 Bom L.R 175 12 O L J 74 86 I C 249 1925 P C 33, Madho *v* Dharam, 1930 L 394

Recovery of property from co-parcener—A suit to recover immoveable property by one member from another who is separate from him is governed by Art 144 if the property was never joint family property, (*q*) but if it was a joint family property and the suit was to enforce a share therein Art. 127 will apply. A suit for declaration of plaintiff's title to a share in a property at some future date is governed by Art. 120 and not by Art 127 or 144 (*r*) The expression "joint family property" in Art. 127 means property of joint family and not property in which the parties under the Mitàksharà school are interested as tenants-in-common, (*s*) and it does not apply as soon as the property ceased to be a joint family property by reason of partial partition with respect to some property and reference to arbitration with respect to others, (*t*) that is, as soon as there was severance of status. It applies only when a member of a joint family claims a right to share in joint family property on the ground that he is a member of the joint family to which the property belongs. (*u*) But the Privy Council applied Art. 127 in a case in which the plaintiff sued to recover his half share in a property alleged by him to be joint and held the suit to be barred under this Article although it found that the family was not joint and that there was exclusion of the plaintiff from this property in question to his knowledge. (*v*) A daughter's son who is not a member of joint family, (*w*) a daughter who after her father's death never lived in her paternal residence with the members of the family (*x*) or a stranger purchaser from a member of a joint family (*y*) cannot

Art 144.

Art 127.

Art 120.

Joint family under Art 127

(*q*) Govindrao *v* Rajabai, 35 C W N 438 P C 53 C L J 313

(*r*) Krishnaji *v* Anajee, 54 B 4 31 Bom L R 1240 1930 B 61 124 I C 773, Kodoth *v* Secretary, 47 M 572 P C

(*s*) Krishnaji *v* Anaji, *supra* Aurme *v* Zia, 13 A 282, Bhavrao *v* Rakhmin, 23 B 137, 140 F B

(*t*) Yerukola *v* Yerukola, 45 M 648, 668

(*u*) Kartik *v* Saroda, 18 C 642, 645

(*v*) Yellappa *v* Tiphanna, 53 B 213 33 C W N 238 49 C L J 104

(*w*) Mathura *v* Barkant, 11 C L R 312 (*x*) Kartik *v* Saroda, *supra*

(*y*) Harendra *v* Ainoardi, 14 C 544, 545, Ram Lakhi *v* Durga, 11 C 680, 682; Bhavrao *v* Rakhmin, 23 B 137, 140, Muthusami *v* Ramkrishna 12 M

invoke the provision of Art. 127. In such cases Art. 136 or 144 will apply. (z)

6 years

Suit for account against manager—A suit for account against the *karta* of a joint family is governed by Art. 120 of the Limitation Act. (a)

Acknowledgment under Sec 19 Limit Act,

Under Sec 20 Limit Act,

Acknowledgment of debt—The manager of a joint family has the same authority to acknowledge as he has to create a debt. (b) He must be regarded as an agent by operation of law for the purpose of acknowledgment of debts on behalf of minor members of the family under Section 19 of the Limitation Act (c) So a payment of interest by the manager of a joint family is a payment by the "duly authorised agent" of the other members within the meaning of Section 20 of the Limitation Act (d) so as to extend the period of limitation, but a Full Bench of the Madras High Court has held that where the creditor deals not with the manager as such but with the individual members as co-obligors, he cannot rely on an acknowledgment made under Section 19 by the manager as made on behalf of all the members. (e) This was followed (f) and dissented from (g) by the Calcutta High Court. The Patna High Court dissented from the view of the Madras Full Bench. (h) But a still later decision of the Calcutta High Court, (i) following its earlier decision and the Madras Full Bench has held, that there is no distinction as to the effect of acknowledgment of debt under Section 19 and payment under Section 20 made by the manager of a joint family.

Madras,

Patna,

Calcutta

(z) Ram Lakhi v Durga, *supra*, Bhavrao v Rakhmin, *supra*

(a) Biswambar v Giribala, 32 C L J 25

(b) Hari Mohan v Sourendra 41 C L J 535 88 I C 1025 1925 C 1153, Chinnaya v Gurunatham, 5 M 169 F B

(c) Har v Bakshi, 19 C W N 860 31 I C 30, Ramcharan v Gaya, 30 A 422, 437 F B, Inderpal v Mewalal, 36 A 264, 267, Bhaskar v Bijlal, 17 B 512, Sitla v Jagatpal, 12 O I J 114 86 I C 693 1925 O 394

(d) Sarada Charan v Durgaram, 37 C 461

(e) Narayana v Venkataramma, 25 M 220

(f) Baikunta v Lal, 26 I C 511 (c)

(g) Chandra v Behari, 31 C I J 7

(h) Bejrangi v Keso, 6 P 811

(i) Paban v Sufal, second Appeal No 2077 of 1929 Cal H Court

This question has, after the amendment of the Limitation Act, (*j*) been settled by enacting that acknowledgment or payment made by the manager shall be deemed to have been made on behalf of the whole family.

Limit Act (Amend, 1927).

In this connection *see ante* Section 8, sub-section ix, "Limitation".

Adverse possession *—Adverse possession with respect to any property of the joint family, consisting of the father and his minor sons, begins to run against the minor sons also when it becomes adverse against the father who was a major. (*k*) Mere residence elsewhere than the family residence without obtaining any expenses of maintenance, education or marriage and without even asking for them do not constitute adverse possession. (*l*) A refusal to partition without denial of right is not exclusion so as to accrue title by adverse possession, (*m*) as possession of a co-sharer would not be adverse to another co-sharer until ouster. (*n*)

Against: minor son, co-sharer.

The possession of a certain member of a property kept undivided after partition is not adverse to others unless he proves that he repudiated the other members' title to their knowledge and that he has done some act adversely to the knowledge of other members. (*o*) But the Privy Council, however, in a case where the plaintiff and the defendant belonged to two branches of the same family but separated long ago, where the predecessor of the defendant who was managing the properties of the plaintiff during his minority handed them over to the plaintiff on his attaining majority without the property in dispute which he enjoyed for more than twenty

Denial of title, P C view,

(*j*) Section 21, (3) (b) Act I of 1927

* In this connection *see ante p* 373-374 and *post* Sec 11, sub-sec vii "Adverse possession".

(*k*) Sharam *v* Sadhu, 1928 L 484

(*l*) Radhoba *v* Aburao, 53 B 699 33 C W N 1006 50 C L J 135 1929 P C 231, Harkesh *v* Hardevi, 49 A 763 1927 A 454 (non-payment of profits), Gaya Din *v* Gur, 1929 O 257, Mulji *v* Hiralal, 1929 B 424 (enjoyment of unequal shares)

(*m*) Radhoba *v* Aburao, *supra*

(*n*) Govindrao *v* Rajabai, 35 C W N 438 P C 53 C L J 313, Coria *v* Appuhamy, (1912) A C 230

(*o*) Vaiyapure *v* Subramania, 1929 M. 27, Kuda *v* Madan, 51 C L J 424, Malhari *v* Vinayak, 1929 B 323

years and where the plaintiff's title was never expressly denied before 1912 (suit being dated 1917), held that the plaintiff must have knowledge more than 12 years ago that his title was not admitted and the defendant had acquired title by adverse possession. (*p*) The Madras High Court holds that the entry into possession by the alienee from a co-parcener becomes adverse to other co-parceners from the moment of such entry. (*q*) But the Calcutta High Court entertains a contrary view holding that mere exclusion by a co-sharer or his transferee is not sufficient (*r*)

Mad view on possession of alienee,

Cal view contra

Onus

The onus is on him who sets up title by adverse possession (*s*)

Sec. 10—DEVOLUTION OF MEMBER'S INTEREST

Accession, not succession on member's death —It has already been remarked that on the death of a member of a Mitâkshara joint family his interest in its property lapses, the maintenance of his widow and maiden daughter and the latter's marriage expenses being charged on the family property by virtue of their own rights therein. But in loose language, often used even by lawyers, a deceased member's undivided co-parcenery interest is said to *pass* on his death by *survivorship* There is not, however, *passing* or *succession* of the interest from the deceased member to the *survivors*, but, there is only *accession* to the latter's interests. The joint family estate is in its entirety vested in each co-parcener from the time of the commencement of his or her membership of the family, and title to its property, hence, no new right can accrue on the death of a member, which has the effect of extinguishing his connection with the family, as well as his title to its property, and thereby causing an *accession* to the interests of the survivors, but not necessarily for the benefit of all, for, when the family consists of different branches then on the death of a member of one branch, the ultimate effect of the *accession* to the interests of the survivors

Survivorship

Accession

(*p*) Gobindrao *v* Rajabai, *supra* (*q*) Abdul *v* Ashamath, 54 I C 385
(*r*) Kuda *v* Madan, *supra*, Biswanath *v* Rabija, 33 C W N 46, but set aside on Letters Patent appeal
(*s*) Vaiyapuru *v* Subramania, *supra*

is, that only the members of that branch, become entitled to the benefit of survivorship, to the exclusion of the members of other branches, when partition takes place.

Succession Certificate Act does not apply

Accordingly it has been held that Act XIX of 1841 (*t*) passed for the protection of deceased person's property against wrongful possession in cases of *succession*, cannot apply on the death of a member of a joint family, to his undivided co-parcenery interest in the family property, to which *succession* is inapplicable, which, therefore, is not within the scope of the Act (*u*) so also a surviving member of a joint family cannot apply for Letters of Administration to the estate of the deceased co-parcener, as on the death of the co-parcener his interest in the joint family property extinguishes and no estate is left for administration. (*v*)

Joint-tenancy and Survivorship—The members of a joint family governed by the Mitàkshara law, may be said to hold the family estate as joint-tenants. It has already been said (*w*) that they do not resemble, in every respect the joint-tenants of English law, whose rights are equal in all respects, and whose joint-tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title*, and unity of *time* of the commencement of such title, and all the survivors amongst whom, are equally entitled to the estate on the death of a joint-tenant, and whose joint-tenancy is created by a deed or a Will

Joint tenancy in English law, created by deed or Will,

but in Mit by inheritance

The joint-tenancy under the Mitàkshara arises by the operation of the law of inheritance. There is *unity* of possession and also, in one sense, unity of *title*, namely, the right derived immediately or mediately from a common ancestor but there is neither unity of *time* of the commencement of title, nor unity of *interest* in all cases. It has been held by the Judicial Committee that two joint brothers succeeding to their mother's father's estate after her death take the same

(*t*) Now incorporated in Act xxxix of 1925
(*u*) Sato Koer *v* Gopal, 34 C 929 12 C W N 65, Banwari *v* Makshdan 52 A 252 1930 A 99
(*v*) Uttam *v* Dina, 51 I C 651 (Puj), *see ante p.* 479
(*w*) *Ante p* 338

as joint-tenants with the benefit of survivorship. (*x*) Whether their male issues become their co-parceners or joint-tenants of the property so inherited by them, by reason of the same being held *ancestral* property—is a question on which there has been a conflict of decisions it is answered in the affirmative by the Madras High Court, but in the negative, by the Allahabad High Court. In the former case the question arose in a suit for partition between father and son, in the latter, between a son and the purchaser from the father who inherited the property from the maternal grandfather. (*y*) It should be observed that the survivorship here is not the same as in English law, but subject to the paramount right of a joint-tenant's male issue who are regarded as consubstantial of their father It should be borne in mind that the principle of joint-tenancy is unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family. (*z*)

Madras

Allahabad

Succession is tenancy in common

But it appears that under the Mitâksharâ school two joint co-parceners jointly succeeding to the *obstructed* heritage left by any other relation, such as their mother or uncle, do not take the same as joint-tenants, but they take as tenants-in-common (*a*) That is so in all cases of joint inheritance according to the Bengal school.

Joint purchasers or donees take as tenants-in-common

And it appears to be the law in both the schools that co-tenants of joint acquisitions by *purchase*, take as tenants-in-common Accordingly, when a gift of property is made to two persons jointly by a Will or a deed, they take as tenants-in-common and not as joint-tenants. (*b*) In the case of *Jogeshwar Narain Deo* (*c*) referred to above, the Privy Council appears to take the same view, as laid down in this case though it was not cited.

(*x*) 25 M, 678 ; *ante* p. 321

(*y*) Vythinatha *v* Yeggia, 27 M, 382 and Jamna *v* Ram, 29 A, 667 4 A L J 582 A W N, (1907) 211 (*z*) Jogeswar *v* Ram, 23 I.A, 37, 44 23 C 670, Mangaldas *v* Secretary, 52 B 188, 191

(*a*) Karuppai *v* Sankaranarayanan, 27 M 300

(*b*) Rewun *v* Mussamut Radha, 4 M I A, 137, 173 7 W R P C 35, Har *v* Sukhdevi, 37 A. 241 28 I C 561 13 A L J 263, see Gopi *v* Jaldhara, 33 A 41, Kishori *v* Mundra, 33 A 665

(*c*) 23 C 670 23 I A 37

According to the English law of joint tenancy "a conveyance, or an agreement to convey his or her personal interest by one of the joint-tenants, operates as a severance "(d)

Survivorship applies so long family joint

It has already been said that all the survivors are not entitled to the undivided interest of a deceased member in all cases there is a certain order in which some of the joint-tenants take, to the exclusion of the rest, though it is ordinarily said that the interest of a deceased member passes by survivorship to the surviving male members alone, but this is true only in a qualified sense, so long as the family continues joint, and there is community of interest

Order of devolution by survivorship

Order in devolution by survivorship—The undivided co-parcenery interest really lapses, but having regard to the benefit derived by the survivors at partition, the undivided interest may be deemed to pass in a certain order it devolves on the male issue in the first instance, on their default, it goes to the nearest male ascendant and the collaterals descended from him, and on failure of these, to the next male ascendant and his descendants, and so on This is true in a qualified sense only, for, females getting shares on partition, do take the benefit of survivorship together with the males, provided partition takes place, when their shares also are augmented.

Example,

Suppose for instance, A and B are two brothers, having sons and ancestral property, then all of them are entitled to undivided interests in the property, but the death of a member of A's branch will not, at partition, augment the share of B and his branch. Suppose again that A dies leaving a wife and three sons, then A's share may be said to devolve on the widow and the sons, should the latter make a partition, if one of these sons dies before partition without leaving male issue, then his share may be said to devolve on his two surviving brothers and also on his mother, should the two brothers come to a partition during her life, otherwise on the two brothers only if they continue joint. It should, however, be borne in mind that what is *co-parcenery*

(d) Jogeswar v Ram, 23 C 670, 679 23 I A 37

interest during the joint estate becomes converted into and is called *share* only on and after partition, and also in contemplation of it But so long as the family continues joint the benefit of survivorship is enjoyed by all the members, male or female.

What happens on death of member

The result of a member's death may be stated thus —If he dies leaving male issue, he may be deemed to exist in them, for certain purposes he may be deemed to exist also in his widow, so long as the family continues joint, otherwise, excepting for the purpose of the maintenance of his widow and maiden daughter, if any, and the marriage of the latter his existence may be ignored as regards the joint property, which continues to be enjoyed by the survivors as before and their rights are, on partition, determined in the same way as if the deceased never existed, except for the purposes mentioned above.

Father's self acquired property

But on the death of the father having self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division takes place after the acquisition of such property by the father. It is said that, "after obtaining on partition his share of all the divisible property the separating son loses all the rights which he had as a member of the co-parcenery and it was only as a member of the co-parcenery that he had by birth an interest in his father's self-acquisitions." (*e*) With regard to this case a Full Bench of the Madras High Court has said that, "although only the order of succession was in dispute, it was said that 'the succession to the undivided property of the father would, where there was an undivided son, be by survivorship rather than inheritance', but this dictum was unnecessary to the conclusion and should not * * * be followed." (*f*)

But not such order as in succession —Hence, although there is an order of devolution as between different branches, there is no preference given to any of the members of the same branch by reason of his being nearer in degree than

(*e*) Nana *v* Ramachandra 32 M 377, 383 5 M L T. 67 2 I.C 519

(*f*) Vairavan *v* Srinivasachariar, 44 M 499 40 M L.J 481, 485 F B. : 62 I.C 944.

another. For instance, if a family consists of three brothers, and one of them dies leaving two sons, and then another dies without male issue leaving the two fraternal nephews and one brother surviving him, then the surviving brother, though nearer, cannot claim the undivided one-third interest of the sonless deceased brother to the exclusion of the nephews who are more remote in degree The sonless deceased brother's interest passes to the surviving brother and the nephews, and on partition between the uncle and the nephews, the joint property is to be divided into two equal shares, one of which is to be allotted to the uncle, and the other to the two nephews (g) It should be observed that, if the sonless deceased brother had been separate, the surviving brother alone would have taken his estate to the exclusion of the nephews.

Female heirs, daughter's son excluded from survivorship

Exclusion of female heirs and daughter's son.—The effect of this rule of devolution by survivorship is said to exclude the widow, the daughter, and the daughter's son in all cases, if the member dies without leaving male issue. A member's grandfather's great-grandson's grandson living jointly with him, takes by survivorship his undivided interest to the exclusion of his widow. Should the circumstances of the family be such that a female heir of the deceased would be entitled to a share on partition, then she cannot be said to be excluded except in the sense of her not being entitled to claim a share if the family continues joint. The widow, however, cannot properly be said to be excluded. for the subordinate or imperfect co-ownership acquired by her on her marriage, cannot reasonably be assumed to be destroyed by the husband's death, because its incidents cannot but be admitted to continue in the shape of the legal charge on her deceased husband's co-parcenery interest, for her maintenance, residence, and religious expenses, subject to which the same may be said to pass to male co-parceners. It should be remembered that according to Hindu law, she becomes her

Widow's interest

(g) Debi v Thakur, 1 A 105 (F B), Bhimul v Choonee, 2 C 379 (F B) Kesarlal v Jagubhai, 49 B 282 27 Bom L R 226 1925 B 406, C rika v Muna 24 A 273 29 I A 70 4 Bom L R 376 6 C W N 425

husband's co-owner and what is now mistaken to be merely an *equitable charge*, is the incident of her co-ownership which subsists after the husband's death, and to which are referable her rights in his estates, *i. e.*, in his co-parcenery interest in the family estate

Charges on undivided share passing by survivorship

Charges on undivided share passing by survivorship —It has already been indicated (*h*) that the maintenance of the widow and the maiden daughter of a deceased co-parcener, and the marriage expenses of the latter, are charges on his co-parcenery interest And so are the maintenance of the deceased's mother, and also of his dependent members such as his widowed daughter, and the *sradh expenses* of himself and the said persons If he leaves any male issue excluded from inheritance for any cause other than being outcasted, then such issue and his family are also to be maintained out of the undivided interest of the deceased. The co-sharers taking it by survivorship are liable for these charges to the extent of the said interest. They are also, according to Hindu law similarly liable for his debts which form a charge on the interest left by him, but the Courts of justice have not, up to the present day, enforced this liability.

He a co-parcener with legitimate brother in Bombay

Illegitimate brother of a Sudra taking by survivorship.*—It has been held by the Calcutta High Court (*i*) following certain Bombay decisions that in a Sudra family governed by the Mitákshará, a *dási-putra* or illegitimate son by a slave girl, is a co-parcener with his legitimate brother in the ancestral estate, and will take by survivorship; and this view has been upheld by the Judicial Committee. (*j*)

P C view

but cannot be supported from texts

The reasons upon which the above conclusion is based cannot be followed. According to the Mitákshará, an illegitimate son, like a maiden daughter, is not *entitled* to any share when the partition is made during the life-time of the father, except at the pleasure of the father But when *partition is made* by the legitimate sons, after the death of the

(*h*) *See ante pp* 370-371, 494

* *In this connection see ante*, Sec 3, Sub-Sec 11, *pp* 330-336

(*i*) Jogendro Bhupati *v* Nityanund, 11 C, 702

(*j*) Jogendro Bhupati *v* Nityanund, 18 C, 151 (P C) 17 I A, 128, see also Thangam *v* Suppa, 12 M, 401

father, they are directed to allot a half share to an illegitimate son, in the same way as a quarter share to a maiden daughter of the father. When there is no legitimate son, an illegitimate son may take the whole estate, provided there be no widow or legitimate daughter or her son, in which case the illegitimate son takes half (*k*) It is not easy to find out, as to when does an illegitimate son become a co-parcener in the ancestral estate, if he had been so, during the lifetime of the father, his right to a share could not have been depended on the father's choice, he would have been entitled to a share in his own right independently of the father's descretion. Nor can rules of succession and survivorship apply to the same ancestral estate, and, therefore, it cannot be said that he acquires by *succession* a title, on the death of the father, to a half of the father's undivided share, the other half devolving by *survivorship* to the legitimate sons. How again is the co-parcenery interest of an illigetimate son affected by the existence of a legitimate daughter or her son? A son takes even the father's separate estate by survivorship and not by succession, except when he has been separated from the father. The correct view seems to be that Section xii of the first Chapter of the Mitàksharà, which concludes the subject of partition, succession being dealt with in the next chapter,—deals with the position of an illegitimate son to whom the preceding sections cannot apply, and defines his rights generally.

Illegitimate son whether co-parcener

He is no more a co-parcener than the father's wife, who is entitled to a full share on partition. And it is doubtful whether he is entitled to any share when there is a single legitimate son, that is to say, whether he has a right to demand partition. Accordingly, it was held by the Madras High Court in several cases that he was not entitled to claim partition (*l*) the ordinary incident of his *status* being held to be a right to be maintained. (*m*) But subsequently the said

(*k*) Meenakshi v Appakutti, 33 M 226 20 M L J 359
(*l*) Krishnayyan v Mattusami, 7 M 407, Ranoji v Kandoji, 8 M 557
(*m*) Parvathi v Thirumalai, 10 M 334, *see* Visvanathaswamy v Kamu, 24 M L J 271 21 I C 724

Mad H C thought bound by P C ruling

Court thought itself bound by the above decision of the Privy Council to hold that he is a co-parcener and as such entitled to enforce partition. (n) The same Court has again in a still later case (o) has held that there is "no warrant for extending the scope of the Privy Council ruling so as to hold that an illegitimate son is a co-parcener along with his father's uncles and cousins." Hence, he cannot inherit collaterally in preference to legitimate heirs. (p)

Female member and survivorship

Can a female member take by survivorship?—It has already been said that a lawfully wedded wife or *Patni*, becomes from the moment of her marriage, the co-owner of her husband with respect to all his property, and it is by virtue of this right, that she becomes entitled to a share at a partition between her husband and his male descendants, or at a partition between the latter. But she is not entitled to a share in other circumstances, for instance, if her husband dies without leaving male issue. And then it is supposed that his undivided interest passes to his surviving brother or other collateral male co-sharer, to the exclusion of his widow. If that were so, then what becomes of her co-ownership with the husband, or right to the family property acquired through her husband from the moment of her marriage? According to the true view of the principles of Hindu law it must be held to subsist even after the husband's death, whose interest only, as distinguished from her interest, can pass to surviving male members, and she continues to get maintenance out of his property by virtue of that interest, her subordinate capacity to get a share or not, at a partition which she can never demand or enforce, is no criterion of the existence or non-existence of that interest. But according to another view, this interest is said to be extinguished by the death of the husband, the co-ownership subsists only during their joint lives. This view, however, appears to be erroneous, as it is inconsistent with the reason for recognising this co-ownership,

Widow's right curtailed

(n) Thangam v Suppa, 12 M 401 but see *contra* 24 M L J 271 21 I C 724, on appeal after remand 30 M L J 451 and P C appeal 50 I A 32 *see p* 5c3 *post*

(o) Visvanathswamy v Kamu, 24 M L J 271, 285. 21 I C 724

(p) Dharma v Sakharam, 44 B 185, *see foot note (l) p 335 ante*

which reason subsists even after the husband's death. It has already been observed that the wife's co-ownership is admitted to account for her enjoyment of the family property, which continues even after the husband's death in the same manner as before: why should then her co-parcenary, of which her enjoyment is the effect, be held to cease? The only change that takes place is that the husband's male relations step into his position with respect to his interest and become her guardians or protectors. But the law relating to females has been misunderstood and misconstrued in a manner detrimental to their interests, and it has been held that a widow of a deceased co-parcener living jointly with the last surviving male member of the family, is not entitled to take by survivorship, (q) although there is an earlier case (r) in which was taken the contrary view which alone is consistent with the original principle underlying the recognition of her co-ownership as well as with reason, equity and justice. For, suppose a man died leaving two sons and his widow, and then one of the sons died leaving his mother, widow, and brother behind him, and then the surviving brother, who became entitled to the whole family property, together with the female members who are his co-parceners though in a subordinate character by reason of their sex,—dies leaving his widow, the mother and the brother's widow, it is but just and equitable that these three ladies whose position was the same during the lifetime of the male member, should jointly take the estate by survivorship, and not the last male member's widow alone, to the exclusion of the other two, for, the law of succession applies only to the estate left by one *separated* from his co-heirs, not to that of one who had been a member of a joint family, but had no male co-parcener at the time of his death, and on that ground cannot be deemed *separate* at the time of his death. Two different principles of devolution are enunciated by the Mitàksharà

Law relating to women misunderstood

(q) Ananda v Nownit, 9 C 315 Nihal v Kishore, 8 I C 999 97 P R 1910. 142 P. W R 1910

(r) Bhagwani v Gopalji, S D, N W P, 1862, Vol. 1 p. 306

school, namely (1) *survivorship* applicable to joint family property and (2) *succession*, to the estate of a person separated from his co-parceners by partition, when provision is made for every member male or female. And accordingly, to the estate under the charge of the deceased in the foregoing circumstances, the rules of devolution of joint-family property, but not the rules of succession, should be applied, the female members being according to the true principles of Hindu law, his co-parceners though in a subordinate character and as such, entitled to participate equally the joint estate by survivorship. Curiously, however, the law has been strained against women on many points, as will be shown hereafter.

Law strained against women

Sec. 11—PARTITION

Sub-Sec 1—PARTITION OF JOINT PROPERTY

What is partition,

What is partition.—The tenure of joint property by the members of a joint family governed by the Mitákshará, is characterized by community of interest, unity of possession, and common enjoyment, there is no question of shares during jointness, the members are said to be joint in food, worship and estate. And the Mitákshará theory of joint rights is, that each co-parcener's right extends to the whole family property, in which every member has an interest, but no definite share.

according to Mit

Partition, according to the Mitákshará, is the adjustment into specific portions, of divers rights of different members, accruing to the whole of the family property, in other words it is the ascertainment of individual rights which are never thought of during jointness. Hence, a suit by a member of a joint family for declaration of title to specific share does not lie in the absence of partition being claimed. (*s*)

The word 'partition' or 'division' may be employed to mean either a division of interest or a division of possession, or both. In connection with the Mitákshará joint families, it means severance of interest and consequent defeasance of survivorship.

(*s*) Ram Sarup v. Kataula, 83 I.C 227. 1925 A. 211.

Family arrangement not to partition.

An agreement not to partition—joint family property or a part of it, introduces a restriction which is repugnant to the interests of the co-parceners, and is inconsistent with Hindu law. Restrictions relating to the enjoyment of property absolutely transferred are declared void by the Transfer of Property Act section 11. On the same principle, a restriction against making any division for twenty years, imposed by a testator on his sons to whom he gave all his property, was held void as being a condition repugnant to the gift (*t*) An agreement between co-parceners never to divide certain joint property or the entire joint property is, nvalid and not binding even on the parties to the same (*u*) An agreement at partition of the family property that one of the co-parceners shall get one-fourth of the net income of a certain village from the eldest brother who is to manage the same is held to be no bar to a suit for partition of his one-fourth share, brought by that co-parcener (*v*) Such an agreement or family arrangement is held by the Calcutta High Court to be binding on the actual or immediate parties thereto, but not on a purchaser from one of the parties, nor on their heirs, far less on a purchaser from an heir. (*w*) The purchaser from a party to such an agreement, cannot be in a better position than his vendor, except by invoking the doctrine of notice, or unless it be held that the agreement is not binding even on the parties themselves. A distinction, however, is drawn between the parties on the one hand, and their heirs and assignees on the other, with respect to the binding character of agreements taking away ordinary legal incidents of property. (*x*)

how far binding in Bombay

in Calcutta

Family settlement

A family settlement, whereby certain members of a joint family divided the family property amongst themselves and agreed that upon the death of every one of them, without issue his share should pass to the surviving brothers, was neither in contravention of Hindu law, nor in infringement

(*t*) Mokoondo *v* Ganesh, 1 C 104
(*u*) Ramlinga *v.* Virupakshi, 7 B 538, Rup *v* Bhabhuti, 42 A 30, Brijleshari *v* Kashi, 1928 O 365
(*v*) Subbraya *v* Rajaram, 25 M 585 12 M L J 91
(*w*) Ram *v* Anund, 2 Hyde 93, Rajender *v* Sham, 6 C. 106, Krisnendra *v* Debendra, 12 C W N 793
(*x*) Venkatarammanna *v.* Brammanni, 4 M.H.C.R 345

of section 6 (a) of the Transfer or Property Act, as being the transfer of an expectant interest in property. (*y*)

A male co-parcener can enforce partition

At whose instance ?—*Male co-parcener* Partition may take place under the Mitákshara by the desire of a single male member, who is therefore entitled, at his pleasure, to put an end to the joint tenancy so far as he himself is concerned : the other members must submit to it (*z*)

Execution purchaser

Alienee An execution purchaser of a member's interest, and a purchaser of the same for value in Bombay and Madras, are entitled to demand partition in right of that member. (*a*)

Sons

Punjab,

Bom holds, son cannot partition against father and uncle,

Sons The son or the adopted son acquires co-equal right with his father from the moment of his birth or adoption (*a1*) and can demand partition The general rule in the Punjab is that a son cannot enforce prtition against the father (*b*) The majority of a Full Bench of the Bombay High Court has held that although it is now settled law that under the Mitákshará, a son can claim partition of ancestral immoveable property inherited by the father, whether he assents to it or not, yet a son cannot in the life-time of his father sue his father *and uncle* for partition of such property, against the will of the father. (*c*)

decision due to wrong meaning put on Mit

The Punjab rule is based on custom and the Bombay decision seems to be due to a misapprehension of the meaning of a passage of the Mitákshará There cannot be the slightest doubt in the mind of a Sanskritist on reading the original passages of the Mitákshará (*d*) that no such restriction on the son's right, as is supposed by the majority of the learned judges to be imposed by paragraph 3 of that section, is really intended to be laid down by that treatise. It should be borne in mind that the Mitákshará is a running commentary on Yájnavalkya's Institutes , after having explained

(*y*) Kanti *v* Al-i nabi, 33 A 414

(*z*) Balkishen *v* Ram, 30 C 738 30 I A 139 7 C W N 578 5 Bom L R 461 , Deo *v* Dwarka, 10 W R 273 , Pirthi *v* Jowahir, 14 C 493 14 I A. 37 , Raja *v* Luchmun, 8 W R 15 , Jogal *v* Shib, 5 A 430 (grandson), Soundararajan *v* Arunachalam, 39 M 159, 182 F B 30 M L J 592, Ram Kali *v* Khamman, 51 A 1 1928 A 422

(*a*) *See* foot note (*b*) p 416 As to demand for partition by alienee of joint property or specific portion of it *see* page 416 (*a*) *See ante pp* 273, 365

(*b*) Hardayal *v* Malik, 1928 L 911 , Amir *v* Malik, 1923 L 255 ,*see ante, p* 362

(*c*) Apaji *v* Ram, 16 B 29 (*d*) Gharu *v* Tara, 89 I C. 176.

in paragraph 2, the text cited in paragraph 1 of Sect. 5., Ch 1, and before citing and commenting on the next text, the commentator sets out the importance of the next text, by the introductory remark that, but for the next text, two positions which are not correct propositions of law, might be deduced from the preceding passage, and that the same are obviated by the next text, and then he goes on to explain the next text, and in the course of doing so, lays down in paragraph 5, that partition does take place, and that it does take place not by the father's choice only, thereby necessarily implying that it takes place by the son's desire as well, and thus the commentator shows that the two positions mentioned in the introductory passage in paragraph 3 are obviated as not being tenable as correct propositions of law, by the next text asserting co-equality of father's and son's right.

Cal & Mad hold contrary view

But the above mistaken view of the majority of the Full Bench judges has been dissented from, and the correct view taken by the Hindu Sanskritist judge in the minority, is approved by the Madras (e) and Calcutta (f) High Courts

Illegitimate son cannot demand partition. (f1)

Father

Father. The father, even against the consent of his sons, can effect partition of ancestral joint property of the family consisting of himself and his sons. (g) So where the effect of a Revenue partition is to bind the father of a joint family conclusively, his son, will be equally bound though his name may not have been entered in the revenue papers. (h) But the father, although the head of the family, cannot make a partition by a Will, (i) nor can he on partition give a share to a stranger. (j)

Mother

Mother. She cannot enforce partition unless partition takes place at the instance of her sons. (j1)

(e) Subba v Gannsa, 18 M 179

(f) Rameshwar v Lachmi, 31 C 111 7 C W N 688 (f1) *Ante pp* 497-8

(g) Murugayya v Palaniyandi, 31 M L J 147, Nirman v Fateh, 1929 A 963.

(h) Gajadhar v Hari, 47 A 416 '23 A L J 291 87 I C 647 1925 A 421

(i) Brijraj v Sheodan, 35 A 337 17 C W N 949 40 I A 161 25 M L J 188 18 C L J 57 15 Bom L R 652. 11 A L J. 698 19 I C 826.

(j) Ramkishore v Jainarayan, 40 C 966 40 I A 213 17 C W N 1189 18 C L J 237 25 M L J 512 · 15 Bom L R 867 11 A L J 865 20 I C 958. See appeal after remand 49 C 120 26 C W.N 881.

(j1) *See post p* 523 foot note (l)

Wife

Wife. She cannot claim partition. (*j2*)

Minor Member With respect to partition during minority of one or more members, the Judicial Committee observes as follow —"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the co-parceners. That seems to follow from the admitted right of one co-parcener to claim a partition, and if an agreement for partition could not be made binding on minors a partition could hardly ever take place. No doubt, if the partition were unfair or prejudicial to the minor's interests, he might on attaining his majority, by proper proceedings set it aside so far as regards himself." (*k*)

Partition during minority of a coparcener is valid

Partition suit on behalf of minor

A suit for partition may be brought on behalf of a minor member on the ground of malversation or corrupt or bad management or other circumstances shewing that separation of his share would be beneficial for him, (*l*) although the minor should, by the partition, be deprived of the right to take by survivorship, which is but a contingent right, which circumstance will not therefore deter a Court of justice from securing the existing interest of the minor by ordering partition even against the father, if it appears advisable that the minor's share sould be set apart, and secured for him. (*m*) A demand for partition may be made by the next friend of the minor even against the father when he adopts persistent hostile attitude against the minor. (*n*) It is for the Court to determine whether there should be a partition or not at the instance of the minor, (*o*) and may, if it thinks proper, allow partition, but until the decree is passed the minor's

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(*j2*) *See ante p* 370

(*k*) Balkishen *v* Ram, 30 I.A 139, 150 30 C 738 7 C W N 578 5 Bom. L R 461, Bali *v* Girji, 9 N.L R 111 20 I C 563, *see* Parbati *v* Naunihal, 412 36 I A 71 10 C L J 121 13 C W N 983 19 M L J 517 11 L R 878 3 I C 195

(*l*) Damoodur *v* Senabutty, 8 C 537, Mahadev *v* Lakshman, 19 B 99 Actual malversation need not be proved Palani *v* Kasi, 50 I C 552 (M)

(*m*) Bhola *v* Ghasi, 29 A 373, Deo *v* Dwarka, 10 W R 273

(*n*) Jagadish *v* Sri, 1927 A. 60

(*o*) Bachoo *v* Mankorebai, 31 B 373 34 I A 107 11 C W N 769 : 6 C L J 1 17 M L J 343 9 Bom L R 646 affirming 29 B 51 ; Chelimi *v* Subbamma, 41 M 442 34 M L J 213 42 I C 8[illegible]0, Kamakshi *v* Chidambara, 3 M H C R 94, 96, Lalta *v* Sri, 42 A 461, 467, Genapathy *v* Subramanyam, 52 M 845 1929 M 738

interest cannot be said to be severed.(*p*) The mere possibility of further births of co-parceners in the family is not a good ground for partition by a minor. (*q*)

Guardian in partition suit

In a suit for partition the father can act as guardian of his minor sons and it cannot be said that his interests are adverse to the minors. (*r*)

Guardian's defalcations

A minor cannot be made liable for defalcations by his guardian in respect of the joint property, unless he is proved to have derived benefit therefrom, therefore at partition his share cannot be burdened with the guardian's liabilities (*s*)

Cause of action.—As is alreadey stated (*t*) partition may take place at the *desire* of a co-parcener and *under certain circumstance* the guardian of the minor can effect partition subject to the protection of the court. (*u*) The father's power to partition the estate where there are minor sons, however, is greater. (*v*) When two brothers inherit both ancestral and maternal grandfather's estates, the cause of action for a suit for partition of their estates is not the same even if these estates were mixed up. (*w*)

Partition Act.

Partition of dwelling house.—Under Section 4 of the Partition Act (*x*) any member or members of an undivided family having share or shares in the dwelling house may undertake to buy the share which a transferee from a member who is not a member of the family, wants to partition by a suit, and the court thereupon may direct the sale thereof to such member or members, after ascertaining the value of such share. This applies both to the Mitákshará and Dayabhága joint family. This provision also applies to a Mitakshara joint family even when the members are divided in status but they occupy the house in common which was not divided (*y*)

(*p*) Rama Rao *v* Hanumantha, 52 M 856
(*q*) Palani *v* Kasi, 50 I C 552 (M)
(*r*) Linga *v* Chengatraya, 48 M L J 417 21 L W 659 87 I C 42 1925 M 734
(*s*) Sonu *v* Dhondu, 28 B 330 6 Bom L R 122
(*t*) *Ante p* 502, "At whose instance" *Male co-parceners*
(*u*) *Ante p* 504, *Minor Member* (*v*) *Ante p* 503, *Father*
(*w*) Sham *v* Jagannath, 1930 A 371
(*x*) Act IV of 1893, *See ante p* 421 *foot note (l)*
(*y*) Sivramayya *v* Kapa, 53 M 417, Sultan Begum *v* Debi, 30 A 324 F B

Sub-Sec ii—WHAT CONSTITUTES SEVERANCE

Partition to defeat survivorship

Expression of intention to partition—When partition may take place at the instance of a single co-sharer, whether the other members assent to it or not, it would appear that the declaration and communication by a member of a joint family, of his desire for separation, to the other members, accompanied and followed by unequivocal conduct and acts showing that there was a fixed and determind intention, and not a passing whim, for separation—is legally sufficient to change his interests, so as to defeat the mutual right of survivorship so far as that member is concerned, *i e.*, between him on the one hand, and the rest of the members on the other As regards the enjoyment of the family property there is no difference between a Dáyabhága joint family and a Mitakshara joint family . although in the one case the members of the family are deemed to hold as joint-tenants, and in the other as tenants-in-common. The distinction is a purely metaphysical one, and is founded on intention or a particular state or process of the mind: the members of a Mitákshará joint family may agree to cease to hold the family property as joint tenants without dividing the same by metes and bounds —without, in fact, doing any physical act in respect of the property, and continue to live together but as tenants-in-common, like a Bengal joint family. Hence, when a member expresses his desire to become separate, as he is legally entitled to become whenever he chooses, whether the other members wish or not, there arises a corresponding duty on the part of the other members to give effect to his desire immediately , and as no physical act is absolutely necessary for a legal severance of interest, the verbal agreement of the co-tenants being sufficient for that purpose, and as the other members are legally bound to agree to the desired partition, and as Equity presumes that to be done which ought to have been done, it appears to follow as necessary direct logical consequence that a member's desire for partition is sufficient in law to constitute him separate so as to put an end to his joint tenancy and the operation of survivorship.

Daya and Mit compared

Communication of desire to separate, changes status

Calcutta

So far as the Calcutta High Court is concerned, the question appears to be settled by a series of decisions in which it has been held that the unequivocal or unmistakable signification or declaration by a member of a joint family of his fixed or determined intention to become separate would be sufficient to effect his separation or division of his title and severance of his interest, although divison of possession, or partition by metes and bounds, of the joint property be not made. That a declaration of intention attended by conduct showing its determined character, has the effect of causing *change in the status*, and *conversion of the title* from *joint-tenancy* to *tenancy-in-common*, is the only legitimate conclusion deducible from the principles of the Mitâkshará law, especially the doctrine that *partition must take place by the desire of a single member*, and the *other members must submit to it* whether they like it or not. The Bengal High Court has arrived at this conclusion in several cases. (z)

So also by Vyavahara Mayukha

The same view is expressed in the *Vyavahâra-Mayûkha* the only Sanskrit commentary that deals with the question in a pointed manner it says—"Even when there is a total failure of common property, a partition may certainly be made, also by *a mere declaration—'I am separate from thee'* for partition is certainly only a kind of mental state (or intention), this declaration makes the same only known (*a*) It should be noticed that this passage clearly implies that partition is *a fortiori* effected by a mere declaration of intention to separate when there is a joint property. But there seems to be some misconception about this point, as will appear from an examination of the decisions, which do not seem to be uniform.

(z) Bulakee *v* Indurputtee, 3 W R 41 Vato *v* Rowshun, 8 W R 82, Debee *v* Phool, 12 W R 510, Mt Phoolbas *v* Lall Juggessur, 14 W R 345-46, Joy *v* Goluck, 25 W R 355, affid in Joy *v* Girish, 4 C 434, 437 5 I A 228, Raghubanund *v* Sadhu, 4 C 425, 430, Radha *v* Kripa, 5 C 474, Ram *v.* Lakhpati, 30 C 231, 30 I A 1 7 C W N 162 5 Bom. L R 103.

(*a*) Stoke's H L Books P 47

P. C view

The Privy Council has explained it thus: "It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v. *Ikbal Narain* (*b*). The question was further examined in *Girja Bai* v. *Sadashiv*, (*c*) and the principle was reaffirmed, and last mentioned case was followed in *Kawal Nain* v. *Prabha*, (*d*) where Lord Haldane says 'The status of the plaintiff as separate in estate is brought about by his assertion of his right to separate'" (*e*)

Partition must include severance of interest

It should be remarked that the essential idea involved in the conception of partition, is the division of the right to, or the severance of the interest in, the joint property there may be separation in residence (*f*) and food without there being separation in estate (*g*) and, conversely there may be a division of right without there being any separation in food and dwelling, (*h*) for the sake of convenience, the members may live in commensality, each contributing his share of the expenses.

Intention to separate is principal thing

*There may likewise be a definement of shares to which the members would have been entitled had there been a partition in the Revenue Records, under the Land Registration Act, without any one of them having the remotest idea of separation (*i*). The intention to separate is the important and

(*b*) 35 A 80 40 I A 40 17 C W N 333 17 C L J 288 24 M L J 345 15 Bom L R 456 : 11 A L J 172 18 I C 30

(*c*) 43 C 1031 43 I A 151 20 C W N 1085 24 C L J 207 14 A L J 822 : 31 M L J 455 18 Bom L R 621 12 N L R 113 37 I C 321

(*d*) 39 A 496 44 I A 159 15 A L J 581 21 C W N 986 26 C L J 101 19 Bom L R 642 33 M L J 42 40 I C 286

(*e*) Bal Krishna *v* Ram, 35 C W N 815, 821

(*f*) Ganesh *v* Jewach, 31 C 262 31 I A 10 8 C W N 146 14 M L J 8 6 Bom L R 8, Suraj *v* Iqbal, 35 A 80 *infra*, 18 I C 30, Mukka *v* Ammakuthi, 51 M L J 1928 M 299, Ranganatha *v* Narayansami, 31 M 482

(*g*) Badmoo *v* Wazeer, 5 W R 78, Rewun *v* Mt Radha, 4 M I A 137, 168 7 W R P C 35, Chhabila *v* Jadavbai, 3 B H C R O C J 87, Suraj *v* Iqbal, 35 A 80 40 I A 40 17 C W N 333 17 C L J 288 24 M L J 345 15 Bom L R 456 18 I C 30, Ganga *v* Narayan, 86 I C 505 1925 N 284

(*h*) Amritrao *v* Mukundrao, 53 I C 866 P C 15 N L R 165 13 L W 112, Kaliram *v* Bajilal, 1927 N 107

* *See* Sec 13, sub-sec ii, *post*

(*i*) Ambika *v* Sukhmani, 1 A 437, Hoolash *v* Kassee, 7 C 369, Ramsingh *v*. Tursa, 17 C W N 1045 P C, *see foot note* (*n*) below

principal thing to be regarded (j) Mere living separate, (k) or even the enjoyment by different members of different portions of property (l) or the division of income for the convenience of the different members, would not amount to partition in the absence of intention. (m) While partition may be presumed from what shows an intention for it, such as opening separate accounts in the Collectorate (n) [but not mere definition of shares of individual owners in Revenue and village papers (o)] or separate enjoyment of different portions of property, (p) or participation of income in distinct and defined shares, (q) taken in conjunction with other circumstances. Execution of a deed of sale by a Court on behalf of one brother in favour of another, in a suit for specific performance, wherein stipulation was made that debts were to be paid by the one brother and some by the other, and some items of property were given to the heirs of the vendor, is an expression of intention to separate and results in severance of status. (r) Whether there has been a disruption of the joint family or not depends on the facts of each case (s) But no formal proof of partition is necessary, if separate living and enjoyment of property is proved. (t)

Separate living,

Division of income,

Intention

Proof.

(j) Ananda v Daiji, 21 C L J 296 28 I C 580, see Ramabadra v Gopalaswami, 54 M 269, Babu v Gokuldoss, 1928 M 1064, Balmukund v Sohano, 8 P 153 1929 P 164

(k) Ganesh v Jewach, 31 C 262 31 I A 10 8 C W N 146, Suraj v Iqbal, 35 A 80 40 I A 40 18 I C 30, Mukka v Ammakutti, 51 M 1 1928 M. 299

(l) Rampershad v Sheo Churn, 10 M I A 490, Anand v Daiji, 21 C L J 296 28 I C 580

(m) Sonatun v Jugaut, 8 M I A 66

(n) Tej v Champa, 12 C 96, Ram v Debi, 10 A 490 3 A W N 203, Parbati v, Nunihal, 31 A 412 36 I A 71 10 C L J 121 13 C W N 983 19 M I J 517 11 Bom L R 878 3 I C 195, Ram Kali v Khamman, 51 A 1 1928 A 422

(o) Bhagwani Kunwar v Mohon, 41 C L J 591 49 M L J 55 29 C W N 1037 23 A L J 589 88 I C 385, Thakur v Surajpal, 193 O 221, see Gangabai v Fakirgowda, 51 C L J 592 P C 1930 P C 93, see foot note (i) above

(p) Murari v Mukund, 15 B 201, Raghbir v Moti, 17 C L J 306 17 C W N 453 25 M L J 28 17 I C 766 35 A. 41

(q) Adi Deo v Dukharan, 5 A 532, Chyet v Bunwaree, 23 W R 395

(r) Lakshumi v Narayanasami, 1930 M 51

(s) Bal Krishna v Ram, 35 C W N 815, 821 2 P C, Suraj v Iqbal, 35 A 80 40 I A 40 17 C W N 331 17 C.L J 288 24 M L J 345 15 Bom L R 456 18 I C 30

(t) Durga v Lal, 1928 O 509

Separation by deed or act,

Separation can be effected by deed or by acts or both by deed and acts, but if the deed is unequivocal in its language and the intention of the parties is clear from it, it would not be necessary to prove acts in support of the deed (*u*).

by Will

There is an *obiter*, that by a statement made by a member of a Mitákshará joint family in his Will, 'I want to get myself divided and want to execute the Will,' he can get himself divided. (*v*) If this view is upheld then any member of a Mitákshará joint family can make a devise of his interest in the joint property by a mere statement to that effect. (*w*)

Approvier v *Rama Subba* division by metes and bounds not necessary for division of status

In *Approvier's* case, (*x*) the Privy Council held that actual partition by metes and bounds is not necessary for completion of division of right, an agreement by the members to hold their property in defined shares, without actually severing and dividing it, takes away from it the character of being joint and undivided, the joint tenancy is severed and converted into a tenancy-in-common, it operates in law as a conversion of the character of the property, and an alteration of the title of the family, converting from a joint to separate ownership and is sufficient in law to make a divided family and to make a divided possession, without actual partition of the subject-matter (*y*) The same view is repeated by their Lordships in the case of *Balkishen* v *Ramnarain*. (*z*) It is further held that the document alloting to each member a defined share in the joint family property being unambiguous, its legal construction and effect could not be controlled or altered by the subsequent conduct of the parties But when a similar unambiguous document, after giving a share to an out-going member and ascertaining the shares of others, stipulated that the *sharers other than* the out-going member *shall be treated as members of an ordinary undivided family subject to the*

(*u*) Jai Narain *v* Baijnath, 50 A 615 1928 A 419
(*v*) Lakshmamma *v* Sreeramalu, 1927 M 1066
(*w*) *In this connection see ante pp* 424
(*x*) 11 M I A 75 8 W R P C I, approved again in Palani Ammal *v* Muthuvenkatachela, *see foot note* (*r*) 515, *see* also Raghubir *v* Moti, 35 A 41 P C 17 C W N 453, Parbati *v* Naunihal, 31 A 412 36 I A 71 13 C W N 983 10 C L J 121 19 M L J 517 11 Bom L R 878 3 I C 195
(*y*) Mohaber *v* Kundan, 8 W R 116 affirmed by P C in Doorga *v* Mt Kundun, 21 W R, P C 214, Tej *v* Champa, 12 C 96
(*z*) 30 C 738 30 I A 139 7 C W N 578 5 Bom L R 461

law of survivorship, it is construed that there was no severance of status. (*a*)

Conduct of parties—The conduct is an important factor as is observed by their Lordships in case of *Ram Persad* v *Lakhpati.* (*b*) "But here again the conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners." It depends on the facts of each case, (*c*) and cannot be inferred merely from the fact that a member purported to hypothecate his share (*d*)

Conduct,

depends on facts

Opposition to partition—In the aforesaid cases, there were agreements to separate without actual division, and it was held that the question in every particular case must be one of intention to effect a division. In one case, it was held that when a deceased co-owner had not merely declared his intention for partition but done everything that lay in him to carry it out, and when failure to do so, was the result of the co-heirs determined opposition, it would be allowing the co-sharer to benefit by his own wrong if he were to succeed by survivorship to the exclusion of the deceased's widow.(*e*)

Member cannot benefit by opposition.

But there are some Bombay decisions in which it has been held that, notwithstanding a suit and a judgment or a decree for partition, the plaintiff who died before decree or execution of it respectively, is not to be deemed to have become separate, and that therefore survivorship applied to his share (*f*) 24 B 182 construes 4 B 157 as contemplating future partition and confines its operation to a very exceptional case (*g*) But these are opposed to the decisions of the Privy Council in which it has been held that the judgment or the decree in a suit for separate possession effects severance of interests, if the same has not been already effected (*h*)

Some contrary decisions of Bombay,

opposed to P C decision

(*a*) Ramabadra *v.* Gopalaswami, 54 M 269

(*b*) 30 C 231 30 I A 1 7 C W N 162 5 Bom L R 103

(*c*) Brijeeshari *v* Kasi, 1928 O 365

(*d*) Amar *v* Har, 5 Pat L J 605

(*e*) Joy *v* Goluck, 25 W R 355

(*f*) Babaji *v.* Kashibai, 4 B 157

(*g*) Sokharam *v.* Hari, 6 B 113—a case of death during appeal, of one member

(*h*) Joy *v* Goluck, 25 W R 355 affd in Joy *v* Girish, 4 C 434 5 I A 228, Chidambaram *v* Gouri, 2 M 83 6 I A 177, Lakshman *v* Narayan, 24 B, 182, 1 Bom L R 777, *See* also Rustom *v* Dinkor, 55 I C 38 (N), Alur *v* Venkata, 52 I C 614 (M), Thandayuthapani *v* Raghunatha, 35 M 239 21 M L J 240 10 I C 660

Definement of share & separate enjoyment if necessary

It is laid down that there must be definement of shares, and distinct and independent enjoyment, in order that the mother may claim to have a share, right to which was held to be *created* by partition. (i) Both these principles appear to be erroneous and will be considered later on

irreconcilable decisions

All the cases do not appear to be reconcilable. In each of these cases the Court had to consider whether, having regard to the facts and circumstances of the particular case, the members were joint or separate in estate. The Courts appear to have dealt with the question as one of fact, and have only incidentally referred to the legal principle on the subject, without fully discussing and deciding what is absolutely necessary to constitute severance of interest.

Point decided by P C

But one important point is settled by the decisions of the Privy Council, namely, that division by metes and bounds is not necessary, but an agreement by the members that henceforth the joint property shall be the subject of separate ownership, is sufficient to cause division of right It is also settled beyond all dispute that such an agreement may be verbal. (j)

Conclusion from these decisions—According to the view taken by the Privy Council the members become separate from the time of the agreement, that is to say, no physical act beyond the verbal agreement or interchange of words conveying mutual consent, was considered necessary to effect severance of interest, in the particular case. From the moment they agree to separate, the status of the family becomes changed, though nothing else is done, and they may live together as before, as they must, for some time. But partition must take place by the desire of a single member, and the others are bound to consent and agree to it. Therefore, the declaration by a member, of his desire to partition to the other members, accompanied or followed by conduct evidencing its earnestness, must be sufficient to cause the severance of his interest. That is all that he can do; if the others do not agree, but obstruct his desire, and compel

Agreement to separate,

(i) Judoonath v Bishonath, 9 W R 61
(j) Rewun v Radha, 4 M I A 137 7 W R P C 35

him to continue to live with them for some time as before, they cannot be permitted, by both law and equity, to prejudice his right, and to gain an advantage by such wrongful omission. He should thence forward be deemed to live with them in the same manner as a member of a joint family governed by the Dàyabhàga, that is to say, as a tenant-in-common, and no longer as a joint-tenant.

effect change of status,

Partition is, no doubt, defined as the adjustment into specific portions of the joint property, of divers rights accruing to the whole of the same it means, the ascertainment of the share or proportion of the joint property, receivable by a co-parcener, which may be done in a moment, and it implies neither more nor less than the cessation of the other members' right to his said undivided fractional share or proportion, and the cessation of his right tot he rest of the property *i e.*, the conversion of the joint-tenancy into a tenancy-in-common.

Partition defined.

And it is as has already been said, a settled doctrine of Hindu law that partition may be effected by the desire of a single member. Hence, according to both law and equity a member of a joint family is to be deemed separate, as soon as he declares his desire to become separate, or does virtually declare himself separate, with the object of causing his share to devolve on his widow, daughter and daughter's son, to the exclusion of the male relations entitled to take by survivorship.

Partition effected by desire of single member

This view is consistent with the decisions in which it has been held that when the undivided co-parcenery interest of a son or the father is sold in execution, it is equivalent to partition and the father's wife is entitled to demand a share. (*k*)

Sale in execution of interest of member effect severance.

It has now been settled by the Privy Council in several cases as also by other Courts, that "a severance of estate is effected by an unequivocal declaration, on the part of one of the

P C view declaration to sever effect severance.

(*k*) Bilaso *v* Dina, 3 A 88, Pursid *v* Hanooman 5 C 845, *see* p 419 and *foot note* (*x*)

joint holders, of his intention to hold his share separately even though no actual division takes place." (*l*)

Division, meaning of

The word "division" in connection with a partition has double significance, *firstly*, the severance of the status that an intention to become divided has been expressed clearly and unequivocally expressed by explicit declaration or by conduct, *secondly*, there is the partition or division of the joint estate, comprising the allotment of shares effected by various methods. (*m*)

Effect of wrong statement

An execution of a document by one of the two sons who lived separate having obtained some property from the father, acknowledging that the property left by the father on his death (which were really ancestral) was self-acquired, that his brother was the full owner of the property under his father's Will and that he or his heirs had no interest in the property, did not operate as severance of interest. (*n*)

Statement in deed

A deed, whereby the shares in the whole joint family property was defined and alloted to the co-parceners with a stipulation that the co-parceners shall be at liberty to live together or to separate their shares, operates a division of status. (*o*)

Filing suit.

Filing suit how far effects severance.—The filing of a suit for partition amounts to separation (*p*) But a suit for

(*l*) Syed *v* Jorawar, 50 C 84 49 I A 358 27 C W N 179, 182 37 C L.J. 73 43 Pat J 676 21 A L J 57 25 Bom L R 1 68 I C 573 (N), Jagadamba *v* Takhur, 37 C L J 287, Ramalinga *v* Narayana, 45 M. 489 · 26 C W N 929, Girja *v* Sadashiv, 43 C 1031 43 I A 151 20 C W N 1085 24 C L J 207 14 A L J 822 31 M L J 485 18 Bom L R 621 37 I C 321 (N), Kawal *v* Budh, 39 A 496 44 I A 159 21 C W N 986 26 C L J. 101 33 M L J 42 19 Bom L R 641 2 Pat L W 57 15 A L J 581 40 I C 286, Girdhar *v* Sri Krishna, 39 M L J 18 (A), Parbati *v* Naunihal, 31 A 412 36 I A 71 10 C L J 121 13 C W N 983 19 M L J 517 11 Bom L R 878 3 I C 195, Amritrao *v*. Mukundrao 53 I C 866 P C 15 N L R 165, Surja *v* Iqbal, 35 A 80 18 I C 30 17 C W N 333 17 C L J 288 24 M L J 345 15 Bom L R 456 40 I A 40, *See* Babana *v* Parawa, 50 B 815, Kandhaiya *v* Sheo, 20 I C 861 (O), Chaubar *v* Bakhtawar, 47 I C 897 5 O L J 486, Ram Kali *v* Khamman, 51 A 1 1928 A 422

(*m*) Mukund *v* Balkrishna, 52 B 8, 15 54 I A 413 32 C W N 203 46 C L J 413 1927 P C 224, Ram Kali *v*. Khamman, 51 A 1 1928 A 422, Mulji *v* Hiralal, 1929 B 424

(*n*) Mukund *v* Balkrishna, *supra*.

(*o*) Hira *v* Manglan, 1928 L 122

(*p*) Parsotam *v* Jagan, 41 A 361 17 A L J 347 50 I C 357, Soundararajan *v* Arunachalam, 39 M 159, Jagadish *v*. Sri, 1927 A 60, Dharopsing *v* Rajaram, 1928 N 193, [*but see* Paras *v* Mewa, 1930 A 561], Ram Kali *v* Khamman, 51 A 1 1921 A 422, Mulji *v*. Hiralal, 1929 B 424, Ram Balak *v*. Ambika, 1929 P. 365.

partition by a minor through his guardian will not have the effect of severance until the Court grants a decree, (q) but when the decree is made it has the effect of severance of status from the date of the plaint, (r) hence, the birth of a son born before the primary decree was passed but conceived after the date of the plaint cannot affect the share of the first minor son which he was entitled to at the date of the plaint. (s)

by minor, birth of son before decree,

The Judicial Committee in the case of *Kedar Nath* v. *Ratan Singh* (t) has held that no severance of joint status results when a member of joint family had filed a plaint claiming partition but afterwards withdrew it. But the same Board in a still later case, (u) has tried to reconcile the principle laid down in the case of *Kedar Nath* with the previous decisions, saying "Their Lordships see no reason to depart from that view," (meaning the view expressed in *Kedar Nath*) "although such a plaint, even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained [see *Girja Bai* v. *Sudasiva Dhundiraj* (v) and *Rewal* v. *Prabhuhal.* (w)]" This attempt to reconcile the decision in *Kedar Nath* with the series of decisions including those their Lordships have quoted, throws considerable doubts on the law on the subject. Their Lordships in *Kewal Nain's* case clearly states, the "judgment of the Judicial Committee in the recent case of *Girja Bai* v. *Sadashiv Dhundiraj* renders it beyond question that the commencement of this suit for partition effected a separation from the joint family." The decisions cannot be reconciled unless their Lordships intended to hold that a member having expressed his unequivo-

P C view on withdrawal of suits,

(q) Lalta v Sri, 42 A 461, Chelimi v Subeamma, 41 M 442. 34 M L J 213: 42 I C 860

(r) Palani Ammal v Muthuvenkatachela, 48 M 254 52 I A 83 29 C W N 846; Sri Ranga v Srinivasa, 50 M 866 1927 M 801

(s) Krishnaswami v Pulukaruppa, 48 M 465 48 M L J 354

(t) 37 I A. 161 14 C W N 985, *see* Krisnaswami v Perumal 83 I C 168: 1925 M 112

(u) Palani Ammal v Muthuvenkatachela, 48 M 254 52 I A 83 48 M L J 83 29 C W N 486 27 Bom L R 735 23 A, L J 746. 6 P L T. 133: 87 I C. 333 1925 P C 49

(v) 43 C 1031 43 I A 151. 20 C W N 1085.

(w) 39 A. 496: 44 I.A. 159: 21 C.W.N 986.

cal intention to separate, may revoke it before actual partition or before decree or at any rate before the notice of the suit is received by the other co-parceners or before their appearance, but even then various other difficult questions may crop up.

Madras on filing of suits,

But the Madras High Court (x) following its earlier decisions (y) has held that "mere filing of the plaint does not necessarily effect a final severance in status", for "a plaintiff may withdraw his declaration of intention and that then no severance is effected ," and this view their Lordships stated to have been approved by the Privy Council in the case of *Palani Ammal* (z) No doubt on a perusal of this Privy Council decision, the material portion of which is quoted *in extenso*, (a) it will appear that their Lordships in the case of *Palani Ammal* have approved of the Board's decision in *Kedar Nath's* case wherein their Lordships in effect held that if after filing of a plaint it is withdrawn, no severance of status takes place. Though their Lordships in *Palani Ammal* says, "their Lordships see no reason to depart from that view," yet in the same sentence they lay down "although such a plaint even if withdrawn, *would unless explained* (b) afford evidence that an intention to separate had been entertained."

Allahabad view

The Allahabad High Court on a review of the various cases on the point, has given clear indication of the proper view of the law on the subject and decided the case on that principle of the law, but, perhaps in view of the decision of Privy Council in the case *Kedar Nath*, partially supported in *Palani Ammal*, their Lordships of the Allahabad High Court in due regard to this decision, put in a saving clause, namely· "It is not necessary for us to say, definitely, in this case, whether the person making the demand for partition may aban-

(x) Ganapatty v. Subramaneyam, 52 M 845, 851 1929 M 738, *see* Paras v. Mewa, 1930 A 561.

(y) Vemi v Nallappa, 11 L W 611 57 I C. 800, Krishnaswami v Perumal, 20 L W 540 1925 M 112

(z) 48 M 254 52 I A 83 48 M L J 83 · 29 C W N 846 · 27 Bom L R 735 23 A L J 746 87 I C 333 1925 P C 49 affirming 33 M.L J 749

(a) *Post pp* 533-534

(b) The italics are mine.

don it without the consent of the other members of the family, so as to enable him to continue to be a member of the joint family. (c)

Date of severance in a compromise

A suit for declaration that certain partition was fraudulantly effected and that the family was joint, was compromised and a division of property was made in terms of the compromise, the severance took place from the date of division and not on the date of the suit, as the suit was for declaration that the family was joint. (d)

Tansfer of entire undivided share in Bombay and Madras In case of a sale of the entire interest of a coparcener, a severance of status takes place in Bombay and Madras, where a co-parcener can sell his undivided interest, in the joint family (e)

A marriage under the Special Marriage Act (III of 1872 as amended by Act XXX of 1923) of a member of a co-parcenary effects his severance from the family (f)

Gift In the absence of express words in the deed of gift to show that from the date thereof he be divided in status from the son, the mere gift of the father's share to the son would not create a severance of status. (g)

Conversion to another religion * —The severance of a joint family to defeat the accrual of the right of survivorship also takes place on the conversion of one co-parcener into Christianity, even though he enjoyed the ancestral property jointly with other co-parceners after his conversion (h) The disruption of the co-parcenary is also effected by the conversion of one of its members to another religious faith. (i)

Sub-Sec iii—ACCOUNT OF JOINT ESTATE

Manager is bound to render account

Partition and liability to account – It has already been said (j) that the manager is liable to render an account, (k)

(c) Banke v Brij, 51 A 519 1929 A 170, *But see*, Shagun v Data, 1927 A 465

(d) Doraiswami v Nagasami, 1929 M 898

(e) *See ante pp* 420 foot note (d) (f) Sec 22

(g) Swaminathan v Subramania, 1928 M 1082

* In this connection *see ante p* 65, 336

(h) Kulada v Haripada, 40 C 407 16 C L J 311 17 C W N 102

(i) Janna v Gonda, 6 L L J 84 80 I C 519 1924 L 479; Bhagwan v Shib 1930 A 341, *but see* Ramji v Anandappa, 2 Mys L J 92

(j) *See pp* 398-401 *supra* (k) Ramakrishna v. Muthusami, 1929 M 456.

and it has been so held by a Full Bench of the Calcutta High Court. (*l*) There was an earlier case (*m*) on the subject, which was virtually, though not expressly, overruled by that Full Bench, and which appears to be founded on a misapprehension of the constituton of a joint-family-government, when the other members are adults.

Constitution of Hindu family

In a Hindu family as in Hindu society, no two persons can be equal in rank and position, one must be superior and the other inferior an elder brother managing the family affairs, is to be looked upon as father (*n*) and conversely a younger brother is to be looked upon as son, an elder sister is to be looked upon as mothor and a younger sister as daughter, an elder brother's wife is similar to the mother, (*o*) and a younger brother's wife is similar to a daughter-in-law The idea of equality and liberty was unknown to the Hindu mind with respect to family government and social order, though of course the people of this country have now been learning this doctrine under the British rule

The conception of the family government, such as is depicted in the above passage, is seldom if ever, found in practice. Autocracy is the rule, democracy is nowhere met with, never is a *Kartà* elected or changed, the senior member holds the office by usage The *Kartà* is all in all, exercising complete authority as if he were the sole proprietor of the whole family property, so long as absolute trust and complete confidence reposed in him by the other members, remain unshaken ; and the junior members seem to be entirely dependent on him, and never dare to look into accounts for the purpose of examining their *bona fides* during joitness , for, as soon as suspicion arises with respect to the *bona fides* of the *Kartà*, it must necessarily be followed by the disruption of the family. To be suspicious about the manager's good faith, and to continue joint, would be two inconsistent things. Hence, the adult members other than the *Kartà*, cannot be supposed to take any part in the management, except as a servant by order of the *Kartà* A wide door to fraud and misappropriation would be opened if the manager of the family be held not liable to account, on the ground of the

Karta or manager,

his liability to account,

(*l*) Obhoy *v* Pearee 13 W R F.B 75 5 B L R 347
(*m*) Chuckun *v* Poran 9 W R 483
(*n*) Manu 9, 165
(*o*) D B 4, 3, 31.

other members being adults and their consequent supposed participation, or liberty to participate, in the management of the family, for, oftener than not, managers of joint families are found to defraud the other members by misappropriating joint property and its proceeds as undoubtedly they have the opportunity to do so with impunity, and also they have, oftener than not, the necessity for so doing, by reason of having the largest family of their own to provide for, in comparison with that of younger members.

Mode of accounting.—The manager's liability to account appears to consist of his duty to produce the account books for inspection and examination by, or on behalf of, the other members, but on the footing of what have actually been expended, irrespective of the question whether the expenditure was extravagant in scale, or improper, on account of want of skill or absence of the desire to economize or save, provided the expenses were honestly incurred, and of the further duty to pay and divide the *surplus*, if any, found to exist on settlement of the account, of which he is presumably the custodian.

Expenses in current, no question of economy or saving

It would therefore appear that the existence of regular accounts of the whole income and expenditure, is a necessary condition to fix the manager with liability to render account. Hence, where the income of the property is not much higher than what is sufficient for meeting the expenses of the family, and as a matter of fact the family has no regular account books, and where no account of expenditure was ever actually kept although there may be collection-papers of small revenue-paying estates or under-tenures, as is generally the case in the middle class families, it would be unjust to require the manager to render an account. In such cases the other members must accept the *ipse dixit* of the manager as to the property which is the subject of partition.

When demand of account unjust

The question about the rights and liabilities of the manager is not free from doubt and difficulty. According to the constitution of joint families, the management of its affairs is entrusted to the elderly member usually called the *Kartá*, who himself

has an interest in its property, and is connected by ties of natural love and affection with the other members having an interest in the same. The expenditure of the income depends entirely on his will, and he is entitled to spend every farthing of the income by adopting an extravagant scale of expenses, not being legally bound to economize and save. Partition is the only remedy to which the other members are entitled for protecting their interests, if the management be deemed negligent and prejudicial to the same. If they are indifferent and apathetic, and do not take care to protect their own interests, and should they be minors and if there is no body else to look after their interests, then they must submit to the management or mismanagement, there being no remedy unless fraud, dishonesty and misappropriation can be proved.

Partition is remedy against mismanagement

No difference in two schools about manager's position

No difference in two schools.—As regards the management of joint families, there is absolutely no difference between the two schools. (*p*) The distinction between the two schools with respect to the nature of the title of co-heirs, and its incidents of alienation and survivorship does not in any way effect any difference on the present question. For, community of interest, which is the distinctive feature of jointness, and upon which the question depends, is common to both the schools; and the manager or any other member who has a large family of his own to maintain, and in consequence consumed the largest portion of the income during the minority of a member, cannot as well under the Dáyabhága as under the Mitákshará, be called upon to account for the excess consumption, by that member who had none to support except himself. The nature and character of the *community of interest* of the members of a Bengal joint family, clearly appears from the description by the founder of the Bengal school, of *re-union* consisting in the annulment of previous partition, with the stipulation that,—"The property which is thine is mine, and the property, which is mine, is thine also."—which was the state of things during jointness. It is therefore erroneous to suppose that there is such a difference between the two

(*p*) See *pp* 400-401 *ante*

schools, that the aforesaid Full Bench ruling of the Calcutta High Court with respect to the manager's liability, may be correct in the Bengal school, but not so in the Mitākshar school, as has been held by the Madras High Court while refusing to follow the same (*q*)

Decisions on his liability to account not harmonious,

There appears therefore to be no distinction between the two schools, nor between an adult and a minor member, as neither of them has a right to an account of past transactions, *i.e.*, can call into question the propriety of past transactions, or hold the manager liable on the ground of the management being grossly negligent or prejudicial to his interests, in the absence of fraud and misappropriation (*r*) But the case of a member ejected from the family house and excluded from the enjoyment of the family property is different, for he is entitled to demand an account. (*s*) The decisions on the question of the manager's liability to account do not seem to be harmonious, (*t*) but the Privy Council has now made the law clear (*u*) In a case in which one of the members had squandered certain property worth Rs. 5,500 for his own purpose and in which it was urged that an account should be taken of the property, and it should be charged to his share, the Bombay High Court said,—"But we cannot allow it; as, if we allowed it, we should be acting contrary to the principle of law, that in a partition suit no co-parcener has any right to an account of past transactions." (*v*)

but not so now

Sub Sec iv—SHARES

Father's wives get equally with sons on partition

Share of father's wife.—Each of the father's wives is entitled to a share equal to that of a son on partition, whether

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(*q*) Balakrishna *v* Muthusami, 32 M 271 119 M L J 70 5 M L.T 145 . 3 I.C 878

(*r*) Parameshwar *v* Gobind, 43 C 459, Sri Ranga *v* Srinivasa, 50 M. 866 1927 M 801

(*s*) Krishna *v* Subbanna, 7 M 564

(*t*) Damodardas *v* Uttamram, 17 B 271, Balakrishna *v* Muthusami, 32 M. 271 19 M L T 70, Parmeshwar *v* Gobind, 43 C 459

(*u*) *See p* 399 *supra* (*v*) Narayan *v* Nathaji, 28 B 201, 208 5 Bom L R 945

H L.—66,

it takes place during the father's life (*w*) or after his death. (*x*) She gets the share, in virtue of the co-ownership she acquires from the moment of her marriage, in her husband's property, by reason of her being the lawfully wedded wife or *Patni* of her husband (*y*) It is erroneous to suppose that partition creates her right to get a share, (*z*) for according to the Mitákshará (*a*) partition does not create any right, but it proceeds upon the footing of pre-existing rights.

Her share against husband's wish.

It has been held that she is entitled to get her share even against the father's wish, in a case in which his conduct towards her was such as to entitle her to separate maintenance, but her right to the share was held not to depend on it. (*b*) It should, however, be noticed that while dealing with the wife's co-ownership with the husband over his property, the Mitákshará distinctly says that the partition of the hasband's property between husband and wife, at which a share is allotted to her, may take place *by the husband's desire, and not by the desire of the wife.* The question seems to be beset with considerable difficulty whether the share allotted to a wife at a partition may be severed from that of the husband so as to constitute a partition as between the husband and the wife, against the husband's desire.

She gets accretions also

She is entitled to get a share, not only of the ancestral property but also of the accretions thereto. (*c*)

Her share when she gets *stridhan*.

If *stridhan* has been given to her by the husband or the father-in-law, whether by gift *inter vivos* or by devise, she is entitled to so much only as together with the *stridhan* so received, is equal to a son's share (*d*)

(*w*) Sumrun *v* Chunder, 8 C 17, Krishna *v* Nandeshwar, 4 Pat L J 38. 44 I C 146, Partap *v* Dalip, 52 A 596 1930 A 537, Radhe *v* Harkishanlal, 1927 N 55

(*x*) Damoodur *v* Senabutty, 8 C 537, Damoodardas *v* Uttamram, 17 B 271, Har *v* Bishambhar, 38 A 83, mother—includes step-mother Tegh *v* Harnam, 6 L 457 7 L L J 424 90 I C 1035 1925 L 568,

(*y*) Jamna *v* Machul, 2 A 315, *but see*, Munni *v* Phula, 50 A 22 1927 A 679

(*z*) Juddoonath *v* Bishonath, 9 W R 61

(*a*) 1, 1, 17 and 23.

(*b*) Dular *v* Dwarka, 32 C 234 9 C W N 270

(*c*) Isri *v* Nasib, 10 C 1017, Ganesh *v* Jewach, 31 C 262 31 I A 10 8 C W N 146 14 M L J 8 6 Bom L R I

(*d*) Jodoo Nath *v* Brojo Nath, 12 B.L R 385, Kishori *v* Moni, 12 C 165; Poorendra *v* Hemangini, 36 C 75, 84—85 12 C W N 1002 1 I C 523.

Although it is true that there is a close connection between her maintenance and the recognition of her co-ownership in the husband's property, (e) still it is erroneous to suppose that she gets the share in lieu of maintenance (f) this may virtually be true when the property is small, and the sons may relieve themselves of the liability to supply her with maintenance, by coming to a partition and allotting to her a share But this cannot be true when the property is very large, for in such a case she gets property far in excess of what is necessary for her maintenance The real reason why a share is given to her will be explained in Chapter XII, Sec 3, Sub-sec iii

The share which she gets becomes her *strìdhan*, for, the Mitâksharà (g) distinctly says, upon the authority of a text of Yajnavalkya declaring succession to the mother's *stridhan* estate, that the daughters inherit this share, and in their default the sons, and thereby clearly implies that it becomes her *stridhan* The same result follows by necessary implication, from the rule that she is to get only so much as together with the *stridhan* received from the husband and the father-in-law, would equal the share of a son, she must have the same sort of right in what she receives in addition to the *stridhan* as in the latter, *i e*, an absolute right The *obiter dictum* expressed to the contrary, (h) is, therefore, not acceptable as being inconsistent with the Mitâkshara In the case of *Chhidu* v *Naivat* (i) the Allahabad High Court had taken the correct view and pronounced that the share became *stridhan*

Character of her interest in her share on partition

The Privy Council in the case *Debi Mangal Prasad* v. *Mahadeo* (j) has now settled the law that the share does not become her *stridhan* so as to pass to her heirs on her death and not to that of her husband. (k)

She cannot enforce partition, but she is entitled to get a share when partition does take place at the instance of sons or male members, or when the interest of a single member is severed by execution sale. (l)

She cannot enforce partition.

With respect to the mother's share on partition by sons, the Judicial Committee observes,—"There is no doubt that

P C on mother's share

(e) Becha v Mathina, 23 A 86 20 A W N 210, Narbadabai v Mahadeo, 5 B 99, Punna v Radha, 31 C 476
(f) *But see*, Munni v Phula, 50 A 22 1927 A 679
(g) 1, 6, 2
(h) Judoonath v Bishonath, 9 W R 61, Beni Parshad v Puran, 23 C 262
(i) 24 A 67 21 A W N 171
(j) 34 A 234 39 I A 121 15 C L J 344 16 C W N 409 22 M L J 462 14 Bom L R 220 9 A L J 263 14 I C 1000 on appeal from 32 A 253 5 I C 208-11, *see*, Munni v Phula, 50 A 22 1927 A 679, Dukhit v Newaj, 53 I C 425 (C) see *contra* Sri Pal v Suraj, 24 A 82
(k) For further discussion *see "Mother's share"* in Ch XII, S 3, ss iii *post*
(l) Bilaso v Dina, 3 A 88, Pursid v Honooman, 5 C 845, Ganesh v Darshan, 56 I C 478 (L), Beti v Janki, 33 A 118 7 I C 908 7 A L J 980, Jadu v Haran, 36 C L J 217, Hemangini v Kedar, 16 C 758 16 I A 115 on appeal from 13 C. 339, Ganesh v Jewach, 31 C. 262, 271. 31 I A 10, 8 C.W N. 146.

according to the law in force in Bengal, the mother, though not entitled to require a partition so long as her sons remain united, is entitled, if a partition takes place between her sons, to receive the share of a son in property which is ancestral or acquired by the employment of ancestral wealth. She may, of course, acquiesce in the division of property between her sons without claiming any share for herself, but there is no evidence of any such acquiescence in this case"(*m*) This was a case from Mithilà.

Father's wife not entitled to share in Madras

In Madras the father's wife is not entitled to a share, but, only to maintenance the texts providing for the allotment of a share to her are interpreted to intend the allowance of wealth sufficient for her support. Therefore, provision for the mother's maintenance must be made by the sons when they partition the estate after the death of their father (*n*)

Grand-mother

Grandmother's share—A paternal grandmother, like the mother, cannot herself enforce a partition In case of a partition amongst the grandsons only, after the death of her sons, she is entitled to a share, according to the Bengal (*o*) and the Bombay (*p*) schools.

Bengal, Bombay,

In a partition between father and his sons, the paternal grand-mother is not entitled to any share, (*q*) except in Mithilá. (*r*)

Mithila,

But in cases of partition between her grandsons or between her sons and grandsons by her deceased sons, she is entitled to a share equal to that of her son (*s*)

Allahabad, Patna

The *step-grandmother's* position is like that of grand-mother, (*t*) and entitled to a share.

Step-grand-mother.

(*m*) Ganesh *v* Jewach, 31 C 262 31 I A 10 8 C W N 146 · 14 M L J. 8 6 Bom L R I

(*n*) Veeranna *v* Sitamma, 1927 M 83

(*o*) Purna *v* Sarojini, 31 C 1065 8 C W N 763, Badri *v* Bhugwat, 8 C 649; Sibbosoondery *v* Bussoomutty, 7 C 191

(*p*) Vithal *v* Prahlad, 39 B 373 17 Bom I R 361 28 I C 967, see observation in Jamnabai *v* Vasudeo, 54 B 417, 421-422 1930 B 302, (not under Mayukha)

(*q*) Jamnabai *v* Vasudeo, *supra*, Sheo *v* Janaki, 34 A 505 F B 16 I C 88 9 A I J 749, Radha *v* Bachhaman, 3 A 118

(*r*) Krishna *v* Nandeswar, 4 Pat L J 38, 44 I C 146

(*s*) Babunna *v* Jagat, 50 A 532, 1928 A 330, Kanhaiya *v* Gaura, 47 A 127 · 83 I C 147 1925 A 19, Sriram *v* Haricharan, 9 P 338 1930 P 315 between son and step-grandson

(*t*) Sheo *v* Janaki, *supra*, Radha *v* Buchhaman, *supra*, Sriram *v* Haricharan, *supra*, Bhaurao *v*. Gangi, 23 N L R 184

The share does not become her *Stridhan.* (*u*)

Share not Stridhan

In Bengal and Bombay schools, therefore, there is no difficulty in ascertaining the amount of share which she is entitled to. Her share is equal to that of a grandson. But when the partition is between her sons and grandsons of deceased sons, she may claim a share equal to that of her son and not grandson (*u*1)

Unmarried sister's share

Unmarried sister's share —At a partition made by the sons after the death of the father, they must allot a quarter share to a maiden sister, (*v*) but not if partition is made between father and sons in the Central Provinces (*w*) The quarter share is ascertained in this way , suppose the partition takes place between a man's three sons, two widows and two maiden daughters, then the property is to be divided into seven shares, and a quarter of one such share is to be given to each of the maiden daughters, and then the residue is to be divided equally between the sons and the widows.(*x*)

how ascertained

Commentator's interpretations.

The commentators differ in the interpretation of the texts ordaining the gift of a quarter share to a maiden daughter , for instance, the Mithilà school maintains that by quarter share is intended property sufficient to defray the expenses of her nuptials , while the Mitàksharà (*y*) asserts that the quarter share must be allotted, and not wealth sufficient for marriage in lieu of it , the Viramitrodaya argues out the conclusion that she is entitled to the quarter share in addition to the expenses of her marriage, when partition is made after the death of the father , but if it takes place before, she is not entitled to any share, but gets only what the father may give her.

Illegitimate brother's share amongst Sudras

Illegitimate brother's share amongst Sudras —The half share to which an illegitimate son is entitled when partition takes place at the instance of, and amongst, the legitimate sons of a Sùdra, is to be ascertained in the same

(*u*) Krishna v. Nandeswar, *supra* ,
(*u*1) In this connection *see foot note* (*s*) above
(*v*) Lalljeet v Raj, 20 W R 336 12 B L R 373
(*w*) Dharopsing v Rajaram, 1928 N 193
(*x*) Mit, 1, 7, 5-8 , Damoodur v Senabutty, 8 C 537 (*y*) 1, 7, 5-14

manner as the quarter share of an unmarried sister, the principle being the same. (z) The share is the same as between an adopted son and illegitimate sons (a) He is entitled to share, equally with the father's widow, the father's separate property. (b)

Charges on joint property

Common charges on joint property—Provision must be made before distribution for common charges such as the maintenance of a widow not entitled to a share, and of one who would have been a sharer but is excluded from inheritance by reason of some bodily deformity and the like, as well as of other dependent members of the family.

Estate expenses A member who meets the expenses of the joint estate from his private property, should be proportionately reimbursed by others, before partition (c)

Improvements So also he is to be compensated for improvements of joint estate made in good faith (d) The following observation in Freeman on Co-tenancy and Partition clearly explains the law on this subject —

"If one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land, because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired In such a case the improver stands as a mere volunteer and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements "(e)

Such a co-owner should be given on allotment, so far as is possible, so that he may keep the advantage of his own improvements, and it requires a special and a very strong case to go further than the principle laid down in the above quotation (f)

(z) See *supra* pp 495-498, Kamulammal *v* Visvanathaswami, 46 M 167 50 I A 32 71 I C 643 1923 P C 8 appeal from 30 M L J 451 after remand from 24 M L J 271
(a) Kolapur, Maharaja of, 48 M 1, 228 (b) 50 I A. 32
(c) Bholi *v* Dwarka, 84 I C 168 1925 L 32
(d) Shiam *v* Radha, 48 A 34
(e) 2nd Ed p 680
(f) Soliaman *v* Jatindra, 32 C W N 1199

Marriage and initiation expenses If some co-sharers have been initiated or married at the expense of the family, and the others are uninitiated or unmarried at the time of partition, then the prospective expenses of the initiation or marriage of the latter should be set apart. (*g*) A member who at the date of the suit for partition was unmarried but, even if, married before decree, is not entitled to the marriage expenses from the estate. (*h*)

Marriage expenses

The marriage is the last of the sacramental or purificatory ceremonies which a father has to perform on his child, hence provision is made for it when partition is made (*i*) As to this point there was a difference of opinion between two Judges of the Madras High Court and the question was referred under Section 98 of the Civil Procedure Code, to a third Judge, who agreeing with one of them held, "that the expenses for the marriage of an unmarried co-sharer should be set apart at partition." (*j*) But a subsequent Division Bench (*k*) of the same High Court without referring the question to a Full Bench, differed from the decision of the above Division Bench. It is curious that the attention of the learned Judges was not drawn to the Full Bench decision (*l*) of the same Court which seems to have finally settled the question as to the obligatory nature of the duty of performing the *Samskára.* The correct view has been followed by a later case of the same High Court. (*m*) But this provision at partition for subsequent marriages applies to the parties to the division and does not extend to persons who are not in the same degree of relationship as those who have been married at the family expense (*n*) It would therefore be

should be set apart at partition,

for persons of same degree

(*g*) Jairam *v* Nathu, 31 B 54, *but see*, Dharopsing *v* Rajaram, 1928 N 193

(*h*) Dharopsing *v* Rajaram, *supra* (*i*) Mit 1, 7, 3-5

(*j*) Srinivasa *v* Thiravengadathaiyangar, 38 M 556, order of reference p 575, decision p 581 25 M L J 644 15 M L J 307 23 I C 264

(*k*) Narayana *v* Ramalinga, 39 M 587, 591-592 36 I C 428, (reversed by P C in 45 M 489), in this connection *see* the observation in Ganesh *v* Shriniwas, 1928 B 411

(*l*) Gopalakrishnam *v* Venkatanarasa, 37 M 273 23 M L J 288 17 I C 308.

(*m*) Karuturi Gopalam *v* Venkataraghavalu, 40 M 632, 29 M L J 710 31 I C 574, reversed by P C on other point

(*n*) Yerakola *v* Yerukola, 45 M 648 42 M L J 507 30 M L T 279 15 L W 595 1922 M 160, 38 M 556 Karuturi *v* Karuturi, 40 M 632, Jairam *v*

erroneous to suppose that the father is under no kind of obligation legal, moral or religious to celebrate the marriage of a son or a daughter *(o)*

On a consideration of all the cases on the relevant question the Madras High Court has held that *first,* the daughter's right to her marriage expenses is based on her right to or interest in the joint property and not on the natural obligation of a father to maintain a child, *secondly,* this right is not affected by partition between father and son, all the shares being proportionately liable, and *thirdly,* for the marriage expenses of the daughter of a son after partition, the share of the father or of a collateral shall not be liable *(p)*

Unmarried daughter in the Central Provinces is not entitled to a share in the joint family property. *(q)*

How distribution to be made

Distribution *per stirpes* not *per capita*.—When a family consists of different branches, each of which is composed of unequal number of male members, then the division is to be made *per stirpes* and not *per capita* , if the common ancestor and his wife or wives are alive, then each of them is to get a share , and there should also be as many shares as there are branches consisting of male issues descended from him, one share being allotted to the members of each branch collectively should there be an unmarried daughter of the common ancestor she must get a quarter share. In this manner the partition is to be carried out This division by number of sons is called *putrabhag* , but there exists a custom, in some parts of India, called *patnibhag* by which the division is according to the number of wives and the sons by each wife constitute a unit *(r)*

Should there be any dissension among the members of any branch and any one of them desire to separate, then the share

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Nathu, 31 B 54 *See* Ramalinga *v* Narayana, 45 M 489 P C 26 C W N 929, 940 37 C L J 15 43 M L J 428 24 Bom L R 1209 20 A L J 839 68 I C 451 1922 P C 201, on appeal from 39 M 587

(o) Gopalakrishnam *v* Venkatanarasa, 37 M 273 23 M L J 288 17 I C 308 following Kameswara *v* Veeracharlu, 34 M 422 20 M L J 855 9 M L T 26 8 I C 105, overruling Govinda *v* Devara, 27 M 206 , *see pp* 161-163, 370 371 *ante* , *see also* Vettor *v* Pooch, 22 M L J 321 13 I C 475

(p) Subbayya *v* Ananta, 53 M 84 1929 M 586 *See ante p* 370

(q) Dharopsing *v* Rajaram, 1928 N 193

(r) Palaniappa *v* Alayan, 44 M 740 26 C W N 417 48 I A 539, *(Athangudi Chitties)* Alagu *v* Palaniyappa, 2 L W 272 (1915) M W N 221 28 I C 278

allotted to that branch is to be distributed amongst the members of that branch in exactly the same mode of partition in which the first distribution is to be made as set forth above. It has, however, been held, by the Bombay High Court, (s) disagreeing with an early decision of the Madras High Court, (t) that if the particular member of that branch got one-twelfth share of the property and the others remained joint and then subsequently the three branches which formed the joint family divided, the partition is to be made *rebus sic stantibus*, as on the date of the suit and the branch from which a member had already separated will be entitled to a full one-third share and not one-third *minus* one-twelfth But the Madras High Court (u) again re-affirmed its earlier decision referred to above, wherein it was held, that when the eventual complete partition took place, the branch to which those members belonged who had under the partial partition taken their shares and passed out of the family, was to be debited in the ultimate reckoning against the member of that branch.

Rule *per capita, per stirpes.*

Succession *per capita* is the rule, and succession *per stirpes* is the exception, in each case the rule is based on special text. (v) The brothers' sons (w) when they inherit as nephews and daughters' sons (x) take *per capita* and not *per stirpes* The same rule applies in case of succession of first cousins.(y)

Share of acquired property, with aid from joint funds

Acquired property and double share.—If any property is acquired with small aid from joint funds, but through the special personal exertion of a member, then he is entitled to two shares. (z)

The same mode or partition should be applied to property which was self-acquired of a member, but has been thrown by him into the common stock, by reason of allowing

(s) Pranjivandas v Ichharam 39 B, 734 17 Bom L R 712 30 I C 918
(t) Manjanatha v Narayan, 5 M 362
(u) Narayaya v Sankar, 53 M 1 F B 1929 M 865
(v) Nagesh v Gururao, 17 B. 303, 305, *See* C VI, S 2, ss 1 p 557, C IX, S 1
(w) Brojo v Gouree, 15 W R 70, Gooroo v Kailash, 6 W R 93, Brojo v Strunath, 9 W R 463, Mit ii, 4, 7
(x) Chandi v Narsing, 39 I C 26 (P), Laloo v Laloo, 10 I.C 448 (A)
(y) Narsappa v Bharmappa, 45 F 296.
(z) Sree v Gooro, 6 W R 219, Sheo v Judoo, 9 W R 61

the other members to enjoy it, that is to say, two shares should be allotted to the acquirer, who cannot be placed in a worse position than one acquiring property with slight aid from the joint funds, which must necessarily be enjoyed by all the members during jointness. Hence, if joint-enjoyment by all the members cannot deprive the acquirer in the latter case, of his right to a double share, then there is no reason why an acquirer without any aid from the joint estate should not get an additional share of the property acquired by him through his sole personal labour or capital. But such property appears to be held as absolutely joint, and liable to be distributed at partition without showing any consideration to the acquirer whose right to a greater share, however, was not claimed nor decided in the cases relating to such property. (a)

without aid from joint funds

Renunciation of share,

Renunciation by a member of his share.—If a member is possessed of sufficient separate property, and therefore does not wish to take any share of the joint property, he may renounce his share. But the Mitâkshara directs that some trifle should be given him at the partition, so that no claim may be advanced by his heir in future. (b) This renunciation has the effect of extinguishing his interest for the benefit of all the other members. But it is argued that according to the Smritis the renunciation operates as alienation of one co-parcener's interest in favour of the others, and that if he can alienate in favour or the other co-parceners as a body, there is no reason why he should not be competent to do so in favour of one of them, and accordingly it has been held that he can do so. (c) The argument, however, proceeds upon an assumption which does not appear to be correct, for renunciation does not operate as *alienation*, but as *extinction*, of the co-parcener's interest, according to the true intent of the Smritis. If it were alienation, it would be gift, but it has been held that a member of a joint family cannot make a gift of his undivided share (d) Accordingly, it has been

enures for benefit of all,

can it be made for particular member?

(a) Ram v Sheo, 10 M I A 490, Lal v Kanhaiya, 34 I A 65 22 A 244.
(b) *See* Text No 7 p 314, Peddayya v. Rama 11 M 406, 407
(c) Peddayya v Ramlingam, 11 M 406
(d) *Supra*, p 422

held that a *release* by a son, of his co-parcenery interest in favour of the father enures for the benefit of the family including the releaser's then existing son. *(e)*

Sub-Sec v—INCOMPLETE AND PARTIAL PARTITION

Partition not necessarily separation of all

Partition not necessarily separation of all members — Partition may stop at the primary stage, that is to say, the members of each branch may, and oftener than not do, remain joint while the branches become separate from each other. *(f)* Similarly, one member or one branch only may separate from the other members or branches, while the latter continue to live jointly as before. Hence partition or separation of one or some members is not incompatible with the jointness of the rest.

P C view

The Privy Council *(g)* has thus explained the law, on the subject —

"Owing to a misconception of the effect of a judgment of the Board which was delivered by Lord Davey in *Balabux* v *Rukhmabai*, *(h)* it was generally, but erroneously, assumed that the Board had decided that when a Hindu governed by the law of the Mitakshara, who had sons living, separated from his brothers it was a presumption of law that he had separated from his sons and that he and his descendants ceased to constitute amongst themselves a joint family unless it was proved that they had agreed to continue to be a joint Hindu family It was pointed, however, by the Board * * * in *Hari Bukhsh* v *Babu Lal*, *(i)* that that was an erroneous conception of the effect of what Lord Davey had said, and that no authority had been brought to the attention of their Lordships for introducing a novel principle into the law of joint Hindu families governed by the law of the Mitakshara"

whether family is joint, re-united or separate after separation of one member depends on intention.

The whole thing depends upon intention. But yet a nice question arises which is not merely metaphysical but also practical by reason of being attended with different legal incidents of importance, namely, whether those who do not separate but continue to live together as before, are to be

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(e) Shivaji v Vasant, 33 B 267 10 Bom L R 778

(f) Batakrishna v Chintamani, 12 C 262, Durga v Balmakund, 29 A 93 3 A L J 683, *see* Jadavbai v Multan, 27 Bom L R 426 87 I C 936 1925 B 350

(g) Jai Narain v Ujagai, 29 C W.N 775, 778 48 M L J 236 27 Bom L R. 713 85 I C 2 1925 P.C 11.

(h) 30 C 725 30 I A 130 7 C W N 642

(i) 5 L 92 28 C W N 953

deemed *joint* or *re-united* or *separate?* On the one hand it may be said that there is a disruption of the unity even when only one member separates, inasmuch as there arises a conversion of title, from the joint-tenancy into a tenancy-in-common, as between those to whom a share is to be allotted for the purpose of ascertaining the share of the co-parcener desirous to separate, while those to whom collectively one share is given may be deemed joint.(*j*) On the other hand it may be said that the mere theoretical allotment of separate shares, to co-sharers who are to continue joint and whose shares are to remain undivided, which is made only for the purpose of calculating and ascertaining the share to be separately assigned to the member separating, cannot have the legal effect of causing a division of right, or severance of title, of the former, hence a separation of one member does not necessarily create a separation between the other members, nor causes the general disruption of the family.(*k*) According to the first view, the undivided members are to be deemed *re-united*, (*l*) according to the second, they are to be considerded *joint*, (*m*) the distinction is an important one, for in re-union there is not survivorship as in jointness. But in such cases the *prima facie* presumption appears to be in favour of *separation*, in the absence of express agreement to continue joint or become re-united, as follows from the exposition of law in the following case

P C in *Balabux* v *Rukhmabai.*

In the case of *Balabux* v *Rukhmabai* (*n*) the Judicial Committee has explained the law, thus —

"It appears to their Lordships that their is no presumption when one co-parcener separates from the others, that the latter remain united In many cases it may be necessary, in order to ascertain the share of the outgoing member, to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all And their Lordships think that an agreement amongst the remaining

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(*j*) Radha *v* Kripa, 5 C 474

(*k*) Upendra *v* Gopee, 9 C 817, Ram Kali *v* Khamman, 51 A 1 1928 A 422

(*l*) Peddayya *v* Ramalingam 11 M 406, 408

(*m*) Sudarsanam *v* Narasimhulu 25 M 149, 157 11 M L J 353

(*n*) 30 C 725 30 I A 130 7 C W N 642 5 Bom L R 469, followed in Jatti *v*. Banwari, 4 L 350 50 I A 192 28 C W N 785

members of a joint family to remain united or to re-unite must be proved like any other fact" (o)

This decision has been explained by the Board in the case of *Jai Narain* v. *Ujagar Lal* (p) The mere fact of continuing to live together and enjoy their property in common as before, affects the mode of enjoyment, but not the tenure of the property or their interest in it, the intention to subject the property to a division of interest is not inconsistent with that mode of enjoyment. (q) The Privy Council (r) has very clearly explained the law in the following manner —

further explained by P C

"In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of separation is denied A Mitakshara family is presumed in law to be joint until it is proved that the members have separated That the co-parcener in a joint family can, by agreement amongst themselves, separate and cease to be members of joint family, and on separation is entitled to partition the joint family property amongst themselves, is now a well established law An authority for that proposition is the judgment of the Privy Council in *Appovier* v *Rama Subba*, (s) which applies to joint families, such as, the joint family descended from the propositus But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated There may be reasons other than contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be It is also now beyond doubt that a member of such a joint family can separate himself from the other members of a joint family, and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that *the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners* (t) and to enjoy as members of a joint family what remained after such a partition of the family property *That the remaining members continued to be joint, may, if disputed, be inferred from the way in which their family business was carried on* (u) after their previous co-parcener had separated from them (v) It is also

(o) 30 C 725, *see* Rangasami *v* Sundarajulu 31 M I J 472 34 I C 52
(p) *See* p 531 *foot note* (g)
(q) Balkishen *v* Ram 30 I A 139 30 C 738
(r) Palani Ammal *v* Muthuvenkatachelu 48 M 254 52 I A 83 48 M L J 83 29 C W N 846 27 Bom L R 735 23 A L J 740 6 P L T 133 87 I C 333 1925 P C 49 affirming, 33 M L J 749, 780, see also Parsotam *v* Jagan, 50 I C 357 17 A L J 347
(s) 11 M I A 75
(t) Italics are not in the original, *see* Bhimabai *v* Gurunathgonda, 1928 B. 367
(u) Italics are not in the original
(v) This view is again approved in Balkrishna *v* Ram, 35, C W N 815, 823 P.C.

quite clear that if a Hindu joint family separates, the family or any members of it may agree to re-unite as a joint Hindu family, but such a re-uniting is for obvious reasons, which would apply in many cases under the law of Mitaksharà, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved The leading authority for that last proposition is *Balabux* v *Rukhmabai* (w)

"The fact that any member of a joint family has separated himself from his co parceners may be proved by his suing for a partition of the joint family property, and if the suit is decreed the date of his severance from the joint family will, if nothing else is proved, be treated as the date when the suit was instituted In *Kedar Nath* v *Ratan Singh* (x) a member of a joint Hindu family had filed a plaint claiming a partition but afterwards had withdrawn it and the Board held that no severance of the joint status resulted Their Lordships see no reason to depart from that view, although such a plaint, even if withdrawn, would, unless explained, afford evidence that an intention to separate had been entertained [see *Girja Bai* v *Sudashiv Dhundiraj* (y) and *Rawal Nain* v *Prabhu Lal* (z)] In a suit for partition which proceeds to a decree which was made, the decree for a partition is the evidence to show whether the separation was only a separation of the plaintiff from his co-parceners or was a separation of all the members of the joint family from each other It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the co-parceners whose addresses are known, are parties to the suit, and that it is the decree alone which can be evidence of what was decreed" (a)

How to be proved

Conclusion * The numerical division would amount to partition, unless intention of the members other than the outgoing member to remain joint in estate, or to become re-united, be proved like any other fact, (b) it has been held that no special agreement is necessary to remain in the state of jointness, (c) but in case of re-union, express agree-

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(w) 30 C 725, 30 I A 131 7 C W N 642
(x) 37 I A 161 14 C W N 985
(y) 43 C 1031 43 I A 151 20 C W. N 1085
(z) 39 A 496 44 I A 159 21 C W N 985 26 C I J 101 33 M L J 42 19 Bom L R 642 15 A L J 581 40 I C 286
(a) In this connection see Rajagopala v Singaravelu, 53 I C 590, 594 10 L W 438 (1919) M W N 800
* *See also* Sec 13, Sub Sec 11 *post*
(b) Balkrishna v Ram, 35 C W N 815, 823, P C, Palani Ammal v Muthuvenkatacharlu, *supra*, Beti v Sikdar, 50 A 180 1928 A 39, Martand v Radhabai, 54 B 616, Jatti v Banwari 4 L 350 50 I A 192 28 C W N 785, *see* also Ram v Lakhpati, 30 C. 231, Sua v Dukalu, 59 I C 499 (N), Nil v Jai, 60 I C. 696, Mahabir v Sant, 55 I C 495 7 O L J 13, Soundararaja v Rukmani, 1929 M 500, Kalawati v Raghuraj, 1929 O 427, Krishnappa v Kashinath, 1929 N 364 Bhimabu, v Gurunathgnnda, 1928 B 367
(c) Palani Ammal v Muthuvenkatacharlu, *supra*, Rangasami v Sundarajulu, 31 M L J 472 35 I C 520, in this connection *see* Rup v Bhabputi 42 A 30

ment and junction of estate must be proved. (*d*) In this connection *see* Sec. 13, Sub-Secs. i and ii.

Partition among remaining co-parceners.— Partition among the rest of the members who remained as joint tenants after one of them went out of the family obtaining his share, is not made on uniform principle based on Hindu law. (*e*)

What is partial partition,

Partial partition —From what has been said it is clear, that there can be a partial partition in the sense of some members remaining joint notwithstanding the separation of the rest, also in the sense of some property being divided by metes and bounds and the rest not being so divided (*f*) But it is unlikely that there should be a partial partition in the sense of there being a severance of interest as regards part only of the property, and not as regards the whole (*g*)

suit for partial partition, not allowed,

It appears to be settled that a suit by a member will not lie for partition of a portion only of joint family property. (*h*) But this will not be a bar to an amendment being allowed to include the property not included, when the mistake or fraud is detected (*i*) No objection on the ground of partial partition will be entertained unless the defendant supply a list of such properties omitted in his plaint by the plaintiff. (*j*) Unless the plaintiff was aware or informed of such omission of joint property, the claim will not be bar under Order 2, Rule 2 of the Civil Procedure Code, but the plaintiff cannot claim for partition of some property and expressly reserve his right to others in future. (*k*)

such suit by purchaser of share,

But there seems to be a conflict of decisions on the question whether a purchaser of the undivided interest of a co-parcener in a *portion* of the joint family property can maintain a suit for *partition* of that *portion* only. It is argued that the

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(*d*) *See* post Ch VII, Sec 2, Sub-sec i
(*e*) *See ante* p 531
(*f*) Ajodhya *v* Mahadeo, 14 C W N 221 3 I C 9
(*g*) *See* Malhari *v* Vinayak, 1929 B 323
(*h*) Jogendra *v* Jugobundhu, 14 C 122, Rajendra *v* Brojendra, 37 C L J 191 77 I C 790 1923 C 501, Venkayya *v* Lakshmayya, 16 M 97, Mukunda *v* Jogesh, 1 Pat L J 393 35 I C 370 20 C W N 1276, Subramania *v* Ramchandra, 85 I C 503 1925 M 333, Hira *v* Kali, 1929 O 162 *See p* 538 *foot note* (*d*) and *p* 539 *foot note* (*f*)
(*i*) Mukunda *v* Jogesh, 1 Pat L J 393
(*j*) Gaya *v* Gur, 1929 O 257
(*k*) Subramanium *v* Lakshminarasamma, 1927 M 213

purchaser cannot claim a higher position than the co-parcener and therefore a suit for a partial partition of a portion of joint property will not lie (*l*)

In specific property,

It is no doubt true that each member's interest extends to the whole, and it is uncertain which property will on partition be allotted to a co-parcener But if compulsory alienation by execution sale in all the provinces, and voluntary alienation by private sale in Madras and Bombay, of a co-parcener's undivided interest in *specified property* forming a *portion* only of the joint estate, be permitted to take place and be valid, so as to create the purchaser's title to that particular property only, then either the purchaser on the one hand, or the rest of the family on the other, may bring a suit for partition of that portion only of the family property, for the purpose of obtaining separate possession of their respective shares. (*m*)

and its difficulty

But the question is not free from difficulty. on the one side it may very reasonably be argued that the purchaser is only entitled to stand on the shoes of the co-parcener for the purpose of working out partition not of that particular property, but of the joint family property, and on equitable grounds the whole of that particular property may at such partition be allotted to another member, and some other property to that co-parcener whose interest was sold, but who had no right to claim a share of every item of the joint property partitioned. (*n*) On the other hand, the purchaser, specially the execution purchaser, may justly argue that the particular property was put up to sale and he paid the price for the debtor's share in the property sold which alone he desired to buy and did buy. The question depends on the validity of the sale of a portion of joint property, and if the sale be valid, then the purchaser acquires title to the particular property sold, and he cannot be required to accept some other property in its stead.

(*l*) Shivmurtippa v Virappa, 24 B 128 1 Bom L R 620, Kristayya v Narasimham, 23 M 608, *see also* Venkatramana v Meeralabai, 13 M 275, Palani v Masakaram, 20 M. 243, Sundara v Krishna, 31 M L J 317

(*m*) Ram v Mulchand, 28 A 39 2 A L J 700, Ram v Ajudhia, 28 A 50.

(*n*) Hasmat v Sunder, 11 C 396

When a stranger co-sharer of a portion of property belonging to a joint family, or when some only of the members are entitled to a portion, then a suit for partition o such portion only, would lie. (*o*)

When suit for partial partition lies

It should be noticed that although the purchaser may not, yet the members other than the vendor may, bring a suit for partition of only the particular property sold, there being none to object to it on the ground of its being brought for partial partition. (*p*) It would appear that such a suit by a purchaser is maintainable, if the other members do not object. (*q*)

The result of cases seems to be that a suit will not lie for partition of a portion only of joint family property, even when the purchaser of the rights of a co-parcener sues for partition, the partition must be general. (*r*) But in equity the purchaser should be allotted the particular parcel purchased, if possible, to his share. (*s*) A suit for partition of only the property sold will not lie, unless the other members agree. (*t*) But such suit may lie when partial partition will not be attended with much inconvenience to the other co-sharers. (*u*)

Result of cases

The Privy Council in *Appovier* v. *Rama Subba* (*v*) has held that the members by agreement may make a partition of a particular property without dividing the entire property. In a recent case the Judicial Committee has held that "it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family." (*w*) In the

Appovier v *Rama*

(*o*) Purushottam *v* Atmaram, 23 B 597, Lachmi *v* Janki, 23 A 216, Subba *v* Annatha, 23 M I J 64, 11 M L T 305 14 I C 524, following, Iburamsa *v* Thirumalai, 34 M. 269 F B 20 M L J 743 : 8 M L T 269 7 I C 559

(*p*) Subramanya *v* Padmanabha, 19 M 267

(*q*) Manjanatha *v* Narayana 5 M 362

(*r*) Manjaya *v* Shanmuga, 38 M 684, 26 M L J. 576 22 I C 555, Palani *v* Masaknan, 20 M 243, Padala *v* Madavarapu, 12 I C 408 (M)

(*s*) Narayan *v* Nathaji, 28 B 201, Dularam *v* Badaldas, 35 I C 478 10 S.L R 34, *see p* 421 *ante*

(*t*) Jogendra *v* Jugobundhu, 14 C 122, Venkayya *v* Lakshmayya, 16 M 98 Shiv *v* Virappa, 24 B. 128 1 Bom L R 620

(*u*) Harikristna *v* Venkata, 34 M 402 : 20 M L J 323 : 5 I C 491

(*v*) 11 M I A 75 8 W R P C 1

(*w*) Ramalinga *v* Narayana, 45 M. 489 26 C W N. 929, 935 68 I C 451 on appeal from 39 M 587

absence of a special agreement to hold the property as joint tenants, the members will be presumed to hold such property as tenants-in-common. (x)

When partial partition allowed

But if some members of a joint family hold any property jointly, in which the other members of the family have no interest, then there may be a suit for partition of that property only between the joint owners thereof; and it is not necessary to include in such a suit the other joint property to which all the members of the family are entitled, (y) nor are the other members necessary parties to it. (z)

Calcutta view,

The Calcutta High Court (a) has explained some of the circumstances under which a suit for partial partition may be allowed. It runs as follows —"Exceptions to the rule that a suit cannot lie for partition of a portion of the family property have been recognised when different portions of the family property are situated in different jurisdictions, and separate suits for separate portions have sometimes been allowed, where different rules of substantive or adjective law prevail in different Courts. (b) Again a suit for partial partition has been allowed when the portion excluded is not in the possession of co-parceners and may consequently be deemed not to be really available for partition. (c) A suit for partial partition has also been allowed when the portion excepted is impartible property (d) In another class of cases, the rule has been relaxed, namely, where the portion excluded is held jointly with strangers who have no interest in the

(x) Martand v Radhabai, 54 B 616

(y) Hira v Kali, 1929 O 162

(z) Lachmi v Janki, 23 A 216

(a) Rajendra v Brojendra, 37 C L J 191, 195 77 I C 790 1923 C 501

(b) Hari v Gangapatray, 7 B 272, Ramacharya v Anantacharya, 18 B 389 Motiram v Kanhya, 3 Lah L J 514, Punchanun v Sibchunder, 14 C 835 Balaram v Ramchandra, 22 B 922, Abdul v Bedrudeen, 28 M 216 Padmamani v Jagadamba, 6 B L R 134, Ram v Mulchand, 28 A. Lachmana v Terimul, 4 Mad Jur 241, Subba v Rama, 3 M H C R [illegible], Jairam v Atmaram, 4 B 482

(c) Balkrishna v Hari Shankar, 8 Bom H C R 64 A C J, Narayan v Pundurang, 12 Bom H C R 148, Sivamurteppa v Virappa, 24 B 128 1 Bom L R 620, Kristayya v Narasimham, 23 M 608 10 M L J 141, Pattaravy v Audimula, 5 M H C.R 419, Gorachand v Basanta, 15 C L J 258 12 I C 684

(d) Mallikarjuna v Durga Prasada, 24 M 147 27 I A 151 : 5 C W N, 74, Parvathi v Thirumalai, 10 M 334

family partition."(e) But their Lordships have held that "these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property."

P C decision

In a suit by one of the brothers against his mother and other brother for a decree for a third share in some cash without praying for partition of all the joint property, the Privy Council without entering upon any question of partial partition granted a declaration as to the plaintiff's one-third share in the money, leaving open all further questions for determination in the final partition of the whole property. (f)

Suit, particular property alienated lies

A suit for partition by a co-parcener to recover his share in a portion of the family property improperly alienated, without claiming a complete division, will lie (g)

Sub Sec vi—RE OPENING PARTITION

When partition can be re-opened

By after-born son—A decree for partition made in a suit by a member of a joint family is *res judicata* as between all co-sharers, who were parties to the suit. (h) But if a male child was in the womb of its mother at the time of partition, who would have been entitled to a share had he been then in separate existence, and the child becomes born alive subsequently to partition, then a share is to be allowed to him by re-opening the partition already made, but the birth of another son before the date of the preliminary decree but conceived after the filing of the suit cannot diminish the other brother's shares receivable at the date of the suit (i) But a son begotten after partition, (j) or after renunciation by

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(e) Purushottam v Atmaram, 23 B 597 Venkata v Chinnaiya, 5 M H C R 166, Chinna v Suriya, 5 M 196, Manjanatha v Narayana, 5 M 362, Venkyya v Lakshmayya, 16 M 98, Subramanya v Padmanabha, 19 M 267, Lachmi v Janki, 23 A 216, Ram v Mulchand, 28 A 39, Ram v Ajudhia, 28 A 50, Bunwari v Daya, 13 C W N 815 1 I C 670, Gadodhar v Balvant, (1883) Bom P J 250 Subbarayu v Venkata, 15 M 234, Iburamsa v Thirumalai, 34 M 269 (F B) 20 M L J 743 7 I C 559, Hari Kristna v Venkata, 34 M 402 20 M L J 323 5 I C 491, Kadegan v Periya, 13 M L J 477, Ajudhya v Mahadeo, 14 C W N 221 3 I C 9, Kailash v Nityananda, 11 C L J 384 3 I C 21

(f) Guran Ditta v Ram, 55 C 944 P C 32 C W N 817 48 C L J 119

(g) Subbaiya v Thulasi, 14 M L T 537 : 22 I C 44

(h) Nalini Kanta v Sarnamoyi, 41 I.A 247 21 C L J 23

(i) Krishnaswami v Pulukaruppa, 48 M 465 48 M L J 354 88 I C 424 : 1925 M 354

(j) Thandayuthapani v Raghunatha, 35 M 239 21 M L J 240 : 10 I C 660

the father of his interest in the family property, cannot have any claim against his separated brothers, but his rights are limited to the then existing property of the father.

Unfair, fraudulent partition re-opened

Unfair and fraudulent partition.—A partition to which a member was not a party, or was inequitable, (*k*) or was brought about unfairly and fraudulently, (*l*) or which was made during the minority of a member and was unfair or prejudicial to his interests, may also be re-opened at the instance, of such member, in so far as he is concerned. (*m*) But that the partition was effected because the father had been incurring debts does not make the partition other than a *bona-fide* one. (*n*)

So also if effected by mistake.

Partition caused by mistake—If it be established that through mistake or error, whether it occurred by accident or design, some portion of the joint property was excluded from partition, then the omitted portion is liable to partition, even if the error was not mutual, there may be re-opening of partition as well as of settled account (*o*)

Sub-Sec vii—LIMITATION *

Limitation.

Effect of partition and limitation—After change in his *status* by partition, a member can no longer be deemed as agent or representative of the family, and cannot maintain a suit to recover a debt due to the family · if he does, the other members can recover their shares by suit against him, provided it be instituted within the period allowed by Article 62, Article 127 being no longer applicable, (*p*) for, the possession of one cannot be deemed possession of all, as after complete separation none can represent others. (*q*)

Adverse possession.

Adverse possession. †—A member of a joint family in exclusive possession of any joint property cannot plead limitation upon the ground of such possession, unless he has

(*k*) Jain *v* Tukaram, 1927 N 350
(*l*) Partap *v* Dalip, 52 A 596 1930 A 537
(*m*) Balkishen *v* Ram, 30 I A 139, 150 30 C 738, Ganesh *v* Jewach, 31 C 262 31 I A 10 8 C W N 146 14 M L J 8 6 Bom. L R 1
(*n*) Kani *v* Chelluri, 40 M L J 473 29 M L T 265 : 62 I C. 980
(*o*) Bhowani *v* Juggernath, 13 C W N 309 9 C L J 133, 3 I C 241
* *See* Sec 9, Sub-sec iv, *p* 485, Sec 8, Sub-sec ix *p* 463
(*p*) As to the application of Art 127 *see ante p* 487-488
(*q*) Vaidyanatha *v* Aiyasamy, 32 M 191 19 M.L J 94.
† *See ante p* 489-490 "Adverse possession"

asserted an exclusive title to the knowledge of the co-parceners and his possession becomes adverse. The burden of proving these lies on him, (r) but if partition is proved the burden will be shifted on the plaintiff to prove that partition took place within twelve years prior to suit or that he had been in possession within that period. (s) If a co-parcener is excluded from his share, and such exclusion is known to him, then he may be barred by limitation, (t) but mere non-participation in the profits does not amount to exclusion. (u) The Calcutta High Court (v) has held in cases governed by the Dáyabhága school, that

> "In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period * * * What is sufficient evidence of exclusion must depend upon the circumstances of each case Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession but such non-participation or non-possession may in the circumstances of a particular case, amount to an adverse possession Regard must be had to all the circumstances and a most important element is the length of time " (w)

Possession in order to be adverse must be actual, visible hostile and continued during the time necessary to create, a bar under the statute. (x)

Sec 12—IMPARTIBLE PROPERTY

There are certain things that are not liable to partition. They are dealt with both in the Mitákshára, (y) and in the Dáyabhága (z) They are —

Things not liable to partition:

(1) Those that are not the subjects of joint right, *i.e.*, the separate property of a member.

1 Separate property

(r) Jagjivan v Bai Amba, 25 B 362 3 Bom L R 47, *see ante* Sec 9, Sub-sec iv, *p* 489
(s) Ajudhia v Mata, 53 I C 928 (O), Mendana v Jagan, 25 I C 689 17 O C 235
(t) Sch II Art 127, Kali v Dhununjoy, 3 C 228, Sinnasami v Subbana, 26 I C 904 (1915) M W N 29
(u) Sellam v Chinnammal, 24 M 441
(v) Gobinda v Upendra, 47 C 274, Lokenath v Dhakeswar, 21 C L J 253 20 C W N. 51 27 I C 465, Hardit v Gurmukh, 28 C I J 437 20 Bom L R 1064 47 I C 626, Chintamani v Hriday, 29 C L J 241
(w) Ayenenussa v Sheikh, 16 C W N 849
(x) Jogendra v Baladeo, 35 C 961, 971 12 C.W N, 127 6 C L J 735
(y) Ch I, Sec iv
(z) Ch. iv.

2 Father's gift of (a) moveables,

(b) immoveables

(2) Father's affectionate gifts * The father's *affectionate* gifts of moveable property to his wife, male issue, daughter, or daughter-in-law are valid, if the subject matter of gift be small in comparison to the whole estate. (*a*) But he is not entitled to make such gift of immoveable property, or of a considerable portion of immoveables. (*b*) But the gift of immoveable property on the occasion of a daughter's marriage, may be valid as necessary marriage expense, (*c*) But a gift made to a daughter's father-in-law two years after her marriage, in consideration of a promised dowry,—is held invalid on the ground of the alienation being not necessary for the marriage.(*d*)

3 certain moveables,

(3) Certain moveables, though joint, used personally by the members severally, such as wearing apparel or ornaments given to a woman.

4 property incapable of division.

(4) Those that cannot conveniently be divided, as for instance, a reservoir of water, the common pathway, the place for worship and pasturage (*e*)

5 property, impartible by custom

(5) Those that are impartible by custom, such as a *raj* or a principality, which may be the joint and undivided property of a family, but is exclusively held by one member only according to customary rules. the other members being entitled to get maintenance only, and under certain circumstances, to take possession of the estate by survivorship This subject will be dealt with in Chapter XV.

Sec. 13 —EVIDENCE AND PRESUMPTIONS

Sub-Sec 1—EVIDENCE

Evidence of partition,

Evidence of partition. * *—The Mitàksharà (*f*) and the Dàyabhàga (*g*) deal with the evidence of partition when there

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* *See ante p* 422 "Affectionate gift"

(*a*) Bachoo *v* Mankorebai, 31 B 373 34 I A 107 11 C W N 769 6 C L J 1 17 M L J 343 9 Bom L R 646 on appeal from 29 B 51 6 Bom L R 268, Hanmantapa *v* Jivubai, 24 B 547 2 Bom I R 478

(*b*) Rayakkal *v* Subbanna, 16 M 84, Kamakshi *v* Chakrapany 30 M 452 17 M L J 405

(*c*) Ramasami *v* Vengidusami, 22 M 113 gift to son-in-law valid, Suudaram *v* Krishnasami, 28 I C 992 (M), in re Subba Naiker 30 I C 781 2 L W 754

(*d*) Ganga *v* Pirthi 2 A 635

(*e*) See Govind *v* Trimbak 30 B 275, Nathubai *v* Bai 36 B 379

* * *See ante pp* 505-517

(*f*) Ch. ii, sect xii.   (*g*) Ch xiv

is a doubt about the fact of its having been made. The sum and substanoes of what is said in these works are as follows :— The evidence of partition may be of three description, (1) a deed of partition भागलेखा or विभाग पत्र (2) testimony of witnesses, and (3) persumption or inference from conduct or circumstances in other words, (1) documentary evidence, (2) oral evidence and (3) circumstantial evidence The second is declared superior to the third, and the first is superior to the second and *a fortiori* to the third.

is of three classes

i. The documentary evidence consists of a deed or instrument of partition But it should be borne in mind that neither a partition-deed, nor division by metes and bounds, is necessary for effecting partition, but when such a deed is not registered it is not avilable as evidence of the transaction. (*h*)

1 documentary,

ii The oral evidence or the testimony of witnesses consists of the deposition of persons aware of the *factum* of partition, being present when the same was made They may be *Sapindas* or near agnate relations, or *Jnatis* or remote agnate relations, or cognates, or strangers: their competency and the value of their testimony are declared to be in the order of the enumeration, the first among these being preferable to the next in order.

2 oral,

iii. The principal circumstance indicative of jointness is the common chest or till into which the income of the joint family is brought, and in which the surpuls, after meeting the necessary expenditure out of it, continues to remain as the common fund. Hence separate expenditure and separate till are the tests of separation.

3. circumstantial

Other circumstances giving rise to a presumption of separation are,—separate transactions, separate gifts and acceptances, separate acquisitions of property, separate fields for cultivation, separate domestic animals, separate houses for residence, separate servants, separate stores of food-grain, separate cooking, separate religious ceremonies, and mutual transfer of property or one advancing loan to another, as well

Principle test is separation of estate,

(*h*) Jogi Reddi *v* Chinnabai, 52 M 83 32 C W N 333. 49 C L.J 98 B, Maung *v* Ko Tu, 1928 R 196

declarations and conduct from which the intention to separate clearly appears.

But the principle thing to be regarded is the separation or jointness in estate; and the criterion or test of the jointness in estate is the common chest for keeping the income of the joint property, from which are met the necessary legitimate expenses of all the co parceners and their respective families, without any account of the equal or unequal proportion of the expenditure for each co-parcener; for, the expenses of all members must be met from the family fund, irrespective of the amounts of shares to be alloted on partition, before which there is community of interest; and the surplus, if any left after defraying the family expenses, remains there, forming the joint fund of all.

depends on particular facts of each case.

The circumstances stated above are the elements to be taken into consideration in determining the question whether there has been a partition; but none of them is conclusive, since a member may be separate in residence,(*i*) worship and mess without being separate in estate, and *vice versa*. Accordingly, the cesser of commensality though a very important element, has been held to be not conclusive. (*j*) Each case is to be decided according to its peculiar circumstances, all of which may not tend to the same conclusion. (*k*)

When all members not separate

Evidence of partial partition.*—The difficulty, however, arises when one member separates, while the others continue joint as before · for, in order to ascertain the share of that member, the share of all must be ascertained, that is to say, there must be a numerical division seeming to amount to partition or virtual separation of all. But if the other members continue not only to live together and enjoy their property in common as before, but keep their common chest and joint funds and joint expenditure in the same way as before, unaffected in the least by the division, then they cannot but be presumed to be joint and united, not being really separated by the numerical division.

(*i*) *See* Kunwar *v* Madho, 49 I C 620 17 A L J 151, Nanak *v* Gaya, 1929 O 289

(*j*) Gonesh *v.* Jewach 31 I A 10 31 C 262 8 C W N 146. 6 Bom L R 1 14 M.L.J 8.

(*k*) See *pp* 506-517

* *See ante pp* 531-539.

Dayabhaga not different.—It may be argued that the same elements are found in a Dáyabhaga joint family, but still its members are deemed tenants-in-common, and not joint-tenants. That is no doubt true, but they are so by the operation of the law of Bengal, and not by the intention of the parties. In both cases there is community of interest, the distinctive feature of jointness in estate, and so the intention of the members with respect to enjoyment is the same, but the law annexes different incidents to the same state of things, and accordingly while they are held to be joint-tenants in the one school, they can never be so under the other.

No difference in two schools.

Sub-Sec ii—PRESUMPTION **

Partition.*—Where a partial partition is admitted or proved to have taken place, the *presumption* would be that there has been a complete and entire partition (*l*) So also when one member of a joint-family separates, there is no presumption that the remaining members remain united. (*m*) These depend on the facts of each case, (*n*) and various circumstances may lead to the conclusion of partition. (*o*)

Partition of all presumed on proof of of partial partition

The joint family system is the normal condition of Hindu society. Hence having regard to this peculiar feature of social organization, certain, *presumptions* arise, which form a part of the Law of Evidence, and are only indicated here.

Presumption is family joint

1. The relations that may naturally be members of a joint family are joint (*p*) any one alleging separation must

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** *See also, ante* Sec 9, Sub-Sec iii, and *p* 509-511

* *See ante* Sec 11

(*l*) Vaidyanatha *v* Aiyasamy, 32 M 191, Rangasami *v* Sundarajulu, 31 M L J 472 35 I C 52, Balkrishna *v* Raju, 27 I C 736 16 M L I 610 (1915) M W N 17, see Raghunath *v* Basdeo, 6 P L I 764 88 I,C 1012 1925 P 823

(*m*) Balabax *v* Rukhmabai, 30 C 725 30 I A 130, Pratap *v* Sarat 33 C L J 201, Balkrishna *v* Ram, 35 C W N 815 P C, *see* Rukman *v* Kirpa, 22 I C 134 338 P L R 1913 209 P W R 1913, Gadian *v* Gadian 26 I.C 43, Rama *v* Harcharan, 20 I C 562 152 P W R 1913, Rajagopala *v.* Veerapasumal, 1927 M 792, *see ante pp* 531-535 also

(*n*) Bal Krishna *v* Ram, 35 C W N 815 P C

(*o*) Gangabai *v* Fakirgowda, 51 C L J 592 P C 1930 P C 93.

(*p*) *See* Kundan *v* Shankar, 35 A 564 F B 21 I C 13 11 A L J 910, Gaya *v* Jaswant 1930 A 550 and Deo *v* Phagu, 1930 A 541 (brothers and uncles), Lachman *v* Ambika, 1927 A 366

prove that fact. (*q*) The Judicial Committee observed in the case of *Neel Kristo Deb Burmono*,—"The normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things."(*r*) The strength of this presumption varies in different cases; presumption of union is stronger in case of brothers than in case of cousins,—it becomes weaker and weaker as the family descends further and further from the common ancestor. (*s*)

Mere fact that the proprietors of several firms are members of a joint family does not necessarily raise a presumption that the firms are joint property (*t*)

its continuance

2. § If it is admitted or proved that a family was once joint, there arises a presumption in favour of the continuance of jointness, (*u*) and separation after that period is to be proved by him who alleges it. (*v*) And if a partition is proved the presumption arises that there was a complete severance, (*w*) but no presumption as to date of disruption can arise (*x*)

Self acquired property of father

3 Where it is established that considerable nucleus of ancestral property had been received by the father at the time of partition from his brothers, and only one general account was kept for the savings of the ancestral property, and of the earnings of himself and his sons, which were all blended

(*q*) Palani Ammal *v* Muthuvenkatachala, 48 M 254 52 I A 83 48 M L J 83 27 Bom L R 735 29 C W N 846, 849 23 A L J 746 87 I C 333 1925 P C 49, Bhagwani *v* Mohan, 29 C W N 1037 23 A L J 589 41 C L J 591 49 M L J 55 88 I C 385 1925 P C 132 (entry of particular name in Collector's revenue papers or in settlement khewats does not disprove this presumption) in this connection see, Gangabai *v* Fakirgowda 1 P C *supra*, Narsing *v* Birju 48 I C 755 (Pat), Bhawan *v*. Shib, 1930 A 341, Sanwal *v* Kure, 9 L 470 1928 L 224

(*r*) 12 M I A 523, 540 12 W R P.C 21 *See* also Taruk *v* Joodhesteer, 19 W R, 178, Gobind 4 Doorga, 22 W R 248, Baijnath *v* Tej, 38 A 590, 610

(*s*) Yellappa *v* Tippanna, 53 B 213 56 I A 33 C W N 23 49 C L J 104

(*t*) Hem *v* Narain, 1929 L 772

§ *See ante pp* 508-509

(*u*) Gajendar *v* Sardar, 18 A, 176, Baramanund *v* Chowdhury, 14 C L J 183 (1884) 12 I C 6, Nageshar *v* Ganesha, 42 A 368, 381 47 I A 57 38 M L J 521 22 Bom L R 596 56 I C 305 18 A L J 532 this referred in Bhagwani *v* Mohan, 41 C L J 591 P C 49 M L J 55 29 C W N 1037 23 A L J 589 88 I C 385 1925 P C 132

(*v*) Deo Narain *v* Agyan, 1927 P C 52 101 I C 249

(*w*) Beti *v* Sikhdar, 50 A 180 1928 A 39, Subbi *v* Alangmmal, 34 M L J 596, see *foot note* (*t*) *above*, Roshan *v* Maharaj, 89 I.C 344

(*x*) Mendana *v* Jagan 25 I C 689 17 O C 235

together so as to form one common stock of the joint family consisting of the father and sons, into which not only the earnings of every member but also the income of purchased property were thrown, and that the father did not discriminate between the different sources of his income,—the *onus* was held to be on the defendants who claimed under the father's Will to prove that the property devised was his self-acquired · and it was further held that the purchase made by the father with the funds so obtained could not be regarded his self-acquired property. (*y*) But in a suit by a son against a purchaser from his father, of a portion of a village, part of which was the father's ancestral and the rest his self-acquired property, it was held that the *onus* was on the son to prove that the disputed portion was not self-acquired but *ancestral, i. e.,* unless the lands came to their father by descent from a lineal male ancestor in the male line, they are not deemed *ancestral* in Hindu law. (*z*)

If enjoyed in common

4. The property in possession of any such relation is joint property belonging to all the members, he must prove that it is his separate property, if he says so. (*a*) A property is to be presumed joint when all other property is joint and the family is also joint. (*b*)

Property in possession of member presumed joint

5 Any property purchased in the name of such a relation is joint acquisition, provided there be a nucleus of joint funds wherewith the purchase might be made, (*c*) but the presumption will be rebutted if the ancestral assets were small in proportion to the value of the property acquired, (*d*) or the nucleus be not more than what is sufficient for the

Acquisition of property in name of one member

(*y*) Lal *v* Kanhaia, 34 I A, 65 11 C W N 417 29 A 244 5 C L J 340 9 Bom L R 597 17 M L J 228, Anandra *v* Vasantrao, 11 C W N 478
(*z*) Atar *v* Thakar, 35 I A, 206 35 C 1039 12 C W N 1049 6 I C 721 see *ante p* 343
(*a*) Hazari Lal *v* Ram, 47 A, 746 23 A L J 621 88 I C 422 1925 A 813; Prankishen *v* Mothoora, 5 W R, P C 11 and 67, Ramphul *v* Deg 8 C, 571, Baksiram *v* Dwarka, 1928 P 438
(*b*) Muneshar *v* Ram 86 I C 852 1925 A 820
(*c*) Trailakya *v*. Chintamony, 30 C W N 588, Ganpat *v* Balmakund, 18 C L J 548. 22 I C 27, Acharji *v* Harai, 52 A 961, Budhu *v* Muhammad, 32 I C 315 196 P L R 1915 86 P R 1915; 165 P W. R 1915, Ram *v* Tunda, 33 A 677 10 I C 543 8 A L J 723, Nathu *v* Mul, 17 I C 232 183 P W R 1912 197 P L R 1912, *see p* 349 *ante*
(*d*) Kanshi *v* Shankar, 1928 L 397 *but see* Krishnaji *v* Paramanand, 49 I.C 240 (N).

maintenance of the family. (*e*) But if there be no nucleus, the presumption does not arise, (*f*) and the same is rebutted, should in a joint family while it is possible that a member of a joint family may make separate acquisition and keep monies and property so acquired as his separate property, yet the question whether he has done so is to be gathered from all the circumstances of the case (*g*) When there is no nucleus, the property acquired by a member of a joint family is presumed to be his separate property and the burden of proving that the property has been thrown into the common stock is upon those who assert it (*h*) If there is no evidence that a son in whose name the property was purchased had any separate fund or that the property was purchased with money belonging to him, presumption is that the property was acquired by the father in the name of his son. (*i*) A purchase at an auction sale, however, will bar a claim of *benami* purchase under Sec. 66 of Civil P Code. (*j*)

Property acquired and presumption

There can be no presumption that a joint family had a nucleus (*k*) or any joint property (*l*) or any property being ancestral (*m*) or that a business carried on by a co-parcener is a family business (*n*) A dwelling house in possession of either party is not a nucleus so as to clothe with the character of ancestral property to the subsequent acquisitions by any of the parties. (*o*) Nor any additions made to it raises the presumption of having any nucleus. (*p*) The presence of

(*e*) Krishnaji *v* Paramanand, 49 I C 240 (N), *see foot note* (*k*) and (*q*) below.
(*f*) Tara Charan *v* Joy, 8 W R, 226, Dhunookdharee *v* Gunpat, 10 W R, 122, Pran *v* Bhagcerutee, 20 W R, 158, Lachmi *v* Ram 22 I C 887
(*g*) Pandit Suraj *v* Pandit Ratan, 40 A 159 44 I A 201 21 C W N 1065, 1070 26 C L J 267, Lal *v* Kanhaia, 34 I A 65 11 C W N 417
(*h*) Ethirajulu *v* Gobindarajulu, 32 I C 12 F B
(*i*) Parbati *v* Baikuntha, 18 C W N 428 19 C L J 129 26 M L J 248 22 I C 51, *see* Natesa *v* Sahasranama 1927 M 773
(*j*) Ram Rup *v* Khaderu, 50 A 512
(*k*) Ram Kishen *v* Tanda 33 A 677 10 I C 543 8 A L J 723; Vithal *v* Siva 8 N L.R. 82 15 I C 933, Daji *v* Laxman, 1927 B 110
(*l*) Ram Kishen *v* Tanda, 33 A 677, Padmanraj *v* Gopi, 56 I C 129 (N), Sankaranarayana *v* Tangaratna, 1930 M 662
(*m*) Brij *v* Sankata, 1930 O 39
(*n*) 33 A 677, 56 I C 129, Sant *v* Kidar, 56 I C 469 (L), Adwat *v* Radhika, 48 I C 694 (Pat)
(*o*) Trimbakdas *v* Matabai 1930 N 225, Bridichand *v* Papatlal, 24 N.L R 68 1926 N 389
(*p*) Thaneshar *v* Ram, 1929 L 468

considerable nucleus in the hands of a person raises a presumption that the properties in his possession are ancestral being acquired out of the nucleus (*q*) But where no nucleus is admitted or proved, the *onus* is upon him to prove that the property is not self-acquired who asserts it to be self-acquired. (*r*) A house acquired by two brothers by their joint earnings does not constitute a joint property in the absence of any evidence that the money earned by them was ever put into common stock or treated as money belonging to them as members of a joint family (*s*) There is no presumption that one brother must necessarily buy property for the benefit of the other brother. (*t*) So the burden of proof in an action for partition of joint property that any particular item of property is joint, primarily rests upon the plaintiff (*u*)

Purchase of family property by co-owner

So where the family property was sold for arrears of revenue and purchased by one of the members, then, unless it can be shown that it was purchased out of the joint family funds or was thrown back into the joint family property, it becomes the private property of the purchaser. (*v*) A gift to a member of a joint family by a stranger does not create any presumption that it is in reality a gift to the family. (*w*)

Gift by stranger.

Purchase made by *karta*

When a purchase of property has been made in his own name by the *Karta* or the managing member of a joint family the presumption is that the property is joint property (*x*) and is acquired out of the family funds. (*y*) The mere fact that the name of the *Karta* or managing member is entered in the survey papers is not sufficient to show that the minor members have held him out as an ostensible owner as

(*q*) Bali *v* Sadari, 1930 L 613, Sankaranarayana *v* Langaratna, 1930 M 662

(*r*) Ramasamy *v* Marimuthu, 1928 M 764, Durga *v* Chauharja, 1930 A 536, *see foot note* (*f*) above

(*s*) Moti *v* Bhagwan, 35 I C 655, in this connection *see* Mohansing *v* Punji 1927 N 327

(*t*) Venkatarama *v* Maruthappa, 21 L W 226 86 I C 886 1925 M 448

(*u*) Annamalai *v* Subramanian, 33 C W N. 435, 438 P C 49 C L J 93

(*v*) Chokhu *v* Tatya, 59 I C 569 22 Bom L R 1297

(*w*) Battoolal *v* Himmat, 49 I C 912 (N)

(*x*) Bandhu *v* Chintan, 26 C W N 405 20 A L J 495 : 66 I C 402

(*y*) Kamleshri *v* Raghubans, 48 I C 949 (1919) Pat. 62

contemplated in Section 41 of the Tainsfer of Property Act (z)

Conflicting decisions

6. There are some decisions which seem to be in conflict with the above decisions laying down the presumptions, in which it has been held that if the parties are not members of a joint family when the suit is instituted, then the presumptions do not arise. (a) But these rulings appear to apply to the peculiar facts in those cases, and are distinguishable; and are constructed as not laying down any general principle.

Property acquired in name of female member

There are conflicting decisions (b) as to whether a property purchased in the name of a female member should be presumed to be joint family property. Considering that every Hindu woman has separate property and that she is not a co-ordinate co-owner of the joint family property, the foundation of this persumption is wanting in her case (c) In the case of a male, the presumption is that he is not the sole owner; (d) whereas in the case of a helpless woman, it is that she has no right to the property, she is merely a *benamdar* for the male members When, however, a widow, as heiress of her husband is a co-sharer of her husband's agnate relations, as she often is in a Bengal joint family, then, no doubt, the presumption may properly be applied to a purchase in her name, but not otherwise.

Acquisition by widow in possession of husband's estate

* There is no presumption that property acquired by a widow who has inherited her husband's estate, forms part of that estate, (e) nor is there any presumption that the money came out of her husband's estate. (f) There is no presumption that property which was in possession of such a widow,

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(z) Kanhu v Palu, 5 Pat L J 521

(a) Bannoo v Kashee, 3 C 315, Obhoy v Gobind, 9 C 237, Ram v Ram, 18 A 90, Sheo v Lalta, 58 I C 608. 23 O C 184 7 O L J 565

(b) Chander v Kristo, 15 W R 357, Nabin v Dokhobala, 10 C 686, Narayan v Krishna, 8 M 214

(c) Shiva v Phulgharia, 52 I C 402 (Pat), Shanmuga v Kaveri, 1928 M 708; Mahna v Ihaman, 11 L 393

(d) *See* Narhar v Narain, 56 I C 383 (N), in this connection *see* 50 M L J 145

* For further discussion *see* Ch XII, S 6 *Accumulations and Acquisitions*

(e) Dakhina v Jagadis, 2 C W N. 197

(f) Baikunth v Jai, 51 A 341 1929 A 449

had belonged to her husband ; (*g*) nor a purchase by her will be presumed to be on behalf of her husband in the absence of any evidence as to the source from which the purchase-money came (*h*)

Father's creditors.

7. When the father's creditor seeks to recover his dues from ancestral property by suit against sons, the *onus* is on him to prove that he had made enquiry before lending the money, that it was not required for immoral or illegal purposes. (*i*)

Manager's creditors

There is no presumption that a debt created by the managing member of a joint family is for the benefit of the family. (*j*)

(*g*) Diwan *v* Indarpal, 26 I A 225 26 C 871 4 C W N 1 2 Bom. L R 1, Sombhai *v* Jogiwan, 1928 B 380

(*h*) Durga *v* Prankrishna, 39 I C 530

(*i*) Maharaj *v* Balwant, 28 A 508, *see pp* 481-485 *supra*

(*j*) In this connection *see pp* 481-485 and 470 *foot note* (*t*)

CHAPTER VI.

MITAKSHARA SUCCESSION.

Sec 1—ORIGINAL TEXTS

१। पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा।
तत्‌सुता गोत्रजा बन्धुः शिष्य. सब्रह्मचारिणः॥
एषाम् अभावे पूर्व्वस्य धनभाग् उत्तरोत्तर.।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वय विधिः॥

याज्ञवल्क्यः, २, १३६-१३७।

Order of succession according to Yajnavalkya,

1 The lawfully wedded[1] wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles (or agnates), cognates, a pupil, and a fellow student, on failure of the first among these, the next in order is heir to the estate of one who departed for heaven leaving no male issue: this rule extends to all classes —Yajnavalkya ii, 136-137

अपुत्रस्य धन पत्न्यभिगामी, तदभावे दुहितृगामि, तदभावे पितृगामि, तदभावे मातृगामि, तदभावे भ्रातृगामि, तदभावे भ्रातृपुत्रगामि, तदभावे बन्धुगामि तदभावे सकुल्यगामि तदभावे शिष्यगामि तदभावे सहाध्यायिगामि, तदभावे ब्राह्मणवर्ज्जं राजगामि॥

विष्णुः।

Vishnu,

The wealth of a sonless person goes to the wife, in her default, goes to the daughter; in her default, goes to the father, in his default, goes to the mother, in her default, goes to the brother, in his absence, goes to the brother's son, in his default, goes to the bandhus (i e, Sapindas), in their default, goes to the Sakulyas; in their absence, goes to a pupil, in his default, goes to a fellow student, in his default, goes to the King, excepting the property of a Brahmana —Vishnu

२। अनपत्यस्य पुत्रस्य माता दायम् अवाप्नुयात्।
मातर्य्यपि च वृत्तायां पितुर्माता हरेद् धनम॥

मनुः, ९।२१७॥

Manu,

2 Of a son dying childless, the mother shall take the estate, and the mother also being dead, the father's mother shall take the heritage —Manu ix, 217

३। न भ्रातरो न पितरः पुत्रा रिक्थहरा. पितुः॥ १८५॥
अनन्तर सपिण्डाद् यः तस्य तस्य धनं भवेत्।
अत ऊर्द्ध सकुल्य स्याद् आचार्य्य' शिष्यः एव वा॥

मनुः, ९, १८७।

3 Not brothers, nor fathers, but sons (male issue) take the father's property To the nearest *Sapinda* the inheritance next belongs, after them, the *Sakulyas*, the preceptor of the Vedas, or a pupil —Manu ix, 187 See *Supra* P 80

४। आत्मपितृष्वसुः पुत्रा आत्ममातुः स्वसुः सुताः।
आत्ममातुलपुत्राश्च विज्ञेया ह्यात्मबान्धवाः॥
पितुः पितृष्वसुः पुत्राः पितुर्मातृष्वसुः सुताः।
पितुर्मातुलपुत्राश्च विज्ञेयाः पितृबान्धवाः॥
मातुः पितृष्वसुः पुत्रा मातुर्मातृष्वसुः सुताः।
मातुर्मातुलपुत्राश्च विज्ञेया मातृबान्धवाः॥

मिताक्षराधृतवचन॥

4. The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, are known as his own *Bandhus*; the sons of his father's father's sister, the sons of his father's mother's sister, and the sons of his father's maternal uncle, are known as his father's *Banahus*, the sons of his mother's father's sister, the sons of his mother's mother's sister and the sons of his mother's maternal uncle are known, as his *Bandhus*—Texts cited in the Mitàksharà without name of their author

Mitakshara.

Sec 2—MITAKSHARA SUCCESSION

Sub Sec 1—PRINCIPLES OF SUCCESSION

Law of succession.

The law of succession—laid down in the above two Slokas of Yàjnavalkya, applies according to the Mitàksharà to the estate left by a male who was *separated* from his co-heirs and *not re-united* with any of them. (*k*) Although it might be contended with good reason, that according to the Mitàksharà school, the three different modes of devolution therein propounded, of a deceased man's property, according as he was joint, or separated, or re-united apply to the *whole* of the estate left by him; yet as regards devolution by survivorship on the ground of the deceased having been joint and unidvided with his co-parceners, it is now settled by judicial decisions that survivorship applies only to such property as the deceased got as *unobstructed* heritage, *i.e.*, to property in which co-parcenery was acquired from birth, or which is inherited from the father or other paternal male ancestor, or from the maternal grandfather, and to accretions, if any, to such property, (*l*) but it does not apply to his separate property, nor even to other descriptions of joint property, such as jointly inherited as *obstructed* heritage from female ancestors, or from maternal uncles or

Survivorship applies to unobstructed heritage,

and generally not to others

(*k*) See Mitàksharà, 2, 1, 30

(*l*) See supra p 320

from separate paternal collateral relations, or jointly acquired by common labour, or with separate funds of each; such joint property, the co-sharers are deemed to hold, as tenants-in-common and not as joint-tenants But it should be observed that the other two courses of succession apply to the *whole* estate left by the deceased.

Survivorship and succession

Survivorship and succession—It should be noticed that in a case of succession, a person acquires ownership in another man's property to which he had no right before the latter's death, whereas, survivorship applies to property, to the whole of which the survivor had a right from before, and the death of a joint tenant simply removes a co-sharer having a similar right to the whole, and thereby practically augments the pre-existing right of the survivor in some cases, but does not create any new right in him.

Death natural or civil extinguishes ownership

Ceath natural and civil—Acccrding to Hindu law a person's ownership of property becomes extinguished by death *natural* or *civil*, and succession to his estate opens to his heirs. Civil death consists of (1) *degradation* on account of heinous sin for which the sinner becomes an *outcaste*, (2) adoption of a religious order, and (3) extinction of temporal affection. (*m*)

Succession of persons married under Special Marriage Act.

Succession under Special Marriage Act.—The Special Marriage Act III of 1872 as amended by Act XXX of 1923 provides that marriages may be celebrated between persons each of whom professes any one or the other of the following religious persuasions, namely, Hindu, Buddhist, Sikh or Jain religion. But succession to the property of such persons and their issues shall not be governed by Hindu law but shall be regulated by the provisions of the Indian Succession Act.

Order of succession,

The order of succession—is founded on the above two Slokas of Yàjnavalkya, (*n*) and is moulded by the joint family system, the normal condition of the Hindu society. All male relations are heirs in their order and the primary classification for that purpose is into *gotrajas* or gentiles or agnates, or those connected through males only, or members of the same family, and into *bandhus* or cog-

Gotrajas

(*m*) D B 1, 31 (*n*) See text No 1

nates, or those connected through a female, or those belonging to a different family. The former, however distant, are preferred to the latter however near they may be. There is a single exception introduced by the fiction of interpretation, namely, the daughter's son, who is said to be implied by the particle "also" (च) used after the term "daughter" in the above text (No. 1) of Yájnavalkya, which is taken to include something not expressed.

preferred to *Bandhus*,

The *gotrajas* are divided into two groups, namely, *sapindas* and *samánodakas*, of whom the former succeed in preference to the latter.

Gotrajas are *sapindas* and *samanodakas*

The order of succession amongst the *sapindas* is worked out on the analogy of the order so far as it is given in the above text, namely, that among the parents, the brothers and their sons.

Proximity of relationship is, upon the authority of the above text of Manu,(*o*) propounded as the principle on which the order is to be worked out, but it has not been completely worked out, so the Courts will have to do it, following the analogy of the order such as is given in the Mitákshará. The Privy Council in the case of *Buddha Singh* v. *Laltu Singh* (*p*) has held "that under the Mitákshará, whilst the right of inheritance arises from *Sapinda* relationship or community of blood, in judging of the nearness of blood-relationship or propinquity among the *gotraja*, the test to be applied to discover the preferential heir is the capacity to offer oblations." This view has again been approved by the same Board (*q*) and it is stated " It is * * * a mistake to suppose that the doctrine of spiritual benefit does not enter into the scheme of inheritance propounded in the Mitákshará" * * * "And apart from this it seems to be well established that cakes offered to the paternal ancestors are of superior efficacy to

Proximity of relationship is principle of succession

also spiritual benefit,

(*o*) Text No 3

(*p*) 37 A 604, 623. 42 I A 208 22 C L J 481 : 20 C W N 1 29 M L J 431 17 Bom L R 1022 30 I C 529 13 A L J 1007, on appeal from 34 A 663

(*q*) Vidachela *v* Ranganathan, 44 M 753 48 I A 349 25 C W N 159 41 M L J 676 24 Bom. L R 649 64 I C 402 1922 P C 33

those offered to maternal ancestors".(*r*) But it is held that in Mithilà the doctrine of spiritual benefit has no application (*s*)

not in Mithila

Women,

Women, as a general rule, are excluded from inheritance save and except such as have been expressly named as heirs.

in Bombay,

in Madras.

But this rule of exclusion has been departed from by the Bombay High Court by recognizing agnate female *sapindas* as heirs, and by the Madras High Court by recognizing the right of female relations to succeed as *bandhus*. In Bombay the widows of *gotraja sapindas* succeeding as heirs take in their interest as *gotraja sapindas* and so inherit *per capita* and not *per stirpes*. (*t*)

Applies to heirs of equal degree

Whole and half blood—The preference based upon connection by whole blood, applies to all collateral relations of equal degree, (*u*) propinquity being the principle of the order of succession, a relation of the full blood by reason of his proximity excludes a relation of the same degree, who is of the half-blood.

All Sanskrit lawyers appear to entertain this to be the traditional true construction of the Mitakshara according to which propinquity is the only principle of the order of succession, it is on this principle alone that the whole brother and his son are preferred respectively to the half-brother and his son, and the reason applies *mutatis mutandis* to the other collateral relations (*v*) The Mayukha does not follow the Mitàkshara, and places the half-brothers together with the grandfather in the order of succession after the grandmother and the sister, and the half-brother's son after some other relations (*w*) and following in *obiter dictum* in this case it has been held by the Bombay High Court that the preference based on whole blood does not apply to any other relations, and that therefore a paternal uncle of the half blood

(*r*) Jotindra *v* Nagendra, 58 I A 372 35 C W N 1153, 1158, 1159, on appeal from 55 C. 1153.

(*s*) Rajrani *v* Gomti, 7 P 820 1928 P 466

(*t*) Kallava *v* Vithabai, 1930 B 396

(*u*) Jatindra *v* Nagendra 58 I A 372 35 C W N 1153, appeal from 53 C 1153 Ganga Shahai *v* Kesri 37 A 545 42 I A 177 22 C L J 508 29 M L J 329 19 C W N 1175 17 Bom L R 998 13 A L J 999 30 I C 265 on appeal from 32 A 541 F B, Anant Singh *v* Durga 32 A 363 37 I A 191: 12 C L J 36 14 C W N 770 6 I C 787 12 Bom L R 504 7 A L J 704. 20 M L J 604, Nachiappa *v* Rangaswami 28 M L J 1, 25 I C 757, on appeal to P C 42 M 523 46 I A 72 29 C L J 539 23 C W N 777 17 A L J 535 21 Bom L R 640 50 I C 498, Narain *v* Hamaji, 21 N.L R. 163,

(*v*) Suba *v* Sarafraz 19 A 215 (F B) 17 A W N 53

(*w*) *See* Samat *v* Amra, 6 B 394

inherits jointly with one of the whole blood (x) This view is inconsistent with the Mitakshara, nor does it seem to be supported by the Mayukha which has introduced an innovation by giving undue preference to the whole blood by lowering the position of the half-brother and his son in the order of succession, contrary to what is given in the Mitakshara and contrary to the modern view in favour of abolition of the distinction between the relations of whole and half blood, this view has been accepted in the Indian Succession Act (y)

Makkathayan and Marumakkathayan law—The *Makkathayan* law means merely a system of inheritance by sons as distinguished from Marumakkathayan law a system of inheritance by daughters prevalent in some parts of the Madras Presidency. (z)

Inheritance by sons, by daughters

Succession *per stirpes* and *per capita*.—The male issue again takes *per stirpes*, and not *per capita*, suppose a man dies leaving two grandsons by one predeceased son, five grandsons by another pre deceased son, and one great-grandson being the son of a pre-deceased grandson by a third pre-deceased son, then his estate is to be divided into three equal shares, one of which is to be allotted to the two grandsons by one son, another to the five grand-sons by another son, and the remaining one to the single great-grandson descended from the third son

Male issues,

It should be borne in mind that the division *per stirpes* applies only to the male issue in the male line, all other heirs take *per capita*, for instance, if the succession goes to the daughter's sons, or the brother's sons, then if one daughter or brother leaves one son, another three sons, and a third five sons, the estate is to be divided into nine shares, one of which is to be allotted to each of the daughter's or brother's sons.

in male line take *per stirpes* ; others *per capita*

Doctrine of representation—*See* page 558 below "1-3 *Separated sons* &c".

(x) Vithalrao v Ramrao, 24 B 317 2 Bom L R 139, Shankar v Kasinath, 51 B 194 1927 B 97, Laldas v Gurudas, 24 N L R 172 1929 N 2

(y) Act No X of 1865, Sec 23, now Sec 27, of Act XXXIX of 1925

(z) *See* Kundan v Andi, 1929 M 509

Heirs among gotrajas

Determination of heir among gotraja sapindas.—According to the Mitākshara and the Viramitrodāya (*a*) excepting in the case of the owner's son, grandson and great-grandson, the son and grandson of the male ancestor is to be exhausted before the next line in order comes in. But except in Bombay, the Privy Council in a case governed by the Benares School, and the Allahabad and the Madras High Courts, have held that the great-grandson like that of the owner is also to be exhausted before next in order may come in. (*b*)

Only three degrees are to be reckoned and not seven degrees in branch, and after the third degree in one branch, the three degrees in the next collateral branch is to be considered and so on (*c*)

New mode of succession invalid

New mode of succession—contrary to law cannot be prescribed by any person (*d*) Any attempt to alter the law of succession for all times, even by agreement, is unenforceable and invalid (*e*)

From the Mitakshara the following order of succession noted by figures against the heirs is deduced The modification of the order of succession by case-law or by legislation is also indicated at proper places

Sub-Sec ii—ORDER AMONG SAPINDAS

Son, grandson, great-grandson,

1-3 Separated son, (*f*) grandson and great-grandson.—If the male issues were joint and undivided with the deceased, they would take even his self-acquired property by survivorship and not by succession. (*g*)

possess right of representation,

Right of representation—The right of representation obtains amongst the divided male issues, hence, a grandson by a pre-deceased son, and a great-grandson whose father and

(*a*) See Post pp 564-566

(*b*) For full discussion of the subject see pp 564-566

(*c*) Soobramiah v Natarajа, 53 M 61 1930 M 534

(*d*) Tagore v Tagore, 18 W R 359, Harbaksh v Dal, 47 A 186 88 I C. 255 1925 A 155

(*e*) Pan Kuer v Ram, 1929 P 353 (*f*) Ramappa v Sithammal, 2 M 182 (F B)

(*g*) See obiter in Nani v Ramchandra, 32 M 377, 381 2 I C 519, but see the obiter in Vairavan v Srinivasachariar, 44 M 499 F B 40 M.L J 481, 485, 489 62 I C 944

grandfather are both pre-deceased, succeed together with a son.(*h*)

It should be remarked that the right of representation does not obtain amongst any other heirs, so that the nearer will take in preference to one more remote, for instance, a brother will exclude the son of a pre deceased brother (*i*) This doctrine does not apply in the case of widows (*j*)

These heirs take *per stirpes*. (*k*)

take *per stirpes*

Wife will succeed

4 The lawfully wedded and loyal wife—In default of the male issue, the *Patni* or the lawfully wedded wife succeeds, provided she was loyal to the husband.

A lawfully wedded wife is one married in any one of the approved forms of marriage (*l*) A wife espoused in a disapproved form is not recognised as heir. The Sanskrit term साध्वीपत्नी is generally rendered into "Chaste wife", and it is thought that the absence of physical unchastity entitles the wife to succeed. It has been held that unchastity during coverture and condoned by the husband is not a disqualification so as to debar the wife from inheriting the husband's property, (*m*) but a contrary view has also been expressed (*n*) But a woman's character may be above all suspicion, and she may be purity personified, but if she does not love her husband, refuses to live with him, and habitually acts contrary to his wishes, then she cannot inherit from him, for she is not *sàdhvi.* The term *sàdhvi* rendered by Colebrooke into "Chaste" is thus defined by Manu, –

provided she is chaste.

पति या नाभिचरति मनोवाग् देह सयता ।
सा भर्तलोकम् आप्नोति सद्भि साध्वीति चोच्यते ॥
मनु, ५, १६५ ।

(*h*) Marudayi *v* Doraisami, 20 M 348 17 M L J 275

(*i*) But *see foot note* (*v*) and (*w*) *p* 564 *post*

(*j*) Nabat *v* Kartor, 1930 L 207

(*k*) *See* above "Succession *per stirpes* and *per capita*" *p* 557

(*l*) *See supra* p 122-126

(*m*) Gangadhar *v* Yellu, 36 B 138 12 I C 714 13 Bom L R 1038, Radhe *v*. Bhawani, 40 A 178, Matunginee *v* Joykallee, 14 W R A ,O J 23, Moniram *v* Keri, 5 C 776 7 I A 115 affirming 19 W R 367

(*n*) Rani *v* Gopali, 34 C W N 648

which is rendered by Sir William Jones thus,—

"While she, who slights not her lord, but keeps her mind, speech, and body, devoted to him attains his heavenly mansion, and is called *sàdhvi* or virtuous by good men" —Manu, v., 165

The condition of loyalty or chastity applies to the wife only, and not to the other female heirs. (*o*) But where a widow gives up her husband's estate on certain conditions, her subsequent unchastity does not debar her from enforcing those conditions in the absence of express stipulation to that effect (*p*)

She takes widow's estate

A widow who is not entitled to inherit, is entitled to maintenance provided she was and continues chaste. (*p1*)

The widow inheriting the husband's estate, does not become absolutely entitled to it, but takes only what is called the *widow's estate* in the same. (*q*) On her death it goes to her husband's next heir, not to her heirs.

This is according to judicial decision, but not according to the Mitàksharà which maintains that property inherited by a woman becomes her *stridhan* This is another instance in which the law has been strained against women

But according to the custom of the Jain community of Mangole and Uplate, (*r*) and the Swetambari Dasashrimali sect of Jains of Balapur in Akola District within the Central Provinces, (*s*) a widow becomes entitled absolutely to the properties left by her husband.

Two widows take as joint-tenants

Two or more widows take in equal shares; on the death of one, the surviving widow takes her share. They are held to take as joint-tenants and their joint-tenancy is peculiar, as it is deemed unseparable, accordingly, there cannot be a partition or division of their title, though for the convenience of enjoyment there may be an arrangement for separate possession of distinct portions of the estate. This subject is discussed in detail in Ch XII, Sec 4, Sub-Sec. iv, *infra.*

(*o*) In this connection see foot notes (*m*) and (*n*) above, specially Monira Kotilas, case

(*p*) Verhomal *v* Radhanbai, 1930 S 225 (*p1*) *See* Ch XI, S 3, ss ii

(*q*) Vatsalabai *v* Vasudev, 1929 B 348

(*r*) Madanji *v* Tribhowan, 12 I C 892 13 Bom L.R 1121

(*s*) Trimbakdas *v* Mathabai, 1930 N. 225

The widow of a Hindu inherits his estate in the character of being his surviving half, or continuing the widowed wife of her deceased husband: in other words, the Hindu widow's estate lasts *darante viduitate* her re-marriage, whether legalised by the Hindu Widow's Re-marriage Act (*t*) or by custom will divest her of the deceased husband's estate whether she marries according to Hindu rites or not, though Allahabad High Court holds a contrary view. (*u*) But when she becomes converted into Muhammadanism and then marries a Muhammadan, she thereby does not lose her right to succeed to her husband's estate in view of the Act XXI of 1850, nor does section 2 of the Act XV of 1856 affect the situation inasmuch as that section applies to Hindu widows only. (*v*) Mere unchastity in the absence of re-marriage will not divest (*w*) For elaborate discussion *see* Ch. XII, Sec. 4, Sub-Sec iii *post.*

Re-marriage diverts her rights

but not after conversion

There are, however, different grades of unchastity; and perhaps on this consideration, it has been held, that a widow living as a mistress to her husband's brother does not lose her right to her husband's property. (*x*) It is of the gravest character when followed by conception and birth of child. In that case she must be divested of the husband's estate: the passages of Hindu law on this subject are not translated into English and were not before the Court in the unchastity case, some of them will be cited in Chapter X, Sec. 2 Sub-sec. i.

Different grades of unchastity

The widow is also divested by the adoption of a son unto her husband, legally made by herself or by her co-widow. (*y*)

Widow divested by adoption.

5. Daughters—In default of the widow, the daughters are heirs; of them, one who is unprovided, takes in preference to one who is provided (*z*) It has been held by the

Daughters

(*t*) Act No XV of 1856, see p 70
(*u*) *See*, Ch. XII, Sec 4, Sub-sec iii
(*v*) Abdul *v* Nirma, 35 A 466 11 A L J 678 20 I C. 335
(*w*) Keri *v* Moniram, 19 W.R 367 affd 5 C. 776 7 I A 115
(*x*) Nageswar *v* Puran, 11 I C. 279 (O)
(*y*) See *ante pp* 275-277
(*z*) Dulari *v* Mulchand, 32 A, 314.

Allahabad High Court that in such cases, "it has to be looked at from the point of view of comparative poverty of the plaintiff and defendant, and it is not essential that the poor sister should be bound to point to some definite acquisition of property by the rich sister. It is sufficient to say that her surroundings are such that she would be regarded as a rich woman" (*a*) In an earlier decision of the same Court it has been held that the expression, 'unprovided for' in contradiction to the term 'enriched' must be construed in the sense of 'indigent' as opposed to 'possessed of means.' (*b*) The latest case referred to above lays down a very general proposition and the application of the principle may prove great hardship in many cases.

In Mithila an unmarried daughter is preferred to a married one but there is no distinction between daughters who have or likely to have issue and those who have no issue or are not likely to have any issue. (*c*)

But by custom a daughter may be excluded from inheritance. (*d*)

take *widow's estate*

A daughter has been held to take only a widow's estate, (*e*) on her death it goes to her father's heir, a surviving daughter will take what is left by a deceased daughter. (*f*)

In the Presidency of Bombay, however, a daughter taking property from her father, inherits it as *Stridhana* or absolute estate and not widow's estate, (*g*) though the Mayukha does does not say so (*h*)

(*a*) Manki *v* Kundan, 47 A 403 23 A L J 183 87 I C 121 1925 A 375

(*b*) Danus *v* Dirbo, 4 A 243

(*c*) Rajrani *v* Gomti, 7 P 820 1928 P 466

(*d*) Balgobind *v* Badri, 50 I A 196 45 A 413 74 I C 449, Raj Bachan *v* Bhanwar, 1929 O 296, in this connection *see*, Ramai *v* Narain, 1930 O 247.

(*e*) Obala Koudama *v* Kandasamy, 28 C W N 1050 P C., Mahadeo *v.* Sheo, 35 A. 481 11 A L J 795 21 I C 454, Dulari *v* Mulchand, 32 A. 314, *see* Gudimetia *v* Bollozu, 23 M L J 223 16 I C 139

(*f*) Chotay Lall *v* Chunnoo, 22 W R 496 4 C 744 6 I A 15

(*g*) Manibhai *v* Shankarlal, 54 B 323 1930 B 295, Tukaram *v* Bahn, 27 Bom. L R. 670 1925 B 424, Vithappa *v* Savitri, 34 B 510 12 Bom. L R 487 7 I C 445

(*h*) Jawahir v Jiran, 46 A 192 1924 A 350, Narain *v* Motisa, 1927 N. 121, *see* Pranjivan *v* Deo, 1 B H C R 130

Unchastity of a daughter is no ground for exclusion from inheritance. (i) An unmarried incontinent daughter can succeed only in default of maiden or married daughters. (j)

her unchastity no bar

An illegitimate daughter cannot succeed to her father's property as against a legitimate daughter. (k)

6 Daughter's sons—In default of daughters, their sons take the inheritance of their maternal grandfather, they take *per capita* in equal shares. (l)

Daughter's son

Daughter's daughter.—Daughter's daughter is entitled to the share which had devolved upon her mother by custom in the Punjab in the absence of daughter's son (m)

7. Mother.—After the daughter's son, comes the mother, or the adoptive mother, who takes in preference to the father.(n) The Viramitrodaya says that a chaste and virtuous mother is preferred to the father, otherwise, the father takes before the mother. So it appears that unchastity does not exclude the mother from inheritance, nor re-marriage (o)

Mother,

her unchastity or re-marriage no bar,

The mother also has been held to take a widow's estate (p)

takes *widow's estate*

Step-mother—is not entitled to succeed her step-son either as *Gotraja Sapinda* or relation She is not in the line of succession at all; (q) but she is an heir in Bombay (r)

Step-mother

8 Father—After the mother comes the father; but they take in the reverse order according to the Bengal School.

Father

9. Brothers—Brothers of the whole blood take to the exclusion of the half brothers. In default of the former, the latter take. But the natural brother of an adopted son cannot inherit the latter's property. (s)

Brothers

(i) Advyapa v Rudrava, 4 B 104
(j) Tara v Krishna, 31 B. 495 ; 9 Bom L R 774
(k) Ram v Bham, 38 A 117 14 A L J 11 32 I C 127.
(l) Chandi v Narsing, 39 I C 26 (P), Laloo v Laloo, 10 I C 448 (A)
(m) Vaishno v Rameshri, 10 L 86 P C 49 C L J. 38.
(n) Anandi v Hari, 33 B 404 11 Bom L R 641
(o) Kojiyodu v Lakshmi, 5 M 149, Basappa v Rayava, 29 B 91 (F B) 6 Bom L R 779, Har Kishore v Thakur, 26 C W N 925, Baldeo v Mathura, 33 A 702 8 A L J 811 11 I C 43
(p) Bhikabai v Manilal, 54 B 780, *see* Parshottam v Keshavlal, 56 B 164
(q) Tahaldai v Gaya, 37 C 214 11 C L J 588 14 C W N 443 5 I C 135, Sheethai v Nachiar, 37 M 286 26 M L J 10 22 I C 18 14 M L T 596, Ram Prasad v Babu, 86 I C 849 1925 A 427
(r) *See post p* 577
(s) Tewari v, Subhadra, 32 C W.N. 1009 1928 P.C 87

For preferential claims of relations of whole and half-blood see page 556 above.

Brother's son

10 Brother's sons—In default of both full and half-brothers, the succession devolves on the brother's sons, of them, a full-brother's son will take in preference to a half-brother's son, (t) and they take *per capita*, (u) as there is no right of representation.

takes along with brother

In the country governed by the Mayukha, however, the sons of a brother who is dead share along with surviving brothers the estate of another deceased brother, (v) and this rule does not go beyond brothers and brother's children (w)

Brother's son's son, placed after brother's son,

Brother's son's sons.—Contrary to what is clearly laid down in the Mitákshará as well as in the Viramitrodaya, and contrary to what has hitherto been all along well understood by Sanskritists as the traditional true construction of these treatises, the Allahabad High Court has held that the brother's son's son should be placed just after the brother's son, and therefore preferred to the paternal uncle's son (x) according to the leading principle of the Mitákshará, that the inheritance is to go to the nearest *sapinda*.

Contrary to texts,

It should be observed that both the principle and the working out of the order of succession according to that principle, rest on, and are deduced from express texts of the sages Yajnavalkya's and Vishnu's texts on the subject give the order of succession down to the brother's son, (y) Manu's text cited in the Mitakshará 2, 1, 7, and 2, 5, 2 places the father's mother after the mother Having regard to these texts the author of the Mitákashrá which is a running commentary on Yajnavalkya's Institutes, to the text of which on this subject, reference is made in Ch 2, Sec 5, Paragraph 1,—places the grandmother immediately after the brother's son It is difficult to understand on what ground the brother's grandson can be said to be nearer than the paternal uncle's son; for according to the Hindu Mode of computation the brother's grandson is distant by four degrees, and the first cousin by three degrees only But the real principle which underlies the commentator's views on the order of succession, is the principle of natural love and affection moulded by the family organisation

(t) *See* p 556 "Whole and half blood"

(u) *See* p 557 "Succession *per stirpes* and *per capita*; Sher Singh *v.* Basdeo, 50 A 904.

(v) Kesarlal *v* Jagubhai, 49 B 282 27 Bom L.R. 225 · 1925 B. 406; Haribhai *v.* Mathura, 47 B 940

(w) Chandrika *v* Muna, 24 A 273 29 I A 70 · 6 C W N 425 4 Bom L R. 376; *see* p 556 *ante*, Haribhai *v* Mathura, *supra*

(x) Kalian *v* Ram, 24 A 128 · 21 A W N 189 (y) Mitakshara, 2, 1, 2 & 6.

The joint family system is the key to the order of succession as it is to other branches of Hindu law. To an Englishman a descendant of the brother with whom he was associated during infancy must appear nearer than the paternal uncle's son. But in a Hindu joint family, it is more likely than not, that one is associated with his paternal first cousin from his birth and looks upon him as a brother. It should be borne in mind that even now brothers often separate after they have got sons and it should also be borne in mind that a man's affections are formed when he is young, hence to a Hindu the paternal first cousin who was associated with him is a member of a joint family, must appear to be nearer than the brother's grandson who is born when he is too old to form a new affection, and also when he may, oftener than not, be separate from the brother. So what is expressly laid down in the Mitakshara is perfectly consistent with the sentiments of the Hindus governed by the Mitakshara. In Bengal the joint family may not continue so long as in the places where the Mitakshara prevails, but still in Bengal the brother's great-grandson is postponed to many orther relations. It is not clear whether the learned Judges of the Allahabad High Court meant to hold that he must be placed just after the brother's grandson, this would, however, be the necessary logical consequence of the *ratio decidendi* of that decision. It is not correct to suppose that all the descendants below the grandson of the father would be cut off by the "stricter construction" of the Mitakshara, inasmuch as they are entitled to take as *sapindas* before the *samanodakas* according to that construction. It is submitted that what is called "*stricter* construction" by their Lordships, is the only construction which the language of the text admits of.

and contrary to reasons

This decision, however, has the effect of unsettling the well understood order of succession in the Benares School. The same order is found in the later commentaries of that school, namely, the Madana-Parijata and the Vivada-Tandava. Sir W. Macnaughten explains the Benares School of the law of succession in the same order which the learned Judges of the Allahabad High Court are pleased to describe as the order following from a *stricter construction* of the Mitakshara, but which appears to be, as remarked above, the *only construction* the passages admit of.

Decision has unsettled law of succession

The view of law as explained by the above case (z) of the Allahabad High Court has been followed by a later decision of the same High Court (a). In this case a decision of the Madras High Court (b) which held a contrary view was considered and not followed, holding that the enumeration of heirs in the Mitákshará is not exhaustive. The later decision of the Allahabad High Court, however, went on appeal to the Privy Council, and their Lordships after considering the above

Madras and Allahabad hold contrary views

(z) Kalian v Ram, 24 A 128; 21 A W N 189
(a) Buddha v. Laltu, 34 A. 663; 16 I.C 529; 10 A.L.J. 303, on appeal to P.C. 37 A. 604; 42 I A 208
(b) Chinnasami v Kunju, 35 M 152; 21 M L J 856; 11 I C. 885.

Privy Council upports All, and explains *putra*,

Madras decision have come to the conclusion that ;—"In the Mitákshará as expounded in the Benares school, the word *putra* or its synonyms employed by Vijnaneswara in connection with brothers and uncles must be understood in a generic sense, as in the case of the deceased owner, and that the descendants in each ascending line up to the fixed limit, at any rate to the third degree should be exhausted before making the ascent to the line next in order of succession." (*c*) It seems that their Lordships did not intend to lay down any general rule to be followed by all the schools, but the Madras High Court while refusing to adopt the extended meaning of the term *putra* in the case of cognates, discussed the decision of the Pirvy Council in a way which may lead one to conclude that it is held that the decision in *Buddha Singh* v. *Laltu Singh*, is binding on the Madras High Court also (*d*) But the Privy Council in an appeal from the Patna High Court has applied the extended meaning of the term *putra* in the case of cognates also. (*e*)

P C Pati

still Bombay F B holds correct

But a recent Full Bench of the Bombay High Court on a consideration of all the relevant cases on the point, has come to the conclusion that the compact series of heirs ends with brother's son and does not include the brother's grandson. (*f*)

11. Paternal grandmother.—(*g*) does not include step-grandmother. (*h*)

Sister was not an heir, but in Bombay was placed here, (*i*) but by Act II of 1929 she is placed after the paternal grandfather.

12. Paternal grandfather

(*a*) **Son's daughter** gets a widow's estate.

(*c*) Buddha Singh *v* Laltu Singh, 37 A 604 42 I A 208 30 I C 529 22 C L J 481, 20 C W N 1 29 M.L.J 434 13 A L J 1007 17 Bom L R 1022

(*d*) Chinni *v* Padmanabha, 39 M L J 417, 426, Soobramiah *v* Nataraja, 53 M 61 1930 M 534

(*e*) Adit Narayan *v* Mahabir, 48 I A 86 33 C.L J. 263. 40 M L J 270 6 Pat L J 140 on appeal from 1 Pat L J. 324 35 I C 687

(*f*) Appaji *v* Mohanlal, 54 B 564 1930 B. 273

(*g*) But *see* Kalian *v* Ram, 24 A 128 21 A W N 189

(*h*) Lugangowda *v* Tulsawa, 17 Bom L R. 315 28 I C 588.

(*i*) *See post pp* 577.

(*b*) **Daughter's daughter** gets a widow's estate.

(*c*) **Sister** gets a widow's estate. Among *Khokhar* Rajputs of Khanpur Tahsil and District Lahore, a sister excludes collatrals of the seventh degree. (*j*)

(*d*) **Sister's son, but** not the sister's adopted son made after her death.

These four heirs are placed here by Act II of 1929 (Hindu Law of Inheritance Act) (*k*)

13 Paternal uncle

Daughter-in-law—is an heir in Bombay and Berar and placed here (*l*)

14 Paternal uncle's son

His son—in Benares and Madras (?) but not in Bombay. (*m*)

15. Paternal great-grandmother.

16 Paternal great-grandfather.

17 Paternal grand-uncle.

18 His Son.

His son's son—in Benares and Madras (?) but not in Bombay (*m*)

19-30.—Similarly, and in the same order, the **paternal grand-parents of the 4th, 5th and 6th degrees in ascent Other Sapindas and their two (or three)** (*m*) **male descendants.**

31-57.—Then come the **remaining Sapindas**, (*o*) the order in which they take is not stated, but is to be gathered by analogy from the foregoing order it appears to be as follows,—

31-33—The deceased's **male descendants**, if any, **of the 4th, 5th and 6th degrees** in descent, beginning with the great-great-grandson. These must be separated from the deceased, for if they were joint and undivided with him, then they would take by survivorship in preference to all other heirs.

(*j*) Ladha *v* Sardar, 11 L 298

(*k*) Its application after widow's death when it came into force. Shib *v* Nand, 13 L 171 36 C W N cxiv

(*l*) Ganpat *v* Budhmal, 1927 N. 86, Aithaldas *v*. Jeshubai, 45 B 219

(*m*) *See pp* 565 and 566

(*o*) Mit 2, 5, 5, Bhyah Ram *v* Bhyah Ugur, 13 M I A 373 · 14 W R P C 1.

34-37.—The father's **3rd, 4th, 5th and 6th descendants** begining with the fraternal nephew's son (*p*)

38-41.—The **paternal grandfather's 3rd 4th, 5th and 6th descendants** beginning with the paternal uncle's son's son.

42-57.—Similarly and in the same order, should come the **3rd, 4th, 5th and 6th descendants in the male line of the paternal great-grandfather and of his father, grandfather and great-grandfather**: the descendants of the nearest ancestor must come before those of a remoter ancestor, and of these descendants, the nearer in degree will take in preference to one more distant.

Sub-Sec iii—ORDER AMONG SAMANODAKAS

58-203—The **Samanodakas** come after the *Sapindas*. they are thirteen descendants of the deceased himself, his thirteen ascendants and thirteen descendants of each of these thirteen ascendants,—all in the male line: (*q*) from these the *sapindas* are to be deducted, then the remaining 147 relations come within the term *Samanodakas*. They are the distant agnate relations. According to some, the term includes remoter distant relations of the same *gotra*, if the relationship can be traced and is remembered. (*r*)

This enumeration, however, is, to a great extent, theoretical, for, no man can live to see and leave behind descendants to the thirteenth degree, of his nearer ancestors, far less of himself, nor even see the remoter ancestors and their nearer descendants

The order of succession amongst these appears to be governed by two principles, namely,

(1) The descendants of a nearer ancestor succeed in preference to those of a remoter ancestor.

(*p*) 25 A. 128 *contra*, *see* foot note (*m*) above

(*q*) Ram *v* Kuttiya, 40 M 654 30 M L J 514. 34 I C, 294 *v*. Mewa v Basant, 1918 P C. 49

(*r*) Bai Devkore *v* Amritaram, 10 B 372, Ram *v* Kamla, 32 A 594: 7 A L J 802: 6 I. C 698 and Hira *v*. Vhir, 43 I C 460 (1918) P R 47 Bajirao *v* Atmaram 1930 N 265, see Kalka *v* Mathura, 35 I A 166. 13 C W N. 1 8 C L. J 447. 45 A L J 701 18 M L J 424 · 10 Bom L. R 1088

(2) Amongst the descendants of the same ancestor the nearer excludes the more remote.

Sub-Sec iv-ORDER AMONG BANDHUS

Bandhus

Bandhus or cognates come after the gentiles. While explaining the order of succession the Mitàkshara says,—"After the paternal grandmother, the *sapindas* of the same *gotra* such as the paternal grandfather become heirs," and then it is observed,—

भिन्नगोत्राणां सपिण्डानां बन्धुशब्देन ग्रहणात् ।

which means,—"For, the *sapindas* belonging to a different *gotra* are included by the term *bandhu* (in the above text of Yàjnavalkya, cited in Mit. 2, 1, 2)."

Yajnavalkya

The heirs down to the great-grandfather's son are then set forth, and it is then laid down that,—"In this manner is to be understood the succession of the *sapindas* of the same *gotra*, (*i e.* agnate relations to the seventh degree, according to the Hindu mode of computation, which is the same as that of the canonist)"

Colebrooke's translation.

In Colebrooke's translation of this part of the Mitàkshara, the term *sapinda* is erroneously rendered into "one connected by funeral oblation" The learned translator appears to have thought that this term bears the same meaning in the Mitàkshara, as in the Dàyabhaga

This error in the rendering given by Colebrooke, was rectified by Messrs West and Buhler, who gave in their very learned and valuable Digest of Hindu Law (*s*) the translation of the passages from the *A'chàra kanda* of the Mitàkshara, in which *sapinda* relationship is explained for the purposes of marriage

Mit on Yajnavalkya *re*; Sapinda,

It is laid down in the *A'chàra-kanda* of the Mitàkshara (which explains the text of Yàjnavalkya on marriage, 1, 52), that wherever in that work the term *sapinda* is used it must be taken in the sense of a "relation or one connected through the same body" and not in the sense of "one connected through funeral oblations"

re. marriage,

And while explaining the text of Yàjnavalkya ordaining that the intended birde should be beyond the fifth and the seventh degrees respectively on the mother's and the father's side the Mitàkshara says that *sapinda* relationship is by this text limited in the said manner, and explains and illustrates the mode of computing the five and seven degrees This text and the exposition relates to marriage only for it is not said that this difference in the number of degrees on the two sides, is applicable to other purposes as well

Buhlers misleading translation,

Messrs West and Buhler have translated a portion only of the passage of the Mitàkshara, in which this subject is dealt with, the concluding sentence

(*s*) 3rd Edition, pages 120-122

of their translation is misleading, which runs as follows,—"and thus must the counting (of the *sapinda* relationship) be made in every case"

For, this has given rise to the error of supposing that this curtailment of *sapinda* relationship applies to inheritance also Hence the translation of the entire passage of the Mitàkshara has been given in pp 81-87 *supra*, from which it is clear that the exposition of *sapinda* relationship therein given, is intended only for the purposes of marriage.

Translation of entire passages.

It would appear that according to Hindu law all relations are heirs, they are divided by Yajnavalkya and the Mitàkshara into two classes, namely, the *gotrajas* and the *bandhus*, or agnates and cognates, or those belonging to the same family, and those belonging to a different family, the latter as a body are postponed to the former, excepting the daughter's son.

The fact that the Mitàkshara cites the text of Vrihan-Manu (*t*) for explaining the *sapinda* and the *samanodaka* relationships for the purpose of inheritance, shows that what is said in the A'chàra-kanda for the purpose of marriage is inapplicable to inheritance

Wider meaning of *bandhu*

Hence, the *bhinna-gotra sapindas*, who are according to the Mitàkshara included by the term *bandhu*, may be taken to mean any relation, however distant, belonging to a different family whose relationship can be traced, for, the term *sapinda*, wherever used in the Mitàkshara, must be taken in the sense of one connected through the body.

curtailed

But if its meaning is to be curtailed by taking the word *sapinda* in a limited sense, then it should be taken to extend to seven degrees on both the maternal and the paternal sides; for, in the text of Vrihan-Manu as well as in the text of Manu, (*u*) no distinction is drawn between the two classes of relations. But the Privy Council has held that for the purposes of inheritance, like those of marriage, the *sapinda* relationship ceases with the seventh degree on the father's side and the fifth degree on the mother's side. (*v*)

still more by P C

Lahore

But the Lahore High Court seems to have held that *Sapinda* relationship ceases beyond the fifth degree in both the father's and the mother's side. (*w*)

Limit of heritable right of cognate, novel rule

The only ground for circumscribing the heritable right of cognate relations by curtailing the degrees of *sapinda* relationship of cognate heirs, is a curious novel interpretation of the grammatical comments by the two

(*t*) Text No 2, *p* 64
(*u*) Text No 1, *p* 64
(*v*) Ramchandra *v* Vinayak, 42 C 384 41 I A 290 20 C L J 573 · 18 C W N 1154 10 N L R 112 27 M L J 333 16 Bom L R 863 12 A L J. 1281: 25 I C 290, Adit *v* Makabir, 48 I A 86 33 C L J 263 40 M.L J 270 6 Pat L J 140 on appeal from 1 Pat L J 324, *see* Ram *v* Bua, 47 A 10,
(*w*) Ram *v* Idu, 13 L 249

commentators of the Mitâksharâ on the words of a text of Manu cited and explained by the author himself of the Mitâksharâ, which interpretation is contrary to the author's own interpretation of that text, which is cited where the mother's succession is dealt with The original passage of the Mitâksharâ and its English version are as follows —

Ground of limitation of degree of cognates

किं च पिता पुत्रान्तरेषु अपि साधारण., माता तु न साधारणी इति प्रत्यासत्त्यातिशयात्—

अनन्तर. सपिण्डात् य:, तस्य तस्य धनं भवेत्

इति (मनु) वचनात् मातुरेव प्रथम धनग्रहण युक्तं । न च सपिण्डेषु एव प्रत्यासत्ति र्नियामिका, अपितु समानोदकादिषु अपि अविशेषेन धनग्रहणे प्राप्ते, प्रत्यासत्तिरेव नियामिका, इति अस्मात् एव वचनात् अवगम्यते,—इति मातापित्रो मातुरेव प्रत्यासत्त्यातिशयात् धनग्रहण युक्ततर ।

which means,—

Moreover, by reason of the greatness of *propinquity* in consequence of the father being a common parent to other sons also, but the mother being not a common parent (to sons other than their common issue),—and by reason of the ordinance of Manu, namely,—"To the nearest *Sapinda*, the inheritance next belongs"—the succession in the first instance, of the mother alone is reasonable

Nor is *propinquity* the regulating principle (of the order of succession) among *sapindas* (technically so-called) only, but on the contrary, it is known from (the language of) this very ordinance (of Manu) that when succession to the estate opens without distinction, to the *samanodakas* and the like also (as groups of relations), *propinquity* alone is the principle regulating order Hence, as between the parents, the succession of the mother alone is more reasonable

Principle of propinquity, how far applicable

It should be observed that the author takes the word *sapinda* in its primary sense, namely, *relation* (x)

The wording of the above text of Manu is very peculiar, the following is its literal rendering,—

"He who is unremote from *sapinda*, his property becomes his"

This peculiar language induced the two commentators of the Mitâksharâ to offer the grammatical comments on this text for the purpose of explaining its meaning (y) They never dreamt that they should be understood for the first time at the last quarter of the 19th century to lay down a novel proposition of law The discovery of the same was made by a Tagore Professor of law, who puts forward the absurd doctrine that in order that A may be a cognate heir of B, they should be *sapinda* of each other, as if there may be any considerable case in which A may be B's *sapinda*, but B is not A's *sapinda*. It is absolutely impossible, as the word *sapinda* is a co-relative term, so there cannot but be mutuality in every case without a single exception

Principle of mutuality of sapindaship

(x) *Supra* pp 81 *et seq*.
(y) *Supra* p 85

It is to be regretted that such a veiw should appear to be approved by the High Court and by the Privy Council, by reason of its being embodied in their judgments as *obiter dictum* (z)

Case-law on Bandhus

Case-law on Bandhus.—While dealing with the order of succession among *bandhus*, the Mitàksharà, (*a*) on the authority of a text whereof the author's name is not mentioned, divides the *bandhus* into three classes, namely, (1) one's own *bandhus*, (2) the father's *bandhus*, and (3) the mother's *bandhus*, and enumerates nine relations as such, thus :—

One's own *bandhus* are his own	Father's sister's son. Mother's sister's son. Mother's brother's son.
Father's *bandhus* are his father's	Father's sister's son. Mother's sister's son. Mother's brother's son.
Mother's *bandhus*, are his mother's,	Father's sister's son. Mother's sister's son. Mother's brother's son.

Above enumeration not exhaustive

In *Giridhari Lal Roy* v. *Bengal Government*, (*b*) their Lordships of the Judicial Committee held that the above enumeration is not exhaustive, and therefore the maternal uncle and the father's maternal uncle are *bandhus* and, as such, entitled to succeed In coming to this conclusion their Lordships relied upon the Viramitrodaya,—where it is laid down that the term *bandhu* comprises also the maternal uncle and the like, and the reason assigned is that it would be improper to hold that their sons are heirs, if they themselves, though nearer, were not so (*c*)

Various cognates held as bandhus for purposes of inheritance

Two other relations not falling within the enumeration have been held by two Full Benches of the Bengal High Court, to be *bandhus* and heirs, namely, the sister's son (*d*)

(z) *Supra p* 105

(*a*) 2, 6, 1

(*b*) 12 M I A 448 10 W R P C 31, *see* also Vedachela *v* Ronganathan, 44 M 753 48 I A 349 26 C W N 159 2 P L T 707 41 M L J 676 24 Bom. L R 649 64 I C 402 1922 P C 33

(*c*) Viramitrodaya, *p* 200

(*d*) Omrit Koomaree *v* Luckhee, 10 W R F B 76 2 B L R F B 28 *see* Bishandayal *v* Jaiseri, (1918) Pat 323 48 I C 746, also Kkargai *v* Debi, 9 I C 339 (A)

and the sister's daughter's son.(e) The decision in the former case, was founded on the doctrine of spiritual benefit, but it was held in the latter case that in the Mitákshará School inheritance was not based upon that doctrine In the latter case an opinion has been expressed that the sister's daughter's son's son is not a *bandhu* nor an heir, it is difficult to understand the principle upon which that opinion is based. This controversy is set at rest by the Privy Council (*f*)

Heritable *bandhus*

It has also been held (*g*) that the father's maternal grand-father's great-grandson is a *bandhu* and heir. So also daughter's son's son (*h*) [he is nearer than a sister's grand-son, (*i*)], daughter's daughter's son, (*j*) sister's son's son, (*k*) sister's daughter's son, (*l*) father's sister [is a preferential heir than father's sister's son in Berar, (*m*) but she is not an heir in the Punjab, (*n*)] Father's sister's son, [preferential to maternal uncle] (*o*) father's half-sister's son, [preferred to mother's sister's son] (*p*) father's sister's son's son, (*q*) father's sister's son's daughter's son, (*r*) maternal uncle's son [preferential heir to maternal aunt's son], (*s*) mother's maternal uncle's grandson, (*t*) paternal uncle's daughter's son, (*u*) grandfather's sister's grandson, (*v*) great-grandfather's son's daughter's son, (*w*) and father's mother's sister's son (*x*) have been held as heritable *bandhus*

(*e*) Umaid Bahadur *v* Udoi, 6 C 119
(*f*) *See supra, pp* 109-114
(*g*) Ananda *v* Nownit, 9 C 315
(*h*) Krishnayya *v* Pichamma, 11 M 287
(*i*) Kolhapur, Maharaja of *v* Sundaram, 48 M 1 1925 M 497
(*j*) Ramphal *v* Pan, 32 A 640 7 A W N 776 7 I C 292
(*k*) Balusami *v* Narayana, 20 M 342 7 M L J 207
(*l*) Umashankar *v* Nageswari, 3 Pat L J 663, (F B) 48 I C 625
(*m*) Ganpati *v* Salu, 89 I C 345
(*n*) Amar *v* Ved, 1928 L 956
(*o*) Sakharam *v* Balkrishna, 49 B 739 27 Bom L R 1003 1925 B 451 (F B)
(*p*) Jotindra *v* Nagendra, 58 I A 372 35 C W N 1153 on appeal from 55 C 1153
(*q*) Harihar *v* Ram, 47 A 172 82 I C 1032 1925 A 17
(*r*) Kesar *v* Secretary, 49 M 652
(*s*) Rami *v* Gangi, 48 M 722 87 I C 609 1925 M 107
(*t*) Ratnasubba *v* Ponnappa, 5 M 69
(*u*) Tirath *v* Kahan, 1 L 558 60 I C 101
(*v*) Sethurama *v* Ponnammal, 12 M 155
(*w*) Ram *v* Bua, 47 A 10
(*x*) Ram *v* Niadar 14 I C 55 (A)

Order of succession among *bandhus*,

Principle of order among Bandhus.—The next point for consideration is the order of succession amongst the *bandhus* In the Mitákshará and the Viramitrodaya it is said, that of the three classes of *bandhus*, the first class succeed in preference to the other two, and the second before the third. (*y*) The first class comprises relations connected through both the parents, the second, through the father alone, and the third, those connected through the mother only, and that the relations of the first class are equal in degree but nearer than those falling under the second and the third classes who are all equal in degree, but differ in sides.

The following three rules (*z*) therefore may be deduced from the above considerations, governing cases of competition between *bandhus*.

(1) The nearer in degree on whichever side is to be preferred to one more remote

(2) Of those equal in degree, one related on the father's side is to be preferred to one related on the mother's side. (*a*)

(3) When the side is the same, the circumstance of one being related through a male and another through a female makes no difference

No light, however, is thrown by the above enumeration on a case of competition between a descendant, and a collateral or an ascendant equal in degree, computed in the mode adopted by civilians, for instance, a son's daughter's son and a sister's son.

not laid down exhaustively

The order of succession among the *bandhus* has not been exhaustively laid down except what has been stated above.

(*y*) Adit *v* Mahabir, 48 I A 86 33 C L J 263 40 M L J 270 on appeal from 35 I C 687 1 pat L J 324, Ram Chandra *v* Vinayak, 42 C 384 41 I A 290 20 C L J 573 18 C W N 1154 27 M L J 333 16 Bom L R 853 : 12 A L J 1281 25 I C 290

(*z*) This approved by P C Vedachela *v* Ranganathan, 44 M 753 : 26 C W N 159, 167 48 I A 349 41 M L J 676 24 Bom L R 649 2 P L T 707 64 I C 402 1922 P C 33, *see also* Chengiah *v* Subbaraya, 1930 M 555

(*a*) This approved by P C Jatindra *v* Nagendra, 58 I A 372 35 C.W N 1153, 1157 on appeal from 55 C 1153

The texts only lay down the order amongst the different classes of *bandhus*, but no order has been stated about the claimants of the same class *inter se*. The three conclusions are drawn from what has been laid down in the Mitákshará and the Viramitrodaya, but by this one should not think that it is meant that there should not be any precedence amongst the claimants of any class *inter se* as the Allahabad High Court has erroneously believed to be. (*b*) But neither should it be held that the order amongst the claimants of the same class should be the order as stated in the texts as has been held by the Madras High Court. (*c*)

Madras and Allahabad differ

In a competition between the two *atma bandhus*, namely mother's sister's son and mother's brother's son, the Madras High Court, holding that the order of precedence should be the order in which they are stated in the texts, gave precedence to the mother's sister's son over the mother's brother's son. (*d*) The Allahabad High Court, (*e*) on the other hand, has held that the mother's brother's son should get the inheritance in preference to the mother's sister's son, following the principle laid down by the Madras High Court, (*f*) to the effect that all other circumstances being equal, the claimant between whom and the stem there intervenes one female link, is to be preferred to that claimant who is separated from the stem by two such links.

Madras now agrees

The Madras High Court in *Rami Reddi* v. *Gangi* (*g*) has now agreed with the above decision of the Allahabad High Court (*h*) and held that the decision of the Madras High Court in *Appandai* v. *Bagubali* referred to above has been overruled by the Privy Council. (*i*)

(*b*) Ram Charan *v* Rahim, 38 A 416, 424
(*c*) Appandai *v* Bagubali, 33 M 439 20 M L J 275 5 I C 280
(*d*) Appandai *v* Bagubali, 33 M 439 20 M L J 275 5 I C 280
(*e*) Ram Charan *v* Rahim, 38 A 416, 424
(*f*) Tirumalachariar *v* Andal, 30 M 406 17 M L J 285
(*g*) 48 M 722 . 21 L W 476 87 I C 609 1925 M 807
(*h*) *See foot note* (*e*) above
(*i*) Vedachela *v* Subramania, 44 M 753 48 I A 349 26 C W N 159, 167 41 M L J. 676 · 2 P L T. 707 24 Bom, L R 649 64 I C 402 1922 P C 33.

Patna.

Mr Justice Mullick of the Patna High Court, perhaps realizing these difficulties has observed in his learned judgment in the Full Bench case of *Umashankar* v. *Nageswari* (*j*) that in cases other than those expressly mentioned in the text, (*k*) "the principle of numerical propinquity alone will determine the heritable right, supplimented in case of doubt by the rule of religious benefit and such other rules derived from the succession of agnates as may be appropriate."

Principle laid down by Privy Council

The Privy Council has adopted the principle of oblation theory or the theory of spiritual benefit for the purpose of finding out the propinquity of rival claimants, (*l*) but also held that the primary test in all questions of inheritance, particularly in the Benares School, is propinquity in blood. (*m*) The same Board, in a case from Bombay, has held that as between the *bandhus* of the same degree as both related on the father's side, the male is to be preferred to females. (*n*) In the above case it is held that the preference given to the mother over the father does not extend to the mother's *bandhus*. (*o*)

As regards the preferential rights of different classes of *bandhus*, the Privy Council has held that "in families governed by the law of the Mitàksharà the right of succession amongst the three classes of *bandhus* mentioned in the text is governed by the propinquity of the class, and accordingly that a *pitri bandhu* does not succeed until the class of *atma bandhus* is exhausted, and a *matri bandhu* does not succeed until the classes of *atma bandhus* and *pitri baudhus* are exhausted."

Sub-Sec. v—ORDER AMONG OTHER HEIRS

Other heirs

Preceptor, Pupil—When a man has no relation, then his Preceptor, (*p*) Pupil and Fellow-student are in their order, entitled to take his estate.

(*j*) 3 Pat L J 663, 684 48 I C 625
(*k*) No 4 *p* 551
(*l*) Vedachela *v* Subramania, *supra*
(*m*) Jatindra *v* Nagendra, 58 I A 372 35 C W N 1153
(*n*) Senyellappa *v* Girimalleppa, 29 C W N 271 P C 1925 P C 209 48 Bom 569
(*o*) Jatindra *v* Nagendra, 58 I A 372 35 C W N 1153, 1156
(*p*) Sambasivam *v* Secretary, 44 M 704 41 M L J 109 63 I C 659

Fellow caste-people—In default of all these, the estate of a Bràhmana goes to learned Bràhmanas, and not to the king. But it has been held by the Privy Council in the case of the *Collector of Masulipatam*, (q) that the personal law of the Hindus relating to inheritance, by which they are permitted to be governed, cannot apply when there is a total failure of heirs, hence this provision of Hindu law cannot have any force and prevent the Crown as the *ultima hœres* to take by escheat the property left by a Bràhmana leaving no heir properly so called, namely, a relation.

Fellow caste-people

The Crown.

King—But the estate of a man of any other caste e cheats to the king.

Sec 3—FEMALE HEIRS

Female heirs in Bombay and Madras—The above order of succession is according to the Benares and the Mithilà Schools, in which female relations, as a general rule, are excluded from succession, save and except the widow, the daughter, the mother, the father's mother, and the paternal grandfather's mother.

Female heirs in Bombay and Madras.

In Bombay all the female *sapindas* of the same *gotra* are recognised as heirs, and they are shuffled in among the male *sapindas*, namely, the full sister who is placed after the paternal grandmother but before the paternal grandfather, (r) and is accordingly preferred to a brother's widow (s) and to father's brother's son, (t) [but not to a brother's son (u)], the half-sister, (v) the stepmother, (w) the widows of *gotraja sapindas* who occupy the place of their husbands, and the daughters of descendants and of collaterals (x) It has been held that "the general rule in favour of widows of *gotraja sapindas* of nearer collateral lines excluding male *gotrajas* of remoter lines has been laid down as a general rule having

Female sapindas are heirs

(q) 8 M I A 529 2 W R P C 61
(r) Lallubhai v Mankuvarbai, 2 B 388, affirmed 5 B 110 7 I.A 212, *See* Lakshmi v Dada, 4 B 210, Biru v Khandu, 4 B 214
(s) Rudrapa v Irava, 28 B 82 5 Bom L R 676
(t) Venayeek v Luxumee, 9 M I A 516, *See* 11 N L R 24
(u) Bhagwan v Warubai, 32 B 300 10 Bom L R 389
(v) Kesserbai v Valab, 4 B 188
(w) Rakhmabai v. Tukharam, 11 B 47, *see* Russoobai v Zoolekhabai, 19 B 707
(x) 4 B 209 and 219, Nahalchand v Hemchand, 9 B. 31

application to all collateral lines." So a brother's widow is a nearer heir than his paternal uncle's son. (*y*) The sister is expressly enumerated as an heir in a Smriti text; (*z*) hence her claim is superior to that of other females born in the family but transferred to other families by marriage, who ceases to be *sagotra sapindas*, such as the father's sister, and are therefore postponed to *sagotra sapindas*, accordingly the father's paternal uncle's son is entitled to succeed in preference to the father's sister. (*a*) The half-sister has also been held to succeed, and comes in after whole sister (*b*) but she comes before the paternal uncle. (*c*) The daughter's daughter also inherits as a *bhinna gotra sapinda* after all the *sagotra sapindas* are exhausted. (*d*)

But an illegitimate daughter cannot succeed in preference to a brother's son (*e*)

In Madras certain female relations have been recognised as *bandhus* and heirs.

Northern India and Bombay differ.

The rule that female relations cannot inherit save such as have been expressly named as heirs, and which is followed in Northern India, has been departed from in Bombay on the ground that the female *sapindas* are expressly recognised as heirs by the following text of Manu as translated by Sir William Jones, namely—

"To the nearest Sapinda, *male or female*, the inheritance next belongs."

In Madras female relations held bandhus

The italicized words which are not in the original, but were interpolated by the learned translator form Kulluka's commentary on Manu, were supposed to be important words of the text itself. And the rule has been departed from also

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(*y*) Basangavda *v* Basangavda, 39 B. 87, 107, 111. 16 Bom L.R 699 27 I C 167

(*z*) *Infra p* 581 text No 4, Nanak *v* Kishen, 53 I C. 815 162 P R 1919

(*a*) Ganesh *v.* Waghu, 27 B 610 5 Bom L R. 581

(*b*) Jana *v* Rakhma, 43 B 461 21 Bom L R 208 · 52 I C 8, Kesserbai *v.* Valab 4 B 188, 198; Lakshmi *v* Dada 4 B 210, 214, Vinayak *v* Luxmibai, 1 Bom H. C 118, appeal to P C 9 M I A 516

(*c*) Trikam *v* Natha, 36 B 120 13 Bom. L R. 853 12 I C 359

(*d*) Ghunaji *v.* Tulsi, 1925 N 98

(*e*) Bhikya *v* P bu, 32 B 562. 10 Bom L R 706

in Madras on the ground that as the Preceptor and the like succeed, "if there be no relations of the deceased" बन्धूनाम् अभावे (*f*) therefore by implication female relations must succeed before the Preceptor and the like. Accordingly son's daughter, (*g*) daughter's daughter, (*h*) sister, and father's sister (*i*) have been held heirs and *bandhus.*

Allahabad follows Madras.

The Allahabad High Court—also adopted and followed the above view of the Madras High Court, and held that in the absence of preferential male heirs, a daughter's daughter is heir to her maternal grandfather. (*j*)

The Punjab.

But it has subsequently been held by the said Court that women, not expressly enumerated as heirs, cannot inherit accordingly, a son's or a daughter's daughter is held to be no heir to the grandfather. (*k*) This view has also been upheld in the Panjab (*l*)

(*f*) Mit 2, 7, 1 (*g*) Nallanna *v* Ponnal, 14 M 149 1 M L J 149
(*h*) Ramappa *v* Arumugath 17 M 182 4 M L J 30, *See* Kishen *v* Shib, 25 I C 697 77 P R 1914
(*i*) Narasimma *v* Mangammal, 13 M 10
(*j*) Bansidhar *v* Ganeshi, 22 A 338 20 A W N 107 *see* Act II of 1929, *ante pp* 563, 567
(*k*) Nanhi *v* Gauri, 28 A 187 2 A L J 654, Jagannath *v* Champa, 28 A 307 3 A L J 87 *see* Act II of 1929, *ante pp* 563, 567
(*l*) Malan *v* Jewan, 32 I C 916 47 P W R 1916 *but see ante pp* 563, 567

CHAPTER VII.
RE-UNION UNDER BOTH SCHOOLS
Sec. 1—ORIGINAL TEXTS

१ । (a) पत्नी, दुहितरश्चैव, पितरौ, भ्रातरस्तथा, ।
तत्सुता', गोत्रजा., बन्धु., शिष्य:, सब्रह्मचारिण. ॥
एषाम् अभावे पूर्व्वस्य धनभाग् उत्तरोत्तर: ।
स्वर्यातस्य ह्यपुत्रस्य सर्व्ववर्णेष्वयं विधि. ॥
याज्ञवल्क्य:—२, १३६-७ ॥

(b) वानप्रस्थयतिब्रह्मचारिणां पिक्थभागिन' ।
क्रमेणाचार्य्य सच्छिष्य धर्म्मभ्रात्रेकतिर्थिन ॥
याज्ञवल्क्य:—२, १३८ ॥

(c) संसृष्टिनस्तु संसृष्टी सोदरस्य तु सोदर ।
दद्याच्चापहरेद् अंश जातस्य च मृतस्य च ।
अन्योदर्य्यस्तु संसृष्टी, नान्योदर्यो धनं हरेत् ।
असंसृष्टापि चाद्दात् संसृष्टी नान्यमातृज ॥
याज्ञवल्क्य.—२, १३९-१४० ॥

General order of succession,

1 (a) The lawfully wedded wife, and the daughters also, both parents, brothers likewise, their sons, gentiles (or agnates), cognates, a pupil, fellow-students, on failure of the first among these, the next in order is heir to the estate left by one who has departed for heaven without leaving male issue, this rule extends to all castes —Yajnavalkya, ii, 136-7

of Brahmachari,

(b) The heirs to the estate of a *brahmachari* or life long student, an *yati* or ascetic or religious mendicant, and a *vànaprastha* or hermit are respectively, the preceptor, a virtuous pupil, and a religious brother residing in the same holy place —Yajnavalkya, ii, 138

of re-united members,

(c) But of a re united (co-heir), a re-united (co heir) shall keep the share when he is deceased, or deliver it if he is born (in the shape of a son), but of a uterine brother, uterine brother shall keep the share, or deliver it (to his son) if (he is) born (in the shape of a son), but a re-united half brother may take the property, not a half brother (not re-united), also a (brother) united (through uterus, *i e*, a full brother) though not re-united may take, not the united, (*i e*, re- united) half brother alone —Yajnavalkya, II, 139 140

These two slokas are differently construed by different commentators see Viramitrodaya, Chapter IV.

२ । विभक्तो य: पुन. पित्रा भ्रात्रा चैकत्र संस्थित: ।
पितृव्येणाथवा प्रीत्या स तत्संसृष्ट उच्यते ॥ वृहस्पति: ॥

Re-union defined

2 He who having been separated dwells together again through affection, with the father, a brother, or a paternal uncle is called re united with him — Vrihaspati,

३। स्वर्यातस्य ह्यपुत्रस्य भ्रातृगामि द्रव्य तदभावे पितरौ हरेयाता ज्येष्ठा वा पत्नी। शङ्ख॥

3 The wealth of a person who departs for heaven leaving no male issue, goes to the brothers, in their default, let the parents take, or the senior wife —Sankha

Sankha on order of succession

४। या तस्य भगिनी सा तु ततोऽंश लब्धुम् अर्हति।
अनपत्यस्य धर्म्मोऽयम् अभार्य्यापितृकस्य च॥ वृहस्पति॥

4 But if there be a sister of his (i e, of the re-united person), she is entitled to get a share of it, this is the law regarding the estate of a person destitude of issue, also destitude of the wife and the father —Vrihaspati

Position of sister

५। मृतोऽनपत्योऽभार्य्यश्चेद् अभ्रातृपितृमातृक।
सर्व्वे सपिण्डास्तद्दायं विभजेरन् यथांशत॥ वृहस्पति।

5 If the deceased leave no issue, nor wife, nor brother, nor father, nor mother, then all the *sapindas* shall divide his property agreeably to shares (i e, in the order of proximity) – Vrihaspati

Vrihaspati on order of succession

Sec 2—RE-UNION UNDER MITAKSHARA

Sub Sec 1—GENERAL DISCUSSION

What is re-union —If two or more parceners after partition agree to annul the partition and to live together jointly as before, and make a junction of their property with the stipulation based on affection, that what is mine is thine and what is thine is mine, then they are called re-united and their status, re-union. Mere living together (*a*) in one residence without junction of estate is not re-union (*b*) Intention to re-unite (*c*) or that there was re-union, (*d*) must be proved like any other fact (*e*) showing that the parties intended to alter their status with all its incidents (*f*) The facts that some of the members lived together in a house or carried on a joint business or paid revenues to the Government jointly do not prove such re-union (*g*) But it is held, a minor son contin-

(*a*) Rai Gajundar *v* Rai Harihar, 12 C W N 687
(*b*) Rusi *v* Sunder, 37 C 703 6 I C 441, Gopal *v* Kenaram, 7 W R 35
(*c*) Jatti *v* Banwari, 50 I A 192, Balabax *v* Rukhmabai, 30 C 725 30 I A. 130 7 C W N 642, 37 C 703, Kunwar *v* Moti, 17 C W N 453 P C
(*d*) Jag Prasad *v* Singari, 29 C W N 941 49 M L J 162 27 Bom L R 760 23 A L J 97 86 I.C 122 1925 P C 93, Palani Annaml *v* Muthumalialia, 48M 254 48 M L J 83 29 C W N 846, Nil *v* Jai, 60 I C 696 (L), Sadananda *v* Baikuntha, 63 I C 833 (P)
(*e*) Babu *v* Gokuldas, 1928 M 1064
(*f*) Rajagopala *v* Veeraperumal, 1927 M 792
(*g*) Jag Prasad *v* Singari, *see* above, Kundan *v* Raja, 1929 A. 513, Raghunath *v*, Yamunabai, 1929 N. 362, *but see* Vasudeva *v*. Sakaram, 1928 M. 412.

ing to live joint with his father even after attaining majority and conducting his business, can press that there was re-union (*h*) It is also held that it may be inferred from the conduct of the parties and surrounding circumstances. (*i*)

Deed

Oral

Re-union how effected—A re-union can be effected by oral agreement But if there is a registered deed by which partition was effected and thereafter there was a re-union by a written document, then it must be registered (*j*) An oral agreement of re-union followed by a division by a decree of a Court or by a registered deed, does not seem to be inadmissible in evidence A re-union, between parties entitled to do so, cannot be said to be a transfer of immovable property, so as to be effected by a registered deed.

Re-union personal, their heirs cannot claim advantage, parties to partition can re-unite,

Who can re-unite—It should be observed that the advantage derived from being re-united is a personal privilege which cannot be claimed by the sons of the re-united co-parceners although living jointly, for, re-union pre-supposes jointness and partition, hence, a re-united co-parcener is one who had been originally joint, then separated, and afterwards became re-united through affection with another co-sharer, by annulling the previous partition and mixing up their shares, and agreeing to live together as members of a joint family. Hence the very person who was joint at first, then separated and then agreed to annul the separation and to become joint over again, is to be understood by the term "re-united". This is what is laid down by the above text of Vrihaspati. (*k*) Suppose, for instance, three brothers forming members of a joint family, separate from each other, then two of them become re-united, subsequently each of them has a son born to him, then all the brothers die one after another, each leaving a son behind him, the two sons of the two re-united brothers continue to live joint, then one of them dies leaving

(*h*) Onkureshwar *v* Dushyant, 1925 O 56.

(*i*) Gouri *v* Keshab, 1929 A 148, Menda *v* Mirtunjai, 3 Luc. 220.

(*j*) Mahalakshmamma *v* Suryanarayana, *supra*.

(*k*) Text No 2.

the two first cousins with one of whom he lived jointly, while the other was separate: here the two first cousins living together cannot be called "re-united" hence both the surviving cousins are entitled to succeed to his estate according to the ordinary law of succession, the one living jointly with the deceased cannot claim preference, as he was not re-united (*l*)

P C decision

The view expressed above appears to be approved by the Judicial Committee in the case of *Balabax* v *Rukmabai*, (*m*) in which it has been held (*n*) that a re-union in estate properly so called can only take place between persons who were parties to the original partition. Their Lordships refer to the text of Vrihaspati cited in the Mitakshara Ch 2, Sec. 9, as supporting that proposition.

Mitakshara

According to Mitakshara.—The Mitàksharà appears to limit re-union to the relations mentioned in that text of Vrihaspati, while the text of Yajnavalkya appears to be predicate it of all relations that may be parties to partion The latter view is maintained in the Viramitrodaya, Vrihaspati's text being taken as illustrative. The order of succession applicable to the estate of a re-united person, as given below, is not found in its entirety in the Mitàksharà, but is laid down in the Viramitrodaya which is held by the Judicial Committee to be declaratory of the law of the Benares School. (*o*) The Calcutta High Court (*p*) has held that "according to the Mitàksharà re-union is restricted to three classes of cases, namely, (1) between father and son, (2) between brothers and (3) between paternal uncle and nephews". The Patna (*q*) and the Lahore (*r*) High Courts hold the same view. It has further been added by the learned judges of the Calcutta High Court that "we are aware of no authority for the proposition that the Viramitrodaya supersedes

does not give order of succession

but Viramitrodaya does and P C view.

Calcutta,

Patna, Lahore

(*l*) But see *contra*, Abhai *v* Mangal, 19 C 634
(*m*) 30 I A 130
(*n*) *see p* 531-532 *ante*
(*o*) Girdhari Lall *v*. Bengal Government, 12 M I A 448
(*p*) Basanta *v* Jogendra, 33 C 371, 375
(*q*) Pan Kner *v* Ram, 1929 P 353
(*r*) Hira *v* Manglan, 1928 L 122.

the Mitâksharâ, except in places where the former is accepted as the binding authority". Their Lordships referred to the observation of the Judicial Committee in the case of *Bhagwandeen Dooby* v *Mayna Bibee* (s) So it has been held in that case that there cannot be a re-union between two first cousins

Why re-union personal

There is also a good reason for considering the privilege to be personal and not heritable, for instance, two of three brothers may like each other and dislike the third, so they come to a partition and then the two become re-united Now it is quite possible that each of the two brothers who dislike the third, may love his children in the same manner as the children of his reunited brother Therefore the attachment being personal the preference also should be of the same character.

Onus

Onus—The presumption is that the members of a Hindu family are joint unless the contrary is proved (t) But when a joint family is proved to have separated, the burden of proof is on him who alleges re-union. (u)

Effect

Effect of re-union—It is worthy of remark that when a member of a joint family, re-unites with another member after partition, it shows that he does not repose much confidence in his wife, nor does he feel love and affection towards his daughter and her son, if he has any, for, the effect of re-union is to postpone the wife, the daughter and the daughter's son to a few of the agnatic relations. The legal incident of re-union again, that a brother succeeds in preference even to the parents shows that nearness of relationship is not the criterion of preference, but at the same time it shows that while the preference assigned to a brother cannot but be agreeable to the parents, it appears to be based on natural love and affection, as it excludes other remoter re-united relations such as the uncle or the nephew.

wife, daughter her son postponed,

brother preferred to parents

(s) 11 M I A 488, 507

(t) *See ante pp* 545-546

(u) Mahalakshmamma v Suryanarayana, 51 M 979. 1928 M 1113, Kundah v, Ray, 1929 A 513 *see ante p* 545

Survivorship among re-united—A great deal of misconception appears to prevail on the subject of re-union; it is difficult for one who has no access to the original treatises, to clearly understand the law of re-union which seems to be arbitrary in character.

Survivorship

It is thought by some that survivorship applies to the estate of re-united co-parceners. (u) But this is evidently a mistake, for, there cannot be any doubt that a re-united half-brother, and a full-brother not re-united but remaining separate, succeed jointly to the estate of a re-united co-parcener, nor can there be any doubt that a separated full-brother of a person who became re-united with the parents or the paternal uncle, is entitled to succeed to that person's estate in preference to the parents or the paternal uncle who became re-united with him. Hence, it is clear that by re-union there is merely a mixture of the shares of those forming it, but the unity of their titles is not effected thereby, and so they become tenants-in-common having community of interest, but not joint-tenants having the benefit of survivorship.

does not apply,

It is held, however, that the re-united members of a Mitākshara family are not tenants-in-common but are co-parceners with right of survivorship *inter se*, and the son of a re-united member will himself be a member re-united with the others. (v)

but held to apply.

Sub-Sec ii—ORDER OF SUCCESSION

According to the Mitākshara School, the circumstance of two or more co-parceners being re-united, after separation from others by partition, modifies the order of succession to some extent.

The variation in the order of succession of a re-united person on principles such as survivorship, or proximity of relationship, on which is founded the devolution of the estate of one who is joint or separate respectively.

Unlike ordinary mode—The order of succession applicable to the estate of a re-united person is entirely based on

(u) Sham v Court, 20 W R, 197, Jasoda v Sheo, 17 C 33

(v) Kristrya v Uenkatramayya, 19 M L J 723, Samudrala v Samudrala, 33 M. 165 19 M I J 719

H L 74

the above texts and a few others repeating the same thing, which are construed by the Benares School to lay down an order different from the ordinary one From the Mitàksharà and the Viramitrodaya, is deduced the following, noticing, however the case-law on the subject —

Order of succession.

1-3. Son, grandson and great-grandson—inherit as in the ordinary case of succession, whether they are separated or re-united. A son who is re-united cannot claim preference to another who remains separate But it has been held in some places that according to the Mitàksharà, a re-united son has a preferential right of inheritance to one who remains separate. (*w*) The Madras High Court in a case in which the point did not arise went beyond the scope of the appeal and held that "the rule being as above stated in the case of re-united son there can be hesitation in applying the same rule in the case of sons who have never separated." (*x*) It is needles to point out that the learned judges have entirely lost sight of the great difference between undivided member and re-united member, in the former case there was no severance of status whereas in the latter there was severance, but by express agreement they re-united In the former case, according to their Lordships, the principle of survivorship applies, whereas in the latter, altered order of succession is expressly provided for in the texts. Their Lordships have held that survivorship applies to those who have not separated at the time when one member severs, and at the same time they have held that these members are to be deemed re-united. Both these principles cannot be applicable inasmuch as there are express provisions for succession in the case of re-union.

Because the above text of Yàjnavalkya, (*y*) containing the rule giving preference to a re-united co-parcener, forms an exception to the rule contained in the text (*z*) relating to the order of succession, and as the rule applies to the estate of a person destitute of male issue, therefore the rule itself

(*w*) Fakirappa *v* Yellapba, 22 B 101, 104, Yenka *v* Dharma, 21 I C 597: 9 N L R 150 (*x*) Nana *v* Ramchandra, 32 M 377, 382-383.
(*y*) No 1 (c) (*z*) No 1 (a).

does not apply to the male issue, hence, the exception also, to the rule, cannot apply to the male issue who are therefore entitled to inherit *per stirpes* whether re-united or not. For, separation or re-union of father and son depends on the disagreement or agreement of the female members, and not on the father's affection or on its absence.

4. Re-united whole brother.

5. A Re-united half-brother, and a separated full brother jointly succeed, in default of the one, the other takes the whole (*a*)

6. Re-united mother

7. Re-united father

8 Any other re-united co parcener

9. A half-brother not re-united with the deceased.

10 The mother not re-united with the deceased.

11 The father not re-united with the deceased.

12. The widow.

13. Daughter

14. Daughter's son.

15. Sister.

Subject to this modification, the succession goes to the *sapindas*, the *samānodakas*, the *bandhus* and the rest, as in the ordinary order of succession, explained in Chapter VI.

Sec 3—RE-UNION UNDER DAYABHAGA

Re-united preferred to not-re-united,

The above text of Yàjnavalkya is explained in the Dàyabhàga to mean that when there is a competition between claimants of equal degree, then if any of them is re-united and the rest are not so, the re-united parcener will take the heritage to the exclusion of those who are not so. According to the Dàyabhàga, the above texts do not lay down a different order of succession applicable to the estate of a re-united co-parcener. (*b*)

rule applied to three cases

The above text of Vrihaspati is explained in the Dàyabhàga (*c*) to curtail the operation of the rule of preference on account of re-union, by limiting it to the three sets of relations

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(*a*) Mathura v Bindra, 1930 O 336 (relying on this order, separated whole brother is preferred to re-united father)

(*b*) D B xi, v, 10-11 and 38-39

(*c*) Ch xii, § § 3-4

mentioned therein, namely, father and son, brothers, and uncle and nephew

So that according to the Dàyabhàga, if the claimants for inheritance be either two or more sons, (*d*) or brothers, or paternal uncles, or fraternal nephews, and any one of each of these sets of heirs be re-united, then he is to be preferred to another of that set, who is not re-united But if the deceased was re-united with any other relations than the four mentioned in Vrihaspati's text, then the legal incident of preference for re-union does not apply to them, such relations whether re-united or not, are entitled to succeed together.

Case-law modifies Dayabhaga

The case law—appears to modify the law of re-union as laid down in the Dàyabhàga, by holding that the privilege extends to the sons of the brothers who became actually re-united (*e*) In the last case Justice Ghosh examined all the passages of the Dàyabhàga bearing on the subject of re-union, and the learned judge while holding that there cannot be a re-union between two agnatic first cousins so as to be attended with the legal incident of preference, thought himself constrained to follow the previous decisions and hold that the son of a re-united brother is entitled to perference to the son of a separated brother, although the former was not re-united in the legal sense

Preference arises among claimants of equal degrees

But it should be remarked that if the separated brother had been alive, he would undoubtedly have, succeeded in preference to the re-united brother's son, for, re-union gives preference, only when the claimants are of the same degree.

Previous decisions overruled

The previous decisions, however, appear to be overruled by the recent case of *Balabux* v *Rukmabai*, (*f*) already noticed (*g*) in which the Judicial Committee has enunciated the right view of the law of re-union

But Calcutta holds previous view,

Justice Mitra, however, has in a subsequent case got round this decision, and practically followed the current of decisions

(*d*) In this connection *see* Marudayi *v* Doraisami, 30 M 348, 352
(*e*) 1 Hyde, 214, Tara Chand *v* Pudum, 5 W R 249; Kasabram *v* Nandkishor 3 B L R A C J 7, Abhai *v* Mangal, 19 C 344
(*f*) 30 I.A 130 (*g*) *Ante pp* 531-532, 583.

of the Calcutta High Court, noticed above, by holding that a nephew whose father was re-united and who was, in consequence, living, after his father's death, jointly with his father's re-united brother, was entitled to inherit his estate in preference to a separated nephew who was the son of his separated brother. (*g*1)

reasons for this view

The principle enunciated is, that a blind adherence to the doctrine of spiritual benefit is not reasonable, nor supported by the Dàyabhàga itself, and that doctrine should not, therefore, be deemed to be the only guide for the decision of disputed questions even in the Bengal school but propinquity, jointness, and natural love and affection, and the like principles consistent with natural justice should be considered and followed in deciding priority in the order of succession, the Mitàkshàra also affords a guide and should be followed, where the Dàyabhàga is silent.

(*g*1) Akhoy v Hari, 35 C 721 12 C W N 511

CHAPTER VIII

DAYABHAGA JOINT FAMILY

Sec. 1—MITAKSHARA AND DAYABHAGA

Mit followed where Daya. silent

The Mitakshara—is universally respected and accepted as of the highest and paramount authority, by all the schools except that of Bengal where it is received also as of high authority yielding only to the Dàyabhàga in those points where they differ The Mitàkshara law should therefore be followed in Bengal where the Dàyabhàga is silent.

Difference between Mit and Daya

Points of difference between Mitakshara and Dayabhaga—The cardinal points of difference between the two schools are as follows —

Meaning of heritage

1 Heritage according to the Dàyabhàga bears its proper sense and means property in which a person's right arises by reason only of his relationship to the former owner, *on the extinction of his right* by natural death, or civil death such as degradation from caste for the commission of a heinous sin, or renunciation, and retirement from worldy affairs by the adoption of a religious order. (*h*)

Right by birth not approved

2. Right by birth is not admitted hence, heritage is in all cases *obstructed*, and never *unobstructed*. (*i*)

Difference in order of succession slight and

It should, however, be specially noticed that there is no difference at all between the two schools as to heirship which is founded on relationship only whoever therefore is heir under the Mitàkshara school must be heir also under the Dàyabhàga school, the order of succession only being different to a slight extent A blind adherence to the doctrine of spiritual benefit, introduced for the first time, by the founder of the Bengal school as one of the reasons, and a very strong one, put forward by him in support of the change in the *mode* and *order* of devolution of inheritance among the relations recognised as heirs by both the schools, has misled the Judges of the Calcutta High Court in expressing an opinion as an *obiter dictum*, namely, that the sister's daughter's

based on spiritual benefit

(*h*) Ch 1, paras, 5, 31-34 *See ante p* 87

(*i*) *See ante p* 336

son is not an heir in the Bengal school upon the ground of his incapacity to confer spiritual benefit (*j*) The learned Judges failed to understand that the doctrine may be rightly held to be a key to the *order of succession*, but *not to inheritance*, for, if that were so, no *samanodaka* could succeed as heir in the Bengal school.

Persons inherit as tenants-in-common

3. Two or more persons jointly inheriting property become tenants-in-common, and not joint-tenants in any case. (*k*)

Co-sharer's right extends to fractional portions

4. The Dàyabhàga doctrine of the co-heir's tenure of joint heritage is, that each co-parcener's right extends to a fractional portion only of the inherited property, in other words, to that fractional share which should be allotted to him if there were an immediate partition made. Hence it differs from that of the Mitàksharà, according to which the right of each co-heir extends to the whole of the property. (*l*)

Co-sharer's can alienate

5. The legal incidents deduced from this doctrine are, that a co-sharer can alienate his share without the consent of the rest,(*m*) and that survivorship cannot apply to the undivided share of a co-heir.

Meaning of partition

6. Partition accordingly means, manifesting or making known that unknown and unascertained fractional share, in which alone the heritable right of co-sharers arose when the succession fell in, and which was undetermined during the joint state.(*n*) It is concisely stated to be "splitting up of joint possession and assigning specific portions of the property to the several co-parceners." (*o*)

actual division

It should, however, be observed that *community of interest* is the common feature of joint families in both the schools. But in Bengal the titles of co-heirs being distinct the mere definement of shares by numerical division would not amount to partition as under the Mitàksharà, according to which co-parceners have one common title, they are, therefore, deemed *joint-tenants* in the one school, and *tenants-in-*

(*j*) Krishna v Govt, 12 C W N 453

(*k*) *Ante p* 88

(*l*) D B Ch. I, para 7

(*m*) D B, II, 27,

(*n*) D B, I, 8-9

(*o*) Ganga Sagar, *In the matter* of, 33 C W N 1190, 1192

i e, cessation of community of interest

common in the other Hence ascertainment of shares that are well defined from the commencement of title, would not amount to partition under the Dayabhaga, the real test being the cessation of the community of interest. Intention to separate must otherwise be proved (*p*)

Son does not acquire right by birth, nor can claim partition

7 As regards ancestral property, a son does not acquire an equal right during the father's life, so as to compel the father to make a partition of it against his will. (*q*) Partition of ancestral property can take place during the father's life only by his desire, and after the mother is past child-bearing. (*r*) On partition of ancestral property the father is entitled to two shares, and not to a share equal to that of a son as under the Mitakhshara, but he cannot claim more than a double share. (*s*)

Father's double share

Father's power of alienation,

But the father cannot alienate ancestral immoveable property, (*t*) excepting a small part, (*u*) nor a corrody. (*v*) He is competent to alienate the ancestral immoveable property only for the support of the family and not otherwise. (*w*)

making unequal distribution

Nor can the father make an unequal distribution of the ancestral property among his sons. (*x*)

Father's right

The father's estate in the ancestral immoveable property therefore, is similar to the widow's estate in the husband's property

Son's maintenance

Although a son cannot demand partition of the ancestral property as against the father, he is certainly entitled to maintenance out of the same. (*y*)

Father's share in son's self-acquisition

8. The father making a partition of the ancestral property during his life is entitled to a moiety of a son's self-acquired property, and two shares of any property acquired by a son with slight aid from the family funds, but principally through his personal exertion, that son getting two shares and the rest one share each. (*z*)

(*p*) Bata *v* Gopal, 5 C L J 417 (*q*) D B, ii, 8
(*r*) D B, ii, 7 (*s*) D B, ii, 20, 35-73 (*t*) D B, ii, 23.
(*u*) D B, ii, 24 (*v*) D B, ii, 25 (*w*) D B, ii, 26
(*x*) D B, ii, 76. (*y*) D B, ii, 23 (*z*) D B, ii, 65-72.

9. The father may make an unequal distribution of his self-acquired property among his sons, and retain as much as he chooses of such property, but not of ancestral property. (*a*)

Self acquired property of father

Dayabhaga law changed, how ?—While dealing with the texts (*b*) upon the authority of which the Mitákshará maintains the co-equal right of father and son in ancestral property, Jìmùtavàhana says that the intention of those texts is not to declare father and son joint owners so as to make their shares equal on partition, or to entitle a son to acquire equal right to ancestral property during the father's will, but the intention is that a grandson becomes entitled to a predeceased son's right, and that the father is not entitled to make an unequal distribution of such property among his sons, nor to alienate ancestral immoveable property except for the support of the family, and although he maintains that the father is entitled to two shares out of the ancestral property, if a partition be made by him, yet he admits that he is not entitled to take more than a double share out of the ancestral property.

Law as laid down by Dayabhaga

From what he says it is clear that the father is not absolute owner of the ancestral immoveable property: he is not entitled to take more than a double share on partition, and in other respects his right therein resembles the right of the Hindu widow in the husband's estate It is also clear that the sons and their wives and children are entitled to maintenance from the ancestral property which is declared the hereditary source of the maintenance of male descendants and their family, and therefore inalienable except for their maintenance. (*c*)

conclusions therefrom

Jìmùtavàhana then controverts the Mitákshará doctrine of incapacity of a co-parcener to alienate his undivided share without the consent of the other members of the joint family, and maintains that he is competent to deal with his share according to his pleasure without reference to his co-parceners,

Coparcener's right to alienate

(*a*) D B, 74 76.
(*b*) See ante p 314.
(*c*) D B, 11, 22-25

if he is otherwise authorized so to do. (*d*) The text requiring the consent of co-sharers is according to him, intended to prohibit transfers to a person of bad character the introduction of whom as a co-sharer would put the other members of the family to difficulty, it is not intended to invalidate an alienation. (*e*)

Father's power over self-acquired property

He then maintains that the father may transfer his self-acquired property in any way he pleases, without the concurrence of his sons, notwithstanding a text of law to the contrary, which must be construed to impose a moral duty, and not a legal restriction so as to invalidate an alienation actually made by the father, for, the nature of the father's absolute ownership in his self-acquired property,—or the capacity to deal with such property according to his pleasure, which is the legal incident of ownership,—cannot be altered by even a hundred texts like the one prohibiting alienation without the son's consent. (*f*)

The Courts and *Factum valet*

Herein the author of the Dáyabhága is said to lay down the doctrine of *Factum valet* (*g*)

By an improper extension of this doctrine of *Factum valet* our courts of justice have come to the conclusion that the father is the absolute owner of the ancestral property, so that there is no distinction between a father's self-acquired and ancestral property as regards his right of disposing of the same either by an act *inter vivos* or by a Will, and that a son has no right except that of maintenance. (*h*)

Reasons adduced by courts,

The process of reasoning by which this conclusion is arrived at, appears to be, that as the sons have no right to enforce partition of ancestral property, therefore they have no right to the property which is accordingly vested absolutely in the father, the father therefore is the owner of the property, and as such has the capacity to deal with the property according to his pleasure, and this capacity cannot be altered by the text restricting his power of alienation.

(*d*) D B, II, 27
(*e*) D B, II, 28.
(*f*) D B II, 29-30
(*g*) See *supra*, p 19
(*h*) Tagore v Tagore, 18 W R 359.

But this argument is fallacious, for it might as well be argued that a reversioner has no right to the property inherited from her husband by a Hindu widow during her life, the estate is absolutely vested in her, no part of it being vested in any body else, therefore she has the capacity to deal with it according to her pleasure, and this capacity cannot be altered by the texts restraining her from alienating the same.

criticised.

The two cases are exactly parallel, there is no difference between them in principle, and the error has been induced by not bearing in mind the broad distinction between self-acquired property and inherited property, in the latter case the nature of the right taken by an heir is defined and limited by the passsages of the law of inheritance conferring such right. As regards the ownership of self-acquired property, its nature and character can by no means be affected by the existence or non-existence of a son. But as regards inherited property, the restrictions and limitations on the father's power of disposal are of the same character as those imposed on the widow.

Sec 2—FATHER AND SON

Father's powers over ancestral immoveable property.

The texts on ancestral property—cited in the second chapter of the Dâyabhagâ in which *ancestral* property is dealt with, and the author's explanatory comments on them show that the father takes only a qualified and not an absolute estate in the same They are as follows,—

१। भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥

1. "Whatever land is acquired by the father's father, or a corrody or a chattel, therein the ownership of father and son is same"—Yâjnavalkya.

The author of the Dâyabhâga after having endeavoured to explain away this text, interprets it to intend that the father is not entitled to make an unequal distribution of ancestral property, as he can of his self-acquired property, (1) as appears from the following text of Vishnu,—

२। पिता चेत् पुत्रान् विभजेत् तस्य स्वेच्छा स्वयमुपात्तेऽर्थे, पितामहे तु पितापुत्रयोः तुल्यं स्वामित्वं ॥

Powers of father and son co-equal

2 "If a father separates his son from himself, his own will (regulates the distribution) in (respect of) his self-acquired property, but in the property inherited from the father's father, the ownership of father and son is equal"

(1) D B ii, 9 and 15

The author is constrained to admit that a father has no right to make an unequal distribution of such property, among his sons, because the ownership of father and son is equal. All that he maintains is, that these texts cannot be so construed as to mean that the father is entitled to the same share as a son, or that a son can enforce partition against his will (j)

३। मणिमुक्ताप्रवालानां सर्व्वस्य च पिता प्रभुः। स्थावरस्य समस्तस्य न पिता न पितामहः॥

Father's power over moveable property

3 "Of the gems, pearls and corals the father is master of even all, but of the entire immoveable property neither the father nor the father's father is so."—Yājnavalkya

The author says that this text refers to *ancestral* property, as the father's father is mentioned

The author maintains that according to this text, a father is *incompetent to alienate* immoveable property, excepting a small portion provided that such alienation is not incompatible with the maintenance of the family, the prohibition applies also to a corrody and a slave, but he can alienate the whole property, if the family cannot be supported without so doing (k)

Then the author maintains that when a person is otherwise legally competent to alienate, as for legal necessity affecting the family when the property is ancestral, and according to his pleasure when it is his self-acquired, the texts requiring consent of the co-parceners in the former case, and of the sons in the latter, should be held to impose only a moral obligation, but not to invalidate an alienation actually made without such consent; because *the nature of a thing cannot be altered by a hundred such texts* as those requiring consent of other persons by "thing" is meant capacity to alienate (l)

४। जीवद्-विभागे तु पिता गृह्णीयाद्ंशद्वयं स्वयं। वृहस्पते.।
द्वावंशौ प्रतिपद्येत विभजन्नात्मनः पिता। नारद.।

4 "But at a partition made in his lifetime, the father may take a couple of share".—Vrihaspati "The father making a partition may set apart two shares for himself" —Nārada

Fafather's share

The author cites these texts to support his position that the father is entitled to a double share out of the *ancestral* property, if he chooses to separate himself from his sons (m)

in son's self-acquired property

The author then goes on adducing arguments in support of his position that the father is entitled to a double share not only out of the ancestral property,—(n) but also out of a son's property acquired with the aid of family funds And he maintains that a father is entitled to a moiety of a son's self-acquired property without such aid

(j) D B ii, 16 and 17
(k) D B ii 22-26
(l) D B, ii, 27-31
(m) D B, ii, 35
(n) D B, ii, 36-64

In the course of the argument the following text of Vrihaspati is cited, –

५। द्रव्ये पितामहोपात्ते स्थावरे जङ्गमे तथा।
समम् अंशित्वम् आख्यात पितु. पुत्रस्य चैव हि॥

Father's right in grand father's property

5 "In property acquired by the paternal grandfather, immoveable likewise moveable, the parcenership of father and son is declared same" Vrihaspati

The author says the meaning of this text is not that the shares (of father and son) must be equal, but that the parcenership is same *i e*, equal, so *the father cannot make an unequal distribution at his pleasure* as in his self acquired property (*o*)

Then the author again cites the above text of Vishnu (*p*) and explains it thus,—

and in self-acquired property

"The meaning of this text is,—In the case of his self-acquired property whatever the father desires to reserve whether a moiety or two shares or three, all that is permitted to him by the law, *but not so also in the ancestral property*" (*q*)

Conclusion.

After referring to other arguments (*r*) the author sets forth his conclusion thus,—

"Therefore the meaning of the texts is, that a father himself may take a double share of the property descended to him in the regular course of Inheritance from the paternal ancestors, as well as of the property acquired by a son he is *not entitled to more than two shares even if desirous*. But of his self-acquired property he may take as much as he pleases" (*s*)

It is difficult to understand how after a persual of the above passages of the Dayabhagá, specially the last, can it reasonably be said that there is no distinction between the ancestral and self acquired properties in Bengal as regards the father's power of disposal over the same

Daya admits son's right over father's ancestral property

The author of the Dayabhaga, has, notwithstanding his endeavour to explain away the texts which declare equal ownership of father and son in ancestral property and to indicate at one place that the ownership thereof is exclusively vested in the father, has, however, been constrained, by reason of the above texts, to admit some right of sons therein, by virtue of which the father's right is qualified, to such an extent that he can neither alienate nor make unequal distribution according to his pleasure, nor appropriate absolutely more than two shares. All this is abundantly clear from the above passages

It is inexplicable how in 1831 long after the publication of Colebrooke's translation of the Dàyabhaga the Judges of the Sudder Dewany could return to the Supreme Court the following certificate,—

The view held by Sudder Dewany Adawlut,

"On mature consideration of the points referred to us, we are unanimously of opinion that the only dorctine that can be

(*o*) D B, ii, 5
(*p*) Text No. 2.
(*q*) D B, ii, 65
(*r*) D B, ii 65-72.
(*s*) D B, ii, 73

held by the Sudder Dewany Adawlut, consistently with the decisions of the Court and the customs and usages of the people, is, that a Hindu, who has sons, can sell, give, or pledge without their consent, immoveable ancestral property, situated in the province of Bengal, and that without the consent of the sons, he can, by will, prevent, alter or affect their succession to such property" (t)

though erroneous,

We are not aware what evidence there was of the customs and usages of the people, referred to by the Judges But the people of this country strenaciously adhere to their customs and usages, and they are still found to believe that there is a distinction between ancestral and self-acquired properties as regards father's power of alienation, such as is apparent from the Dayabhaga itself, and that is conducive to the welfare and well-being of their society, notwithstanding the contrary view of the Courts

is followed

But it must be borne in mind that the above view propounded by the Judge of the Sudder Dewany has since been accepted and followed, and is now the law on the subject in the Courts of Justice.

When father is under undue influence.

Hardship when old father merged in young wife —Whatever may be the theoretical view of the father's and the son's right, practically there is no distinction between a Mitákshara and a Dayabhaga joint family as regards the actual enjoyment of the family property by sons As a man cannot have a better friend than his own father, the above change of law does not prejudicially affect sons in Bengal in the majority of cases. But there are a few instances in which a great wrong is done to sons by fathers under the undue influence of their young wives, to prevent which the restriction on the father's power over ancestral property is imposed by Hindu law which the Courts of Justice ought to enforce in order to remedy the gross iniquity unjustly perpetrated by uxorious fathers on their innocent sons

It is worthy of remark that whatever view of Hindu law may be taken by the Courts of Justice, the people are governed by their old customs, habits and manners It is a notorious fact that Hindus are still married by their fathers, at a time when they cannot, and do not, earn their own maintenance, and that the family property is looked upon as the hereditary source of the maintenance of the sons and their wives and children It sometimes happens that the first wife of a man dies after presenting him several sons, the man then marries a girl of tender age, as grown-up maidens are rare among Hindus The children by the deceased wife look upon their stepmother with jealousy, and presuming upon the unusual affection naturally felt and shown by the father for his deceased wife's children, as he is to them both father and mother, they do sometimes illtreat and even insult her, when she is young This ill treatment and insult make deep impression on her young mind, and she takes her revenge when she has by her charms

(t) Mayne § 372

of youth gained complete influence and ascendency over her husband who must be considerably older than herself,—by alienating the heart of her husband from them, more especially if she has herself become mother of children And all this ultimately results in a deed or a Will whereby the sons by the deceased wife are either disinherited or cut off with a trifle As this iniquity is the consequence af the erroneous view of the Dayabhaga law, the Courts of justice are called upon to remove the mischief introduced by them, which they may very easily and justly do, by setting aside the perpetration of the iniquity by declaring the transaction invalid on the ground of the same being in excess of the father's power over ancestral property, and also on the ground of undue influence, which is usually exercised by wives over husbands considerably older than themselves, and of which a typical instance is, according to popular notion, depicted by the great Hindu bard Valmiki in the well-known Ramayana. The exile of Prince Rama, the eldest and beloved son by the senior wife, to live in forests like an ascetic for a period of fourteen years, was ordered by his father, the King Dasaratha, at the instance of a junior wife, although his love for prince Rama was so great that he died of the grief of the separation from that prince who in obedience to his father's desire did piously and cheerfully leave the palace, the instant he was informed of it, and went away for carrying it out as a filial duty And the reason assigned for this extraordinary conduct of the king is imagined to be, that is love for the prince was *equal* to that of life, but he loved the prince's stepmother the younger queen *more* than his own life. This is embodied in the following popular maxim—

Court's duty

Story of Rama's exile.

वृद्धस्य तरुणी भार्या प्राणेभ्योऽपि गरीयसी ।

which means,—"An old man's young wife is dearer to him than even his own life"

Although the prince's exile and the king's death were really due to the king's high sense of moral obligation for the fulfilment of a promise which had been made by him to grant two requests of the queen as a reward for her valuable services during his illness, and present a high ideal of the sacredness of promises, yet the popular estimate of the king's conduct is the effect of what is usually observed in practice, namely, the pernicious influeuce of young wives over their old husbands

If the Courts of justice do, having regard to the character of the people, take this undoubted undue influence as undue influence in the legal sense, they would certainly do justice in many hard cases owing their origin to a misapprehension of the law, which appears to have been caused by Colebrooke's mis-translation of some passages of the Dayabhaga, bearing on the subject

NOTE

It is surprising as to how the Sudder Dewany Judges could, after perusal of the second chapter of the Dàyabhàga, give the certificate cited at p 597 *supra* Probably it owed its origin to Colebrooke's mis-translation of some passages such as the following—

View of Sudder Dewany, on father's right criticised

तदेवमुक्तप्रबन्धेन यत्र ज्येष्ठभ्रातुरेव पितृधने भागद्वयं कथं तत्रजनकस्य दानविक्रयपरित्यागक्षमस्य पितामहधनसम्बन्धमूलस्य अतिगुरोः पितुरेव स्वपितृधने भागद्वयं न सम्भवति ॥ Dayabhaga, ii, 45—

of which the following is literal translation,—"Hence when thus by the aforesaid reasoning even the eldest brother is entitled to two shares of the father's estate (at a partition between brothers) why should not then the father—who is the progenitor (of his sons), who is competent to give, sell or abandon (his sons), who is the root of the (son's) connexion with the father's father's property, and who is (as such) highly venerable,—be entitled to two shares of his own father's wealth (at a partition between himself and his sons)?"

The words within the parentheses are not in the original.

The following is Colebrooke's translation of the above passage,—"By the reasoning thus set forth, if the elder brother have two shares of the father's estate, how should the highly venerable father being the natural parent *of the brothers* and competent to sell, give or abandon *the property*, and being the root of all connection with the grandfather's estate, be not entitled, in like circumstances, to a double portion of his own father's estate?"

The italicized words are not in the original. The interpolation of the words "*the property*" is erroneous and renders the passage contradictory to what has been laid down by the author in the preceding paragraphs 20-25. In fact, the argument itself, put forward in the passage, would be ridiculous and a contradiction in terms according to Colebrooke's translation to say that the father can alienate the property according to his pleasure, and to argue that he is entitled to a double share, would be simply absurd. The author really means what is declared by Vasishtha in the text cited at p. 187 *ante*, namely, that the father is competent to give, sell or disown his sons, and not the ancestral property. By this erroneous translation, the Judges were misled *into thinking that the father is competent to alienate ancestral property* according to his pleasure, as is stated by them in the Certificate, a proposition not dreamed by the author of the Dâyabhâga.

Sec. 3—NATURE OF JOINT FAMILY

Joint family in Bengal.—Although the joint family system which is the normal condition of Hindu society, prevails in Bengal in the same manner as in other provinces, and although the real difference between the two schools with respect to ancestral property, is, that the author of the Dâyabhâga, with a view to prevent the growth of disobedience in sons, deprived the sons of the right of enforcing partition against the father's will, and further provided two shares for the father in case *he* made a partition during his life, while at the same time the author deprived the father of the power of capriciously and whimsically doing any injustice

Position of father in joint family.

to the sons by declaring him incompetent to alienate, or to make unequal distribution of, the ancestral property, or to take more than a double share on partition, yet, according to the view taken by the Courts of justice with respect to ancestral property, there cannot be a real joint family consisting of father and sons during the father's life-time, inasmuch as joint property which is the essence of the conception of joint family, would be wanting to make them joint (*u*) Nor can there be, according to the modern view, a real partition during the father's life, for, it must now mean neither more nor less than a gift of the property by the father to his sons (*v*)

Position of father in joint family

Case-law

So the position of affairs has become anomalous, owing to the divergence between actual practice and legal theory. But the evil consequences that might otherwise arise, are in the majority of instances prevented by the natural love and affection of a father for his sons, the regard to which appears to have induced the Courts of justice to confer on fathers rights not accorded to them by the commentaries on Hindu law

Father's right over son's self-acquired property

But when a son acquires property with or without the aid of the family property, then a father and his sons may be joint as regards such property For, the father is, according to the Dâyabhâga, entitled to a moiety of his son's acquisitions even when made without any aid of the family property, and two shares of such property when acquired with the aid of his estate, the acquirer being entitled to two shares, and each of the other sons to one share. (*w*) The right of the other sons in the latter case is the same, whether partition is made during the lifetime of the father or after his death The latter rule can be accounted for only on the assumption of son's interest in ancestral property of the family. But the Calcutta High Court, without referring to any authority, has made a sweeping remark, namely, "under the Dâyabhâga there cannot be a joint family consisting of the father and the sons,

(*u*) Gouranga *v* Mohendra, 46 C L J 175 1927 C 776
(*v*) *See* Sarada *v* Mahananda, 31 C 448
(*w*) Lal *v* Swarna, 13 C W. N 1133
(*x*) Gouranga *v* Mohendra, 46 C L J 175 1927 C 776.

because so long as the father is alive he is the master." (x) And it is further held "The sons may acquire separate properties of their own, but they have no concern whatsoever with the joint family property if any property can be so called during the life-time of the father."

its enforcement necessitates partition

The father, however, must, if he wishes to take a share of his son's acquisitions, be willing to divide his property, if any, whether ancestral or self-acquired, according to the rules laid down in the Dàyabhàga, which are now to be regarded as directory in other respects It should be borne in mind that the question of shares arises only when there is disagreement, and in consequence disruption of the family by partition follows.

It is after the death of the father, that the sons may, agreeably to the modern view of ancestral property, really become members of a joint family According to the theory of the Bengal School they become tenants-in-common, and not joint-tenants, in respect of the estate inherited by them from their father, but still their interests remain common as long as the family continues joint, *community of interest* being the criterion of jointness in both the schools The agreement forming the foundation of Re-union, proves the true nature and character of joint family property under the Bengal school notwithstanding the title of the co-heirs being in severalty, namely,—"What is thine is mine, and what is mine is thine"

Elements of joint family same as in Mit

As regards what constitutes joint property, the enjoyment of the same by the members, the management of the same, the manager's powers and the presumptions, the law appears generally to be the same in the Bengal School as under the Mitàksharà. (y)

All view of Daya law on acquisition in name of member

The Allahabad High Court in a case, governed by the Dàyabhàga School, has held that the presumption of the Mitàksharà that acquisitions made in the names of individual members during their jointness are joint, is not applicable to a joint family under the Dàyabhàga School. It is incumbent on a person governed by the Bengal School to prove the

(y) But *see* 31 C 448, and Nagendra *v* Amar, 7 C.W N 725

existence of an original nucleus with the aid of which the property claimed as joint has been acquired (z)

Joint property and self-acquisitions

Joint acquisition and throwing into common stock — There cannot be any doubt that joint families do exist in Bengal consisting of father and sons, though it is held otherwise by the Court (a) The view taken by the Courts, of ancestral property, which is contrary to the true intent of the Dáyabhága, has made it almost impossible that there should be a joint family of father and sons, unless they have joint property acquired otherwise than by inheritance, although this view is contrary to the actual usages prevailing among the Hindus of Bengal But the view taken in some recent cases by the Judges, of what is really either joint acquisition, or thrown into the common stock, under all the schools of Hindu law, is most anomalous and is likely to put an end to the joint family system in Bengal. A father purchases a piece of bare land by paying two hundred rupees as its price, one of the sons builds a house thereon apparently with the father's acquiescence, if not consent, at the expense of two thousand rupees out of his self-acquired money, and the house is treated and used as the joint family dwelling house of the father and all the sons in these circumstances there cannot be any doubt that under the principles of Hindu law of joint families, the father as well as the sons would be entitled to the property, on the grounds of its being joint acquisition of the father and the son and of its being thrown into the common stock by reason of the enjoyment by all the members of the joint family as *their* family dwelling-house and joint property The real test being the hopes and expectations raised by the conduct and treatment of the members by whom the property was acquired. But the learned judges decided the case as if it was one between strangers, without at all taking into consideration the law and usages of Hindus constituting a joint family. (b)

Improvements on father's property

(z) Gobinda Chandra Das v Radha, 31 A 477

(a) Gouranga v Mohendra, *supra*

(b) Bejay v Ashu, 13 C W N 396, purporting to follow Dharmadas v Amulya, 33 C 1119 10 C W N 765 3 C L J 616 which did not decide the question of title between the father and the son

In the case *Dharmadas* v *Amulya (c)* what was held is, that a son building some rooms in the ancestral dwelling house with the father's consent, is not on that account entitled to reside in the house against the father's wishes when the peace of the family was disturbed by continuous family feuds caused by his two wives, which could be restored only by his leaving the house.

P C on blending of acquisitions between two brothers

In the case of brothers, the Privy Council has held that if a member of a joint family blends his self-acquired property with that of the joint family either by bringing his self-acquired property into a joint family account (*d*) or by bringing joint family property into his separate account, the effect is that all the property so blended becomes joint family property. (*e*) But clear intention to waive his separate rights must be established and will not be inferred from acts done from kindness and affection (*f*)

Sec. 4—PARTITION

Partition,

Partition when and by whom made—Real partition may take place only after the father's death It may take place at the instance of a single co-sharer (*g*) who has an interest in the family property according to the rules of succession, that apply to all cases without any such distinction as there is, under the Mitàksharà, based upon jointness, separation or re-union.

who can claim it

If the owner dies leaving male issue surviving, then his son, a predeceased son's son and a great-grandson whose father and grandfather are both predeceased, are entitled to the estate and may claim a partition.

Partition amongst the male descendants is to be made *per stirpes*, and not *per capita*.

Maiden Sister—When partition is made by sons after the death of their father, their maiden sister is not entitled to a quarter share as in the Mitàksharà School, but only to maintenance until her marriage, and to the expenses of her

Maiden sister not entitled to share

(*c*) *See foot note* (*b*) above

(*d*) Suraj Narain *v* Ratan Lal, 44 I A. 201 · 26 C L J 257

(*e*) Rajani *v* Jagamohan, 50 I A. 173 50 Cal 439 : 73 I C 252

(*f*) Rajani *v* Bashiram, 1929 C 636.

(*g*) D. B I, 35

marriage, which cannot exceed a quarter share where the property is small. (*h*)

Mother's share

Mother's share —When the sons left by a man are all full brothers, and their mother is alive, then if partition is made by them, she is entitled to a share equal to that of a son. (*i*) She is not entitled to any share so long as there is no partition ; nor can she claim a share if the partition suit is withdrawn ; and she is not necessary party in a suit for partition though she may be a party to watch the proceeding. (*j*) Her right when partition takes places, "is enforceable not only as against the sons, and as regards so much only of the joint property as at the date of partition is in the hands of the sons, but also as against any person deriving title from any of the sons and as regards the property to which they may have so derived title, subject to certain qualifications and limitations" (*k*)

The mother's share is liable to be reduced if she has received *stridhan* property from her husband or father-in-law, in the same way as under the Mitâkshara But if her *stridhan* so received exceeds what is receivable by her as her share, then she does not get any share, but retains her *stridhan*. But the stepmother, if any, is not entitled to any share, but to maintenance only. (*l*)

A mother who has inherited the share of a son as his heir is nevertheless entitled to another share on partition by her surviving sons, at which she gets one share in her own right, and another as heiress of her deceased son (*m*)

But if the husband by his Will makes express gift of his estate to his sons in such a manner as to distribute his estate among the sons, and provide maintenance only to the mother of the sons, then the mother cannot claim a share on actual division of the estate by her sons. When, however, there is no express gift to the sons by the husband's Will which merely directs the executrix to divide the testator's properties

(*h*) *See ante p* 525

(*i*) Baldeo *v* Sorojini, 57 C 597 34 C W N 160 : 1929 C 697

(*j*) *Ibid*

(*k*) Jogendra *v* Fulkumari, 27 C. 77 : 4 C.W N 25.

(*l*) *See ante p.* 521

(*m*) Poorendra *v* Sm Hemangini 36 C 75 12 C W N. 1004

among his sons in equal shares, the direction was not construed to operate as an *express gift*, but to intend postponement of partition until attainment by the youngest son of his 21st year. (*n*)

Nature of her right,

Nature of mother's right in the share—The share which the mother obtains appears to become her *stridhan.* The nature and extent of the mother's right in such share are not expressly stated in the Dàyabhàga But regard being had to the fact that her share may consist in part of her *stridhan*, and to the rule of the Hindu law that सम स्यात् अश्रुतत्वात् विशेषस्य "Equality is the rule where no distinction is expressed," it appears to follow that she has the same sort of right in it, as her sons have in their shares. She does undoubtedly acquire an interest in the share, and in the absence of any limitation, express or necessarily implied the presumption is that such interest amounts to absolute ownership. The Mitàksharà also supports this view (*o*) Any other view must necessitate the introduction of principles and distinctions unknown to Hindu law, and create considerable difficulty The property is not inherited by her, and there cannot therefore be a reversioner as regards it. The share again may fall short of her maintenance, and what should be her rights then? Is her interest a life interest, or a widow's estate, or an absolute estate? There was no authoritative decision on the point But there were *obiter dicta* in several cases, which appear to be against the mother's absolute right, and to introduce the estate of vested remainder in the sons.

similar to widow's estate

The question has at last been settled by the decision of the High Court in the case of *Sorolah* v *Bhubun.* (*p*) The mother's right to the share has been held to be similar to the widow's estate, and as regards succession after the mother's death, to the share if not consumed by her, the sons from whom she received the same are declared to have a vested remainder, so that they or their legal representatives will get

(*n*) *Ibid* 36 C 75, Kishori *v* Moni, 12 C. 165, Sorolah *v* Bhubun, 15 C 292 Debendra *v* Brojendra, 17 C. 886.

(*o*) *See supra p* 523

(*p*) 15 C. 292.

the share equally, so this is more anomalous than the *widow's estate.* (q)

This is another instance in which woman's right has unjustly been curtailed, by reason of a mistaken view of *woman's property.*

Father's mother's share

Father's mother's share—The paternal grandmother is also entitled to a share at a partition by her grandsons. (r)

Father's wives' maintenance,

Maintenance of father's wives—When the sons are not full brothers, then on partition between them the father's wives are entitled only to maintenance, and not to any share. Their maintenance is a charge upon the whole estate. But it has been held by the Calcutta High Court and the Privy Council in the case of *Srimati Hemangini* v. *Kedar Nath,* (s) in which a person left three sons and one widow who was the mother of only one of these sons, and there was a partition suit between them ending in a decree,—that the widow's maintenance *after* partition becomes a charge on the share of her son, and does no longer remain so on the entire estate. (t) This rule will operate with great hardship, in cases where the property is not so large as it was in the case in which the above rule has been laid down

a charge on her son's share

Others entitled to maintenance

Other persons entitled to maintenance—There are some other persons that are entitled to maintenance, such as dependent members of the family They will be mentioned later on in Chapter XI on Maintenance Sec 3.

Sec. 5—ADVERSE POSSESSION *

Adverse possession

In the case of *Ayenennssa Bibi* v. *Sheik Isuf* (u) which has been followed in the case of *Gobinda Chandra Bhattacharjee* v. *Upendra Chandra,* (v) it has been held that, "inorder to establish adverse possession by one tenant-in-common against his co-tenants there mustbe exclusion or ouster and the possession subsequent to that must be for the statutory period * * * what is sufficient evidence of exclusion must depend upon

(q) See also Tripura v Dakshina, 11 C W N, 698 5 C L J 316
(r) Purna v Sarojini 31 C 1065, *ante p* 524
(s) 13 C 336, P C in 16 C 758 16 I A 115
(t) See Bishen v Mansa 23 I C 536 47 P R 1914 60 P.L.R 1914
**See ante p* 489-490, 540
(u) 16 C W N 849, 852
(v) 47 C. 274, 278 for principle see Hasim v. Abjal Khan 40 CL J 30

the circumstances of each case Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession but such non-participation or non-possession may in the circumstances of a particular case, amount to an adverse possession. Regard must be had to all the circumstances and a most important element is the length of time."

Possession of one tenant-in-common cannot be adverse to the other unless there was *ouster*, (*w*) or an equivalent of an ouster (*x*), and it must be to the knowledge of the co-sharer. (*y*) Mere exclusive possession without more by a co-sharer does not constitute ouster (*z*) The mere fact of living apart without enjoying any benefit out of the joint estate is no proof that there was the intention to exclude (*a*) It is a question of fact, (*b*) and the burden of proof is on him who claims title by adeverse possession (*c*)

(*w*) Gobindrao *v* Rajabai, 35 C W N 438 P C 53 C L J 313
(*x*) Panchanan *v* Surendra, 50 C L J 382 1930 C 180
(*y*) Maulvi Abdul *v* Mohan, 34 C W N 246, *See* Art 127 Limt Act
(*z*) Kunda *v* Madan, 51 C L J 424, Hardit *v* Gurmukh, 28 C I J 437 20 Bom L R 1064 47 I C 626
(*a*) Radhoba *v* Aburao, 53 B 699 33 C W N 1006, 1014 50 C I J 135
(*b*) Panchanan *v* Surendra, *supra*
(*c*) Vaiyapuri *v* Subramania, 1929 M 27

CHAPTER IX
DA'YABHA'GA SUCCESSION
Sec. 1—GENERAL RULES OF SUCCESSION

Per Stirpes, right of representation.—The male issue take *per stirpes*, and as regards them, the *right of representation* obtains down to the third degree. (*a*)

But the sons of different daughters, as well as all collateral relations of equal degrees, take *per capita*. In their case the right of representation does not apply.

Birth before succession opens.—A relation claiming to be an heir must be in existence, at the time when the succession opens: subsequent birth of a nearer heir cannot have the effect of divesting the estate already vested in a more distant heir. (*b*)

Female heirs.—The nature and incidents of the estate taken by the female heirs in the property inherited by them from their male relations, shall be discussed in detail, later on.

The preference based upon whole blood—when two relations are in other respects equal, appears to apply to all collateral relations according to the Dàyabhága. But as the principle of propinquity is entirely ignored and the doctrine of spiritual benefit is deemed in modern decisions to be the sole criterion for deciding every question relating to inheirtance in the Bengal School, it has accordingly been held (*c*) that a half-sister's son is entitled to inherit together with a full-sister's son, there being no difference in the amount of spiritual benefit conferred by them respectively. But see Srikrishna's recapitulation (*d*) showing that relations of the whole-blood should be preferred,—a proposition based upon express texts of the Smriti. (*e*) Upon the authority of this decision, the preference on this ground is to be confined to the nine collaterals among the first class Dáyabhága *sapindas*, namely, a brother, an uncle, and grand-uncle, and their descendants, it will not apply to any other relations.

(*a*) *See ante* p 557 "Succession *per stirpes* and *per capita*" and "Right of representation."
(*b*) Kalidas *v* Krishan, 2 B L R (F B) 103
(*c*) Bhola *v* Rakhal, 11 C 69 (*d*) *Infra* p 624 etc
(*e*) D B xi *v* 10, see *supra* p 580 and D T xi, (6)

Re-union after separation is another cause for preference. It proves that the doctrine or spiritual benefit is not the sole criterion. This subject has already been dealt with. (*f*)

The effect of the operation of these two grounds of preference in the cases of brothers, nephews and uncles is as follows —a re-united brother or nephew or uncle, of the half-blood, respectively, succeeds together with a brother or a nephew on an uncle, of the whole-blood, if the latter is not re-united the ground of one's being a relation of the whole blood, is counterbalanced by that of the other's being re-united

But the preference has been extended by the case-law to sons of re-united co-parceners, which appears to be overruled by the Privy Council. (*g*)

There is an express text laying down the joint succession of a full-brother and a half-brother to the immovable property left by an undivided brother living jointly with them, the text is cited in the Dáyabhága which explains the law accordingly. (*h*) A clear text of the Smriti cannot but be followed, but a Full Bench rejected the authority of both the texts and the commentary, because they seemed to the learned Judges to be inconsistent with the author's principle of spiritual benefit (*i*)

The inheritance of the preceptor, a pupil and a fellow student—has under the altered state of society become almost a thing of the past. It must not, however, be thought that every one may become heirs to every other, nor that the *Diksha-guru* can come under the term preceptor.

The ralation between the preceptor and a pupil was a very strong one in old times, when a pupil had to live with the preceptor as a member of his family, and to procure the maintenance of himself and his preceptor by begging alms, a practice now found in Burma, which is calculated to drive out all vanity and conceit from the minds of boys

(*f*) *See pp*
(*h*) Ch xi ; is 35 and 36
(*g*) *See supra pp.* 587-589
(*i*) Rajkishore *v* Gobind, I C 27, *see ante pp* 35-36

Sec. 2—ORDER OF SUCCESSION

In the Bengal School the order of succession is worked out mainly by application of two principles, namely, (1) Propinquity, and (2) Capacity for conferring spiritual benefit (the relative amount of which is estimated in each case by the author of the Dàyabhaga, himself.) (*j*)

The order of succession to the estate of a male,—according to the Dàyabhàga of Jimutavàhana, and as explained in Srikrishna's commentary on the Dàyabhàga, and also in his treatise on the order of succession called Dáya-Krama-Sangraha (omitting therefrom the interpolated passages not found in all copies) and according to the traditional interpretation of the Dàyabhàga which alone is regarded by the people of Bengal as the authority by which they are governed in matters of inheritance,—is as follows —

Order of succession

1-3. Son, grandson and great-grandson in the same manner as under the Mitàkshara. (*k*)

Illegitimate son.—*See pp* 331-336 *supra.*

4 Widow—She must be chaste in order to inherit her husband's estate. (*l*)

5. Daughter (1) first **maiden** (2) and then **married and having or likely to have male issue**, a widowed sonless daughter (*m*) a barren daughter, and a daughter who gives birth to female children only, are excluded from inheritance There is a reported case of the Calcutta High Court, (*n*) in which it was held that a widowed sonless daughter may remarry under the Widow Re-marriage Act, (*o*) and hence there is likelihood of son being born to her, consequently a sonless widowed daughter was held to inherit her father's property. Their Lordship's attention was at first not drawn

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(*j*) D T, xi, 63

(*k*) *See supra p* 558, As to the right of inheritance of an illegitimate son of a Sudra *see supra pp.* 330-336, Rajani *v* Nitai, 48 C 643 32 C L J 333 25 C W N 433 63 I C 50 F B, *supra p* 525

(*l*) Khettermoni *v* Kadambini, 16 C W N 964, Rani *v* Golapi, 34 C W N 648, 650-1, *see pp.* 559-561 *supra*

(*m*) Mokunda Lal *v.* Mon Mohini, 19 C W N 472.

(*n*) Bimola *v.* Dangoo, 19 W R 189.

(*o*) Act XV of 1856 B C.

to Section 4 of the said Act. Subsequently the wrong view of the law has been corrected by a review of the judgment. (*p*)

The daughters take a widow's estate as has already been explained under the Mitàksharà. (*q*) It has been held that an unchaste daughter is, according to the Dáyabhagà, excluded from inheritance. (*r*)

6 **Daughter's son** Daughter's sons take *per capita*, and not *per stirpes*.

The position of **daughter's son's son** has been discussed by the Calcutta High Court (*s*) and now held that he is not an heir. (*t*)

Having regard to what is stated by the author of the Dáyabhága with respect to the succession of the **widowed sonless and the like daughters** to the mother's *Stridhan* property, the exclusion of the said daughters from the inheritance of the father's estate does not appear to be absolute, but only relative, and accordingly **such daughters** should be placed after the daughter's son, following the analogy of the order of succession to *Stridhan*.

7. **Father.**

8 **Mother** but not the stepmother. (*u*) It has been held that an unchaste mother is excluded from inheritance. (*v*)

9. **Brother** A full-brother is entitled to take to the exclusion of a half-brother ; and this distinction applies to all collaterals such as the brother's son, paternal uncle and the like.

10 **Brother's son.** It has been held that a brother's son whose father was re-united with the uncle, and who used to live jointly with his uncle after his father's death, but who himself cannot be deemed re-united—is nevertheless entitled to inherit from the uncle in preference to a separated nephew. (*w*)

(*p*) *See* Order No 467 dated 28th March 1874 in connection with Spl Appeal No 223 of 1872

(*q*) *Supra p* 562

(*r*) Ramananda *v* Rai Kishori, 22 C 347, Rajabala *v* Shyama, 22 C W N 566 *But see contra supra p* 563

(*s*) Radha *v* Gopal, 24 C W N 316 31 C L J 81

(*t*) Nepaldas *v* Probhas, 30 C W N 357 42 C L J, 221

(*u*) D B iii, 2, 30 and XI, 63

(*v*) Ram *v* Durga, 4 C 550, Trailokhyanath *v* Radhasundari, 23 C W.N. 970. 30 C L J 235 But *see contra supra p* 563

(*w*) Akshay *v* Hari, 35 C 721

11. Brother's son's son

12 Father's daughter's son It has been held that the half-sister's son is entitled to take together with the full-sister's son,—the capacity for spiritual benefit being assumed as the sole test. (*x*) A sister's son is held to be a preferential heir to a step-brother (*y*) of Stridhana property.

13. Paternal grandfather. 14. Paternal grandmother. 15. Paternal uncle 16 Paternal uncle's son 17. Paternal uncle's son's son. 18 Paternal grandfather's daughter's son [The right of paternal grandfather's daughter's son's son has been discussed and left open. (*z*)

19. Paternal great-grandfather. 20 Paternal great-grandmother. 21. Paternal granduncle 22 His son 23. His son's son. 24. Paternal great-grandfather's daughter's son

1ST NOTE.—The Dáyabhága law of succession has been modified by judicial decisions, and the following eight cognates have (for the present) been shuffled in here before the maternal relations, namely, (1) son's daughter's son, (2) grandson's daughter's son, (3) brother's daughter's son, (4) nephew's daughter's son, (5) paternal uncle's daughter's son, (6) paternal uncle's son's daughter's son, (7) paternal granduncle's daughter's son, (*a*) and (8) granduncle's son's daughter's son. But this should be taken as the present law. The following near maternal relations are dearer to the Hindus than those that used to be thought no heirs at all.

25 Maternal grandfather 26 Maternal uncle. 27. Maternal uncle's son 28 Maternal uncle's son's son 29 Mother's sister's son

2ND NOTE.—Consistently with the above modification under the judicial decisions the following reciprocal maternal relations are to be placed here, namely, (1) the maternal great-grandfather, (2) his son, (3) grandson, (4) great-grandson, (5) and daughter's son, (6) maternal great-great-grandfather, (7) his son, (8) grandson, (9) great-grandson, (10) and daughter's

(*x*) Bhola *v* Rakhal, 11 C 59, *But see* Srikrishna's Recapitulation *infra p* 624
(*y*) Sukhamayee *v* Manoranjan, 89 I C 827
(*z*) Radha *v* Gopal, 24 C W N 316 31 C L J 81
(*a*) Kedar *v* Haridas, 43 C I 19 C W N 1181, Kailash *v* Karuna 18 C W N 477, 19 I C 677

son, [but not his son (b)] and probably also (11-16) grandsons by daughter, of the son and the grandson of the three maternal ancestors To postpone the Sakulyas to these too remote maternal relations, however, would be repugnant to the feelings of the Hindus and also erroneous

Sakulyas,

30-62 Sakulyas,—they include the 4th, 5th and 6th descendants in the male line, if any, of the *propositus* himself, and of his father, paternal grandfather and paternal great-grandfather, and they also include the three remoter paternal ancestors in the male line, namely the paternal great-grandfather's father, grandfather and great-grandfather, and also six descendants in the male line, of each of these ancestors,—altogether thirty-three relations

The order of succession amongst the Sakulyas appears to be that the descendants of the *propositus* come first, and then the descendants of his father, and then those of the next nearest paternal ancestor, and so on, and that amongst the descendants of the same ancestor, the nearest in degree takes in preference to the more remote.

Samanodakas

63-208 Samanodakas—They are the same as under the Mitákshará. (c)

Remaining Bandhus

The remaining Bandhus—such as the eight daughter's sons, and the seventeen maternal relations set forth in the two Notes, as well as the father's and the mother's maternal relations, and so forth, in the same manner as under the Mitákshará, then

Preceptor of the Vedas, Pupil and Fellow-student in their order,—then

Distant Sagotras of the same village,—then

Samana pravaras of the same village,—then

Brahmanas of the same village,—lastly

The King—is the *ultima hæres*, but not of the estate of a Bráhmana, which goes to the members of his caste.

(b) Sambhu v. Kartic, 44 C.L J. 470 1927 C. 11. (c) See ante p 568.

Sec 3—ORDER UNDER MITAKSHARA AND DAYABHAGA

Heirs under Mitakshara and Dayabhaga.—There is no difference between the two schools as to the persons that are heirs. To the question who are heirs? the answer is the same in both the schools, namely, relations, agnate and cognate, are heirs. But there is some difference as to the *order of succession.*

Heirs under Mit and Daya compared

The term *gotraja* in Yâjnavalkya's text (*d*) according to the Mitâksharâ, equivalent to *sagotra* or a member of the same *gotra* with the *propositus* But the Dâyabhâga explains the word to include cognates descended from a member of the *gotra*, such as the daughter's son, the sister's son, the father's sister's son and so forth. And the word *Bandhu* which, according to the Mitâksharâ, signifies all cognates, is restricted by the Dâyabhâga to cognate relations connected through the mother, the father's mother, and so forth Thus Jimûta-vahana controverts the interpretation put on the texts of Yâjnavalkya (*e*) by the Mitâkshara which postpones all cognates save and except the daughter's son, to agnates comprised by the terms *sapinda* and *samânodaka.*

The author of the Dâyabhâga follows the analogy of the succession of the descendants of the *propositus* himself, in working out the order of succession among the three paternal ancestor's descendants, and introduces their great-grandsons in the male line and their daughter's son, just after their son's son respectively Thus, in addition to the daughter's son of the *propositus*, three other cognates are introduced, namely, the son of the daughter of the father, of the grandfather, and of the great-grandfather. And then reciprocally to these four cognate descendants of the family, four maternal relations are intended to be introduced by the author of the Dayabhaga, namely, Maternal grandfather reciprocally to daughter's son,
Maternal uncle reciprocally to sister's son,
Maternal uncle's son reciprocally to father's sister's son, and

(*d*) *Supra p* 552

(*e*) *Supra p* 552

Said uncle's son's son reciprocally to grandfather's sister's son.

It should be observed that the maternal uncle and his son, and his son's son are the maternal relations who confer the greatest amount of spiritual benefit on the three maternal ancestors of the deceased, to wohm he is said to be bound to offer *pindas*. But nevertheless the maternal grandfather must be placed before them, for, it is through him that they are related to the deceased, and they cannot confer any spiritual benefit so long as he is alive. The mother's sister's son may also be placed here by reason of his conferring special spiritual benefit on the maternal grandfather.

Subject to this modification, the author of the Dàyabhàga intended to leave the order of succession such as it is according to the Mitàkshàra which also is respected by the Bengal School as of high authority.

From a perusal of the sixth section of Chapter XI of the Dàyabhàga it would appear that it was not the intention of the author to deal so much with the distant succession as with the changes introduced by him. He simply touches upon the distant succession in a few paragraphs 2 and 27 parenthetically, and then returns to the changes which he introduced and which appear to engross his mind. This accounts for the incompleteness of the distant succession, his difficiency being supplied by his follower Raghunandana who is, next to him, the highest authority in Bengal.

Sec 4—DAYABHAGA ORDER

Sub-Sec 1—ORDER MISUNDERSTOOD

Daya order of succession misunderstood

Dayabhaga order of succession misunderstood—A question arose for the consideration of a Full Bench of the Calcutta High Court, whether a brother's daughter's son or the father's brother's daughter's son is an heir at all according to the Bengal School.

There was another question in that case, namely, if he is an heir, what is his position in the order of succession? As regards this latter question, an erroneous admission was made before the Division Bench by the learned pleader of the opposite party, namely, that if they were recognized as heirs

their position would be before the *Sakulya* relations. The Dâyatattva of Raghunandana was not noticed that the same position is assigned by that treatise to all cognates other than the eight mentioned above, as they hold under the Mitâksharâ, and that therefore the position of those cognates in the order of succession is exactly the same as under the Mitâksharâ.

Spiritual benefit was not the test of heirship

Doctrine of spiritual benefit no test of heirship —At one time it was supposed that the doctrine of spiritual benefit is the key to the Hindu law of inheritance. It is, however, now admitted on all hands that the doctrine is not recognized by the Mitâksharâ School also, (*f*) the doctrine was for the first time introduced and relied on by Jimûtavâhana as a corroborative argument in support of his expositions of the texts of law relating to the order of succession It is in fact a pretext by which he fortifies his argument in support of the changes made by him in the order of succession, by the introductin of some near and dear congnates in preference to more distant agnates , it has nothing whatever to do with the question as to who are heirs , for, as to that, both the schools are at one, and give the same answer, namely, the relations are heirs. The very definition of *heritage* clearly implies the same thing.

Propinquity, or proximity of birth, is the principle of the order of succession, according to the Mitâksharâ. (*g*) This is admitted also by the Bengal School, but the capacity for spiritual benefit is also taken into consideration along with it. (*h*)

Object of Daya, misunderstood

Object of Dayabhaga and the doctrine, misunderstood —According to its traditional interpretation, the Dâyabhâga was all along understood to lay down a particular well-known order of succession And this is clear not only from the order expounded by the Dâyabhâga but also from the author's express statement (*i*) Its object was not to lay down the so-called principle of spiritual benefit, and to leave the order of succession uncertain and unsettled But Justice D N Mitter who was ignorant of Sanskrit, and therefore had no access to the original works on Hindu law, put a nove

(*f*) *But see ante p* 555 (*g*) *But see ante p* 555 *Supra*

(*h*) D T xi § 63 Cited in Toolsee *v* Sm Lucky, 4 C W N 743, 746, and approved in Akshoy *v* Hari, 35 C 721, 721 , Nepaldas *v* Prolhas, 30 C W N 357 , in this connection *see*, Nalinaksha *v* Rajani, 35 C W N 726

(*i*) *See* Ch xi, vi, 30.

construction on the Dáyabhága, which is different from, and opposed to, its traditional interpretation That eminent Judge imagined that the object of the Dáyabhága was not to lay down an order of succession, but to lay down the principle of spiritual benefit, from which the order of succession is to be worked out That this view is inconsistent with the Dáyabhága, and therefore unworthy of acceptance, is established by the following passage in the concluding portion of the judgment delivered by him in **Guru Gobind Shaha Mundal's Case** (*j*) —

Guru Gobind Shaha Mandal's case

"Lastly it has been urged that the precise position which the son of a paternal uncle's daughter would be entitled to hold according to the principle of spiritual benefit, would interefere with that which has been assigned by the author of the Dáyabhága to some of the heirs specified in the earlier part (Sections 1-5) of Chapter XI * * * But this circumstance, even if true cannot be accepted as a sufficient reason to justify the total exclusion of one single heir who is competent to satisfy all the requirements of that principle If in any case which may arise hereafter, it should become necessary for us to determine the precise position which the son of a paternal uncle's daughter is entitled to hold in the order of succession, the question would fairly arise, namely, *whether the details of a work like the Dáyabhága ought to be permitted to override the principle upon which it is admittedly based*"

This passage shows that the principle of spiritual benefit as explained in the above judgment, is inconsistent with and opposed to the details of the order of succession among certain heirs, worked out and expressed in the clearest possible language, by the author of the Dáyabhága, himself

The interpretation put on the Dáyabhága by assuming that its acute logical author did not understand the principle which is taken to be enunciated by himself, is one which is opposed to all canons of construction, and is inconsistent with the traditional exposition given by learned Pandits, of the views maintained by the founder of the Bengal School, and contained in that treatise which is accepted by the people of Bengal as the book of paramount authority on inheritance

The learned Pandits who are the repositories of the traditional interpretation of the Dáyabhága hold that the doctrine of spiritual benefit is put forward by Jimutaváhana merely as a corroborative argument in support of the *order of succession* which he maintains as the one intended to be laid down by the sages in the Smritis

Conclusions and not reasons to be looked into.

Proper mode of reading Mitakshara and Dayabhaga —

The proper mode in which the Courts of Justice are to read these Commentaries, is to ascertain the conclusions drawn by their authors The reasons assigned by the authors for their conclusions may be good, bad or indifferent, and the duty of a Judge is not so much to inquire whether a disputed doctrine is fairly deducible from earliest authorities, namely, the texts

(*j*) 5 B.L R 15, 13 W R F B 49

of the Codes, as to ascertain whether it has been received by the particular school and has been sanctioned by usage (*k*) Their Lordships of the Judicial Committee have in a subsequent case pointed out the manner in which these works to be read, thus,—

Privy Council's reading to

"But even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Càtyayana's texts by itself, as what are the conclusions which the author of Dàyabhàga has himself drawn from them" (*l*)

The *order of succession* laid down by the author of the Dàyabhàga embodies the conclusions drawn by the author himself from the texts and from the doctrine of spiritual benefit, and it is not open to the Courts to consider what inferences *they* can draw from the words of texts, and from the arguments put forward by the author in justifying his own conclusions,—and to lay down an altogether different order.

Hence the mode of construction adopted by the above Full Bench is such as is pronounced by the Privy Council to be improper and unreasonable.

The author of the Dàyabhàga used the vague expression "Maternal uncle and the rest" who are to inherit after the paternal great-grandfather's descendants inclusive of his daughter's son (*m*) This has been explained in the Dàyatattva (*n*) by Raghunandana who says that the maternal grandfather must come before the maternal uncle, and by Srikrishna in his commentary on the Dàyabhàga, who says that "Maternal uncle and the rest," includes his son and grandson. And this is also the traditional interpretation of the Dáyabhága.

Sub-Sec ii—RAGHUNANDANA'S AND SRIKRISHNA'S VIEWS

Raghunandana

Raghunandana and Srikrishna—Raghunandana is the author of the Smriti-tattva also called Ashtàvimsati-tattva, or

(*k*) Collector of Madura, 12 M I A, 397.
(*l*) Moniram *v* Keri, 5 C, 776, 785 7 I A, 115, 150
(*m*) Ch. xi, vi, 12 and 20 (*n*) Ch xi, §§ 62-71.

Smriti-tattava or Ashtavinsatitattva

twenty-eight subjects or books, one of which is the Dàya-tattva or Subject of Inheritance which is thus noticed by Colebrooke in the preface to his translation of the Mitakshara and the Dàyabhàga —

"The Dàyatattava or so much of the Smriti-tattava as relates to inheritance, is the undoubted composition of Raghunandana and in deference to the greatness of the author's name and the estimation in which his works are held among the learned Hindus of Bengal, has been throughout diligently consulted and carefully compared with Jimùtvahana's treatise, on which it is almost exclusively founded It is indeed an excellent compendium of the law, in which not only Jimùtavàhana's doctrines are in general strictly followed, but are commonly delivered in his own words in brief extracts from his text. On a few points, however, Raghunandana has differed from his master, *and in some instances he has supplied deficiencies.*"

Raghunandana introduces after the Samanodakas the remaining *Bandhus*, *i e*, those other than the eight to whom a preferable position has been assigned by Jimutavahana, (o) he cites the same texts (p) enumerating nine cognates as Bandhus, which are cited in the Mitakshara, and thus he supplies an apparent deficiency of the Dayabhaga But it was not translated into English when the Full Bench had to consider whether the father's brother's daughter's son is an heir or not, according to the Bengal School, and it does not appear to have been brought to the notice of the Judges

Srikrishna

Srikrishna is a commentator of the Dayabhaga and is also the author of the Dayakrama-Sangraha a treatise on the order of succession Of him, Colebrooke speaks as follows in the aforesaid preface —

"The commentary of Srikrishna Tarcalancara on the Dayabhaga of Jimùtavahana has been chiefly and preferably used This is the most celebrated of the glosses on the text It is work of a very acute logician, who interpretes his author and reasons on his argument with great accuracy and precision * * * (It is) ranked in general estimation after the treatises of Jimutavahana and of Raghunandana

his work, Dayakrama Sangraha on inheritance

"An original treatise by the same author, entitled Dayakrama Sangraha, contains a good compendium of the law of inheritance according to Jimutavahana's text as expounded in his commentary"

But this latter remark would be correct if the passages which are not found in all copies of the Dayakrama-Sangraha but which have been incorporated in its English translation, be omitted as being spurious interpolations These passages are those which relate to the succession of the

(o) Dayatattava Ch. vi, § 62 and 72.

(p) See supra p. 553.

brother's daughter's son and the like, and those which relate to the succession of the maternal great-grandfather and great great grandfather and their descendants the former are not at all noticed by Colebrooke in his annotation at the end of Chapter XI of the Dayabhaga,—a circumstance which shows that those passages were not in the copies of the work in his possession, (q) and the latter passages are noticed in the annotation by Colebrooke but he says that these were wanting in some copies of the work—a fact, proving them to be interpolations For, had these passages been genuine, the views therein expressed would undoubtedly have been mentioned by Srikrishna in his Commentary on the Dayabhaga

It is worthy of special remark that neither Raghunandana nor Srikrishna nor the five other commentators of the Dáyabhága did understand that treatise as laying down the principle of spiritual benefit such as is expounded in the judgment of Justice Dwarka Nath Mitter.

When there is a conflict between the Dáyabhága on the one hand, and the other writers of the Bengal School on the other, the former must be followed The latter cannot override the former, but are accepted as mere commentaries on the same, and as such are authoritative only on points on which the Dáyabhága is silent.

Dayatattva

Dayatattva misunderstood—The Dayatattva does not at all support the view taken by the Full Bench, of the principle of spiritual benefit. But nevertheless a very learned lawyer contended before a Division Bench of the Calcutta High Court that the Dáyatattva supported his contention, namely, that a brother's daughter's son in entitled to preference to a great-grandson of the paternal grandfather (r) and went to the length of asserting that "in the translation (of the Dáyatattva), para. 64 is somewhat different from the original."

This is an instance showing how even the well regulated mind of an advocate may be betrayed into error by taking an onesided view of a question, for no real Sanskritist could call the correctness of the translation in question The original passage runs as follows,—

तत्र यथा दौहित्रान्तस्य सन्तानाभावे अधिकारी, एवं भ्रातृपुत्राभावे तद्दौहित्रान्तः पितुः सन्तानः अधिकारी।

(q) Gobindo v. Woomesh, W R. special No 176; Gobind v. Mohesh 23 W.R. 117.
(r) Hari v Bama, 15 C. 780.

and the translation is as follows:—

"Accordingly, as on failure of the deceased proprietor's lineage including his daughter's son, others succeed, similarly in default of the brother's son, the father's lineage ending with his daughter's son, takes the heritage" (s)

It should be observed that the conjoint or compound word तद्दौहित्रान्तः "ending with his daughter's-son" is an adjective qualifying the term पितृसन्तान "the father's lineage," in the original the former word stands first and then the term "the father's lineage" so that if the words be placed in the same order in which they stand in the original, the last sentence would stand thus,—

"Similarly in default of the brother's son, ending-with-his daughter's son the father's lineage takes the heritage"

And then the question arises to what word does the pronoun "*his*" in the compound adjective term "ending-with-*his*-daughter's-son" relate,—to the word brother, or his son, or to the father, or his lineage?

The contention which appears to have been raised before the Court, was, that it relates to the word "brother' or "brother's son This contention would have been plausible, if the "pronoun "his" had not been a component part of a compound word qualifying the term "the father's lineage", for, as it stands it cannot but relate to the principal word "father's" according to the grammatical rule of construction

If the logical rule of construction be looked into, then having regard to the context, there cannot be the slightest doubt on the mind of a reader as to the person to whom the pronoun "his" relates

In order to understand the true meaning of the passage, it is necessary to understand what is really intended to be expressed by it, and for the purpose of understanding the same, what is laid down in Yajnavalkya's text on succession, and the exposition of the same as given in the Mitakshara, should be taken into consideration

The text of Yajnavalkya, lays down the order of succession down to the brother's son, thus —

"The widow, the daughters also, both parents, brothers likewise, their sons, gentiles, etc" (t)

It should be borne in mind that the order of succession down to the brother's son as laid down in this text, has been adopted with the addition of daughter's son after daughter, by both the schools It is after the brother's son that the orders differ in the two schools the Mitakshara maintains that after him the paternal grandmother and the like succeed, but the Dayabhaga, following the analogy of the descendants of the *propositus* himself, introduces the brother's grandson and the sister's son after the brother's son and before the paternal grandparents And the above passage of the Dayatattva embodies this view of the Dayabhaga school the principal words in the proposition are, deceased proprietor and his father,—the words "brother's son" being but words of secondary importance, he is enumerated in Yajnavalkya's text, as an heir, and so his default is mentioned in the above

(s) D. T., xi, 6 § 64
(t) *Supra* p 552

passage, as the question arises, Who is to take in his default? (*u*) And the answer given by the above passage is, that the father's decendants shall succeed like the descendants of the *propositus* himself, ending with his daughter's son, or in other words, the father's great-grandson and daughter's son, succeed in their order after the brother's son Had the sons of the daughters of the *propositus's* son and grandson been enumerated in the Dayatattva as heirs taking before the parents, then and then only could it have been put forward with reason that the pronoun "his" in the above compound word, relates to the "brother" or "brother's son"

Hence it is clear that the assertion made before the Court impugning the accuracy of the translation is erroneous and unjustifiable

And the learned Judges of the High Court were not justified in attaching the importance they did, to the *ipse dixit* of the pleader who made the bold assertion

Dayatattva supports traditional interpretation

Raghunandana on order of succession—Raghunandana's Dayatattva supports the traditional interpretation of the Dàyabhága and not the view taken by the Full Bench, that is to say, it lays down clearly an order of succession, supplying the deficiencies of the Dàyabhágh

He say that the order of succession is to be determined by the application of two principles, thus—

"Therefore a successor to the inheritance is to'be determined by reference to two considerations, namely, his comparative capacity as regards the offering of oblations, and his proximity of birth" (*v*)

And then he goes on to work out the order according to those principles after the *brother's son* down to whom the order is ordained by both Vishnu and Yajnavalkya, (*w*) in the following passages reproducing Jimutavàhana's views,—

"Accordingly, as on failure of the deceased proprietor's own lineage down to the daughter's son, others succeed similarly in default of the brother's son, the father's lineage ending with his daughter's son takes the heritage (*x*)

In their default, the grandfather succeeds (*y*)

On failure of him, the grandmother inherits * * * (*z*)

In her default, the descendants of the paternal grandfather, down, to his daughter's son, succeed in the same way, as has been seen with regard to the father's issue (*a*)

On the same principle, the paternal great-grandfather, the paternal great-grandmother, and the descendants of the paternal great-grandfather, down to his daughter's son, (succeed in the same order) (*b*)

On failure of (these) givers of oblations partaken of by the deceased (proprietor,) the 'cognates' (§2) such as the maternal grandfather, the like,—are entitled to the inheritance (*c*)

(*u*) Dàyatattva ch xi, § 60. (*v*) D T, xi 63 (*w*) See *p* 552
(*x*) D. T, xi, 64 (*y*) D T xi, 65
(*z*) D T, xi, 66 (*a*) D T, xi, 67
(*b*) D. T, xi, 68. (*c*) D T, xi, 69.

Among these too, if the maternal grandfather survives, he alone succeeds, in the same way as the father and the like (*d*)

If he be dead, then the maternal uncle and the like become heirs in the same order, since they present oblations to the maternal grandfather and the like, which the deceased (proprietor) was bound to offer (*e*)

On their default the 'Sakulyas' or the kinsmen of divided oblations become heirs" (*f*)

On perusal of these passages in the original no Sanskritist lawyer can have any doubt that the eight cognates beginning with the son's daughter's son and the seventeen maternal relations enumerated respectively in the 1st and 2nd Note (*g*) cannot be introduced before the *sakulyas* Although there is no word in the original corresponding to the word "these" put within parenthesis in § 69, still it is necessarily implied by the context, and the only maternal relations expressed and necessarily implied by the words "in the same way as the father and the like" in § 70 and "in the same order" in § 71, are, the maternal grandfather, his son, grandson, and great-grandson, and (it may be conceded) also his daughter's son or the mother's sister's son, the analogy referred to being in his favour

But it should be be specially' noticed that these maternal relations are introduced here because they confer spiritual benefit on those to whom the deceased proprietor was bound to offer but not on the deceased himself On this ground only those that confer the highest amount of benefit on the three maternal ancestors beginning with the maternal grandfather may be brought in they are his three male descendants beginning with the maternal uncle, and his daughter's son By the application of the principle of propinquity, the maternal grandfather is, like the father and his father and grandfather, placed before his three male issue

It should be borne in mind that according to the principle of propinquity alone, which is the only principle followed in Mitākshara, all are postponed to agnates Hence by the application of that principle as well as that of spiritual benefit, those cognates only can be placed before the agnates that are *sure* to confer *higher* amount of spiritual benefit, accordingly, no other cognate than the eight stated above can be preferred to agnates, except perhaps the mother's sister's son who may be said to be implied by the analogy

It has already been noticed that the Dāyatattva assigns to the other cognates the same position as they have under the Mitākshara Had that fact been known, there would have been no question for reference to the Full Bench

Recapitulation of Dayabhaga heirs in their order, by Srikrishna—in his Commentary on the Dáyabhága, as given by Colebrooke in his translation, is inconsistent with the Dāyabhāga as well as with Srikrishna's comments thereon. It is difficult to account for this error, except by assuming either that Colebrooke's copy of the work was inaccurate, or

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(*d*) D T, xi, 70 (*e*) D T, xi, 71.
(*f*) D.T, xi. 72. (*g*) See p. 613.

that the inaccuracies themselves have crept in somehow without Colebrooke's knowledge. The latter alternative is the only assumption that can reasonably be made , for, ortherwise it is impossible to explain how such glaring inconsistencies could fail to attract the attention of so careful and learned a translator as Colebrooke. The following is the rendering of Srikrishna's Recapitulation which is given in the edition of the original Dayabhàga with its six commentaries, by Pandit Bharat-Chandra Siromani at p. 342 —

Srikishna's re-capitulation of Dayabhaga order of succession.

"The following is the order of successors to the estate of deceased male according to this (*i e*, Dayabhaga)·—(1) First, **son**; (2) in his default, **son's son**; (3) in his default, **son's son's son**, —a grandson by a predeceased son and a great grand-son whose father and grandfather are both predeceased, succeed jointly with a son; (4) in default of male issue down to the great grandson, **widow**,—having succeeded to the husband's estate she should live with the family of her husband or in their default with the family of her father, and enjoy her husband's heritage for preserving her body, she should likewise make gifts and the like, of a small portion of the property, for the benefit of her husband's soul, but must not alienate it according to pleasure like her *Stridhan*, (5) in default, **daughters**, amongst them, first **maiden**, in her default, **betrothed**, on failure of her, **married**, of married daughters, she who has a son, and she who is likely to have a son are entitled to succeed jointly, but a barren daughter and a sonless widowed, daughter are not entitled to succeed, (6) in default of the married daughter, **daughter's son**; (7) in his default, the **father**, (8) failing him, the **mother**; (9) in her default, **brothers**, among them first the **uterine**, in his default, a **half-brother** if the deceased was re-united with a brother, then should there be only full-brothers the reunited full brother alone is entitled, in his default a full-brother who is not re-united, similarly should there be only half-brothers, then first the re-united half-brother, failing him a half-brother who is not re-united, when however, a half-brother is re-united and a full-brother is not re-united, then both of them equally succeed, (10) in default of brother, **brother's sons**, amongst them also, first the full brother's son, failing him the half-brother's son, in case of re-union, should there be only full-brother's sons, first the full brother's son who is re-united failing him the full-brother's son who is not re-united , should there be only half-brother's sons, then first the half-brother's son who is re-united, failing him the half-brother's son who is not re-united, when however, the full-brother's son is not re-united and the half-brother's son is re-united, then both of them, like the brothers, equally succeed, (11) in the default of brother's son, **brother's son's sons**, amongst them also the order by reason of the brother being uterine or non-uterine, and order by reason of being re-united or not, are to be understood, (12) on failure of him, the **father's daughter's son**, he again is the full sister's son or the half-sister's son , (13) in his default, the **paternal grandfather**; (14) on failure of him, the **paternal grandmother**;

(15) in her default, the **father's uterine brother,** failing him the **father's half-brother;** (16) in his default the **fathers full brother's son,** the **father's half-brother's son;** (17) the **father's full-brother's son's son,** and the **father's half-brother's son's son,** are heirs in their order; (18) in their default, the **paternal grand-father's daughter's sons,** amongst them also, the **father's uterine sister's son,** and failing him the **father's half sister's son,** this rule is applicable also to the paternal great-grand-father's daughter's sons to be mentioned below, (19) in his default, the **paternal great-grandfather;** (20) on the failure of him, the **paternal great grandmother;** (21) in her default, the **paternal grand father's uterine brother, his half-brother;** (22) **their sons;** (23) **son's sons;** (24) and the **paternal great-grandfather's daughter's son;** in default of heirs down to these who are givers of *pindas* partaken of by the deceased proprietor, the succession goes to the maternal grandfather, the maternal uncle and the like who are givers of *pindas* which were to be given by the deceased, amongst them also (25) the **maternal grandfather;** (26) in his default, the **maternal uncle,** (27) **his son** (28) and **grandson** are entitled in their order in their default, the **Sakulyas** in the decending line who are givers of *lepa* or remnants of oblations, participated by the deceased, such as the three descendants beginning with the great-great grandson, are heirs in their order, in their default the Sakulyas in the ascending line such as the paternal great-great-grandfather and the like who are participators of the *lepa* or remnant of oblations which was to be given by the deceased, and their descendants are heirs according to their proximity in their default, the **samanodakas** are heirs, in their default, the **preceptor** failing him, a **pupil,** in his default, the **fellow student,** in his default, the **sagotras** and **samana pravaras** of the same village are heirs in their order, in default of all the said relations, the **king** should take the estate other than that of a Brahmana, but the estate of a Brahmana should be taken by Brahmanas endowed with good qualities such as the knowledge of the three Vedas"

Sub Sec III—DOCTRINE OF SPIRITUAL BENEFIT

Spiritual benefit,

Spiritual benefit—The principle of spiritual benefit is examined at length at the end of this Chapter.(*h*) It will be seen that it is not the foundation of the right of inheritance, nor is it the only criterion of the order of succession. As regards the relative amount of spiritual benefit conferred by relations other than those whose succession has expressly been discussed by Jimûtavâhana, there is absolutely no means, test or criterion whereby the same may be determined by us.

amount of benefit conferred

Who can confer—Spiritual benefit may be conferred by the so-called *sapindas* in the secondary and the tertiary senses (*i*) as well as by the *sakulyas* and the *samânodakas*,

(*h*) *See infra pp* 640 etc

(*i*) *Supra p* 80.

there are many factors to be taken into account for the purpose of ascertaining the respective amounts of such benefit, that may be bestowed by different relations, and having regard to these factors, it is difficult to say that the so-called *sapindas* confer higher amounts of benefit than the *sakulyas*, &c. Take for instance, the case of a brother's daughter's son, and a *sakulya*: as regards a *sakulya* his capacity to confer spiritual benefit by offering *pinda-lepas* or divided oblations of water is certain and unconditional, and is transmitted after his death to his son and other male descendants, whereas a brother's daughter's son's actual capacity arises only after his own father's death, and dies with himself, so that his capacity is only *potential*, and may never become *actual*, should he die before his own father, and even when it becomes actual it can exist only so long as he is alive and cannot be transmitted by him to his heirs. Such being the case, how could it be said that the latter confers a higher amount of spiritual benefit than the former when it may so happen that he cannot confer the slightest benefit at all.

Sakulyas may become *Sapindas*

Besides, the *sakulyas* may, under certain circumstances, become *sapindas* by reason of the *sapindi-karana* for the deceased being performed with his fourth and other remoter ancestors in case the three immediate ancestors or any of them be alive at the time of the performance of that ceremony. (*j*) An exception must be made in their favour, according to the view taken by the Full Bench of the doctrine of spiritual benefit.

Maternal relations offer *Pindas* not to the deceased himself

Maternal relations.—As regards the maternal relations, admittedly they do not confer any spiritual benefit directly or indirectly on the deceased proprietor himself, but it is said that they confer benefits on the deceased's maternal ancestors to whom the deceased was bound to offer funeral cakes when he was alive It has already been said that on such a ground as this, one can bring in only those who confer the greatest amount of spiritual benefit on the three maternal

(*j*) *See supra p* 86, text No 12 which is cited also by Raghunandana in his Suddhi-Tattwa

ancestors, in preference to the *sakulyas* who admittedly bestow benefits on the deceased himself, and on his paternal ancestors on whom also he himself was bound to confer spiritual benefits, and also bound to leave male issue for conferring such benefits on them after his death. So that the only four maternal relations mentioned above who have been mentioned by Raghunandana and Srikrishna, are the only maternal relations that can properly be, and had all along been understood to be, placed before the Sakulyas.

It is contrary to Daya

View of Full Bench.—The Full Bench begs the question by holding that every person offering a *pinda* to the deceased or to any one of his three paternal or maternal ancestors, confers higher amount of spritual benefit than a *sakulya*; for, there is nothing in the Dàyabhàga, that may support this position. and Justice D. N. Mitter misapprehended the meaning of the term *Traipurushika-pinda* or funeral cake offered to three ancestors of the decased, and even if his interpretation of the term be assumed to be correct, yet his argument is vitiated by the fallacy of composition or of applying to a class what is predicated of certain specified individuals of the same.

It is worthy of special remark that the arguments by which the author of the Dàyabhàga supports his conclusions are some of them opposed to well-known principles universally acknowledged by learned Pandits, and also opposed to the actual usages and practices of the people.

and usages

For instance, the maternal relations are introduced before the *Sakulyas* on the ground that it was the duty of the deceased to present funeral cakes to his three maternal ancestors, and that therefore the maternal relations who offer *pindas* to the same ancestors perform the same duty and therefore benefit the deceased

Now, it is a well-known doctrine of the Hindu practical religion that a *eligious duty attaches to a person so lang as he is free from impurity and pollution, and so long as he is alive* शुचि तत्कालजीवी कर्म्मं कुर्य्यात् । Hence assuming that the decased was bound in duty to present *pindas* to his three maternal ancestors, that duty dies with him, he is not bound to make any provision for the performance of the same duty by any body else after his death For, although a Hindu is bound to leave a son for the benefit of his paternal ancestors, his son cannot benefit his maternal ancestors. How then can the maternal relations benefit the deceased by onering *pindas* to his maternal ancestors, who are their own paternal ancestors to whom they are

personally bound to offer *pindas*? For they only discharge their own duty by performing their ancestor-worship which they can never nor ever do, celebrate in two different capacities, namely, personal and representative

Then again the ancestor-workship called the Parvana Sradha, which is the foundation of the doctrine of spiritual benefit relied on as an argument by Jimutavahana, is not really made for the benefit of the ancestors, but for the benefit of the worshipper himself, in the same manner as the worship of the various deties, celebrated by the Hindus There is no authority in Hindu law that the *pindas* offered at the *Parvana Sroddha* ceremony, are actually enjoyed or participated in by those to whom the same are offered and by their male descendants The interpretation put by Jimutavahana (*k*) on the text of Baudhayana (*l*) is not supported by the language of the text (*m*) for, the Sanskrit word *Dàya* does not mean *pinda* or funeral cake, it means primarily a gift and secondarily heritage, and it is nowhere used in the sense of *pinda*. But Jimutavahana alone construes the word as meaning *pinda* because its etymological meaning is "what is given" and a *pinda* is also a thing *given* or offered to invisible donees

Ancester worship, Sraddha

There is scarcely a Hindu to be found that performs the *Parvana Saddha* regularly, that is, on each conjunction of the sun and the moon. A day is therefore set apart in the year, namely, the *Mahalaya* day in the month of A'swina, which is a public holiday, on which day the Hindus may, if they choose, perform the thirteen *Sraddhas* which they onght to have performed, one in every lunar month during a year

Parvana.

So far as actual practices of the Hindus are found this *Parvana Sraddha*, is, seldom if ever, performed by the Hindus not belonging to the higher castes of Brahmanas, Kayasthas, Vaidyas and the like, and even as regards the members of these higher castes it is dontful whether one in ten performs it, even on the *Mahalaya* day

Hence the conferring of spiritual benefit on ancestors by presenting *pindas* to them in the *Parvana Sraddha* is a myth in the majority of instances And already it has been said that these are intended for the good of the worshipper, and not for the benefit of the ancestors

There is, however, one Sradha which in Bengal is performed by every Hindu on the day after the impurity occasioned by the death of the deceased proprietor is over, that is, on the 11th 13th 16th and 31st day, including the day of death, in the cases of Brahmanas, Kshatriyas, Vaisyas and Sudras respectively, but it is performed by the followers of the Mitakshara on the eleventh day, to whatever caste they may belong This Sraddha is called the *Adya Sradha* or the first ceremony of the kind, which concludes the actual funeral ceremony commencing from the cremation rite. Fifteen other Sraddhas ending in the *Sapindi-Karana Sradha* on the 1st lunar Anniversary of the day of death are enjoined for performance within the first year of death These ceremonies are popularly believed to be beneficial to the departed spirit who is compelled to reside for one year in what is called *Preta-loka*, or the region for the departed souls, which is something like the purgatory, where the

Adya,

Sapindi Karana,

(*k*) D. B II, I, 38. (*l*) D. B., II, I, 37. (*m*) *See supra p.* 80.

spirit, being severed from the relations in this world and not being allowed to join his ancestors in the next is to remain in something like solitary confinement, until the end of the first year when the Sapindi-Karana ceremony is to be performed for him, which enables him to enter the *pitri-loka* or the region of the Manes of ancestors

Although the aforesaid sixteen Sràddhas ending with the Sapindi-Karana are popularly believed to be necessary for the comfort and peace of the departed spirit, yet the *Adya* or first Sràddha is the only one which is universally performed, and as regards the rest they are not performed by most people who cannot afford to pay the expenses necessary for their celebration.

If capacity to perform the Sràddha ceremony be regarded as a factor in the matter of inheritance, then the capacity to perform these sixteen Sràddhas and not the *pàrvana* Sràddhas, should consistently with reason and popular feelings, be taken into consideration.

with that of spiritual benefit

Besides, the doctrine of *Adrishta* which is universally believed by the Hindus as the fundamental article of faith, is opposed to any spiritual benefi being derived by the deceased from Sràddha ceremonies performed for him *Adrishta* or the invisible dual force is the resultant of all good deeds and bad deeds of all meritorious and demeritorious acts and omissions, done by a person in all past forms of existence and also in the present life, and it is this *Adrishta* which determines the condition of every soul, *i e*, is the cause of its unhappiness or misery the state of a living being, depends entirely on his own past conduct

Conclusions and not reasons of Daya to be accepted

And this affords the strongest argument for the view that only the conclusions set forth in the Dàyabhàga should be accepted, irrespective of the reasons whereby the same are sought by its author to be supported, which may not be cogent at all, nor necessarily acceptable to, or accpted by, the people, and that novel inferences deduced from them are not justifiable.

The order of persons competent to perform *Preta Kriyà*

It would not be out of place here to enumerate the relations on whom the duty of performing the sixteen Sràddhas or *Preta-kriyà* is imposed, in their order. The following order is deduced by Raghunandana in his Suddhi-tattva from a consideration of various texts.—

'(1) Eldest son, (2) younger son (3) son's son, (4) son's son's son, (5) widow, (6) widow having a son too young to be capable of performing the ceremony, (7) unbetrothed daughter, (8) betrothed daughter, (9) married

daughter, (10) daughter's son, (11) younger uterine brother, (12) elder uterine brother, (13) younger half-brother, (14) elder half-brother, (15) son of younger uterine brother, (16) son of elder uterine brother, (17) son of younger half-brother, (18) son of elder half-brother, (19) father, (20) mother, (21) daughter-in-law, (22) son's maiden daughter. (23) son's married daughter, (24) son's daughter in-law, (25) son's son's maiden daughter, (26) his married daughter, (27) paternal grandfather, (28) paternal grandmother, (29) the paternal uncle, (30) and the like *sapinda* (on the father's side), (31) Samànodaka, (32) Sagotra, (33) maternal grandfather, (34) maternal uncle, (35) sister's son, (36) *sapindas* on the mother's side, (37) Samànodakas on her side, (38) widow of a different caste, (39) unmarried wife (continuous concubine?), (40) father-in law (41) son-in law, (42) paternal grandmother's brother, (43) pupil, (44) priest, (45) preceptor, (46) friend, (47) father's friend, (48) fellow-villager of the same caste who is paid for,—these forty-eight are in their order entitled and liable (to perform the *Preta-kriya* of a male)"

It is worthy of special remark that "a son's daughter's son" or any other relation of the same kind, is not mentioned at all, although son's daughter and son's son's daughter are mentioned. And it cannot but be admitted that the above order affords the strongest evidence of degrees of natural love and affection of the relations who are to perform the last services to the deceased, although most of the women are excluded from inheritance, being disqualified by their sex.

Conclusion.

The conclusion, therefore, is that the capacity for spiritual benefit such as is expounded by Justice D. N. Mitter, cannot and ought not to be made the basis of an order of succession, which is opposed not only to the feelings of the people but also to the natural development of law.

Joint family, causes natural love, irrespective of degrees

Natural love, and number of degrees of relationship. —Europeans among whom the joint family system is unknown, and who are ignorant of the natural influence of the system in moulding the growth of love and affection of the members towards each other, and also towards their children in the same manner as if they were their own,—may very well take the strength and intensity of natural love and affection between a man and his relations to be inversely proportional to the number of degrees by which they are distant from him. But the same can, by no means, be predicated of Hindus who live in joint families, the joint family system being the normal condition of Hindu society. It goes without saying that those who are called to live

together from their birth, and are associated together in times of joy as well as of distress, and who help and are expected to help each other whenever necessary, are tied together by bonds of union which cannot but be very strong in the nature of things, quite independent and irrespective of the number of degrees of relationship. The Hindus would be astonished to learn that there are European Judges who could not be induced to believe that in a joint family the natural love and affection of the grandparents for their grandchildren, are at least equal to, if not greater than those of their own parents. for, the love and affection that are called *natural* are really to a great extent *acquired* by reason of certain causes that do apply more to the paternal grandfather and grandmother of children in a joint family, than to their father and mother, to whom alone the causes would have applied had they lived separate, like the Europeans. And the agnates, though distant, have bonds of closer union to be attached to each other than the cognates as a general body (*n*) Hence, although a son's daughter's son or a brother's daughter's son may, in the estimation of Europeans and of some English-educated Hindu "lawyers without Sanskrit," be deemed, having regard to the number of degrees of distance, to be very near and dear relations, yet they are in the estimation of the Hindus very distant relations, by reason of their belonging to different families : and it cannot but be admitted that amongst the majority of the Hindus who are followers of the Mitàksharà, all cognates, with the single exception of the daughter's son in case the deceased was separate, are considered to be inferior to the agnates, however distant, who are recognized as heirs in preference to all other cognates agreebaly to the principle of propinquity which is the admitted criterion of the order of succession in the Mitàksharà School. (*o*)

European idea of nearness.

The custom relating to the observance of mourning affords the strongest possible evidence of the nearness of the *sakulyas* and the *samánodakas*. all his *sakulyas* have to observe mourning at the death of a Hindu, for the same

(*n*) *Supra p* 105,
(*o*) Some cognates introduced by Act II of 1929 *see ante p* 567

period as is provided for his own son, that is to say, 10, 12, 15 and 30 days respectively for the four castes in their order; it should be borne in mind that for the purpose of mourning, *sapindas* under the Dàyabhàga are those relations who are *sagotra sapindas* under the Mitàksharà, (*p*) remoter agnate relations residing in the same village do also *actually* observe mourning like the *sakulyas*, though the period of mourning ordained in the Shastras, for them, is three days only, which is also the period for nearest cognates such as the daughter's and sister's sons, while the brother's daughter's son and the rest whom the Full Benches have introduced before *sakulyas* are not required to observe mourning even for a single day.

But nevertheless, one of the unnatural consequences of the principle of spiritual benefit being supposed in the manner explained by the Full Bench, to be the criterion of the order of succession, would be, that some cognates would take the inheritance in perference to agnates to the same degree,—a result which is—opposed not only to every system of Jurisprudence but also to the very text of Manu on which the doctrine is based A student of comparative jurisprudence will find that at first, cognates were not recognised as heirs at all, then in the course of progress they were recognised as heirs, but were placed after all the agnates; then, some of them were permitted to have a position on the order of succession, in preference to more distant agnates, and the last stage of development has been, to abolish all distinctions between agnates and cognates, but it is nowhere found that cognates take in preference to agnates of the same degrees with themselves.

Roman Juris-prudenc

Take for instance the Roman law the Twelve Tables did not at all include the cognates in the category of heirs. In course of time when the family union became less strong, and importance began to be attached to the nearness of kin, irrespective of the family, the exclusion of all cognates from inheritance came to be regarded as unnatural and as a survival of an archaic institution, the *Proetor Urbanus* recognized the

(*p*) See D B, xi, 1, 41-42

heritable right of certain cognates under the pretext of giving them forms of action. And at last all distinctions between agnates and cognates were abrogated by Justinian.

Mahamedan Jurisprudence

The Mahomedan law also discloses similar development. The Sunni School appears to be anterior to the Mitákshará on the point of development, for, it postpones all cognates with out any exception, to agnates however distant. According to this school, even the daughter's son in excluded from inheritance by the remotest agnate. The Shia School, however, has abolished this distinction between agnates and cognates as regards the right of inheritance, although the agnates still enjoy certain privileges showing their superiority to the cognates.

Hindu Jurisprudence

Similar development is found in Hindu law to a certain extent. Manu does not recognize the cognates as heirs at all, the daughter's son mentioned by Manu to be equal to a sons' son, refers to the *appointed* daughter's son—a kind of adopted son who is an agnate, and not a cognate.

Changes more by Mit and Daya

Cognates are, later on, recognized as heirs for the first time, by Yàjnavalkya who places them after the agnates. Then the Mitàkshara made a change in the law by giving to the daughter's son a very superior position in the order of succession, as has already been said, and the Dáyabhàga has given to some other cognates a position in preference to many agnates

The Hindu law, however, has not yet arrived at that stage in which the distinction between agnates and cognates is abolished, by reason of the joint family system, which is the foundation of the distinction, still prevailing in Hindu society agnates live together jointly, excluding cognates.

But the development of law, whereby cognates are preferred to agnates of the same degree with themselves is quite unnatural and unprecedented in the history of law, and is not at all sanctioned by the sages, for instance, son's son's daughter's son taking in preference to son's son's son's son, brother's son's daughter's son taking in preference to brother's son's son's son, and the maternal great-great grand-

father's descendants taking in preference to the paternal great-great-grandfather's descendants.

It appears so unreasonable that the High Court did at first refuse to sanction it. (*q*) This decision was pronounced erroneous by a Full Bench, the judges of which did not decide the question but thought themselves bound by the judgment of the first Full bench, although the only question before the latter was, whether a brother's daughter's son and the like were heirs at all. And they entirely lost sight of the principle of propinquity

It has already been observed that although the text of Manu on which Jimútaváhana relies, may support his theory with respect to the three maternal relations, namely, the uncle and his two descendants, yet it cannot be applied to the eight daughter's sons. Manu says,—"To three (ancestors) should libations of water be offered, for three is ordained the offering of *pindas* or obituary oblations the *fourth* is the giver of them, the *fifth* has no concern in them"

Relations whom libations of water offered

It should be noticed that the terms *fourth* and *fifth* in this text of Manu are used relatively to the remotest of the three ancestors hence, it can by no means be so construed, as to include any of the daughter's sons who must be *fifth* in relation to the remotest of his three maternal ancestors to whom he offers *pindas* since the mother must be one degree in the computation of degrees, though she is not one of the three ancestors on the maternal side to whom *pindas* is offered.

Original law

The grand sons by daughters of the *propositus* himself and of his three paternal ancestors are introduced by Jimúta on the authority of a special text declaring the equality of his son's son and a daughter's son with respect to the capacity for spiritual benefit, which text, cannot apply to a son's daughter's son,or a brother's son, or the like, who confers such benefit only on the son or the like, *i e.*, on his own maternal grandfather only, by virtue of that special text, but not on the *propositus* nor on his father or the like. (*r*)

(*q*) *See* Kashee *v* Raj 24 W R 229.

(*r*) D B. xi, vi, 9

Thus it is clear that the texts on which Jimùta relies cannot support the *inference* drawn by the Full Bench. For had what is ascribed to Jimùta been his rule intention, he would certainly have expressly mentioned at least one of these daughter's sons.

of succession modified by

Case-law and altered order of succession.—In the case of *Gurugovinda v. Anund Lall*, (s) the uncle's daughter's son was held to be an heir, and it was admitted by Babu (subsequently Justice and afterwards Sir) Romeschandra Mitter that if he whose claim was resisted by his client, be held to be heir, he would succeed in preference to his client who was a *Sakulya* , and the reason for this admission seems to have been that if the doctrine of spiritual benefit, upon which Justice D N. Mitter wanted to base the claimant's heritable right, be correct, then he must take to the exclusion of *sakulyas* It did not strike to any one them, that the said claimant might be an heir, yet he might hold the same place under the Bengal School as under the Mitàkshara School.

Full Bench

It is, however, clear that having regard to the question for their consideration this Full Bench was not called upon to decide the question as to the exact position of the paternal uncle's daughter's son in the order of succession

result of Full Bench decision

However that may be, the result is that all the second and the third class Dàyabhàga *sapindas* (t) may be contended, according to the reasons set forth in the judgment of Justice D N Mitter, to be preferable to the *sakulyas.* But in so doing one must altogether ignore propinquity the fundamental principle of inheritance, contrary to the Dàyabhàga school.

Although Full Benches are said to settle doubtful points of law, yet the effect of the above Full Bench decision has been to unsettle the whole law of inheritance

Heirs recognised by Full Bench.

It should be observed that eight daugter's sons were by necessary implication recognised by that Full Bench as heirs . they are, (1) son's daughter's son, (2) son's son's daughter's son, (3) brother's daughter's son, (4) brother's son's daughter's

(s) 5 B L R 15 13 W R F B 49
(t) *See supra p* 92-93 and the table at *p*, 96

son, (5) paternal uncle's daughter's son, (6) paternal uncle's son's daughter's son, (7) paternal granduncle's daughter's son, (8) paternal granduncle's son's daughter's son.

The precise position of these in the order of succession has been the subject of dispute in many cases The contention on behalf of them has been that the two descendants of the *propositus* should succeed in preference to his parents and their descendants and the two descendants of the father should take in preference to the grandfather, and so on.

But this contention could not be accepted and given effect to, except by overriding the order given in the Dàyabhàga. The first case on the point was that of *Gobindprasad* v. *Moheschandra* (u) which was decided by two eminent Judges of the Calcutta High Court, namely, Chief Justice Sir Richard Couch and Justice Ainslie, who held that these eight daughters' sons cannot be placed before the paternal great-grandfather's descendants, including his daughter's son (v) the competition in that case was between the brother's daughter's son and the paternal grandfather's great-grandson, and the latter was held perferable

Govindprasad v *Moheschandra*

The correctness of this decision was impeached in many subsequent cases, but it has been uniformly followed (w)

But nevertheless some judges of Mofussil Courts misunderstand the effect of the above rulings of the High Court, and commit errors by following the arguments in the judgment of Justice D. N. Mitter.

understood in Mofussil

The order of succession among these eight daughter's sons is the order in which they have been enumerated above. (x)

In a case of competition between these eight dauhter's sons on the one hand, and the maternal relations on the other, the former are to be perferred agreeably to the exposition by the Full Bench, of the prnciple of spiritual benefit , accordingly it has been held that the father's brother's daughter's

Position of maternal relations

(u) 15 B L R 35 23 W R 117 (v) No 24 *supra* p 613.
(w) *See* In the matter of Oodoychurn, 3, C 411 and note, Gopal v Haridas, 11 C 343, Hari v Baina 15 C , 780 , besides there are many unreported cases (x) Pran v Surub 10 C.L R 484

son is entitled to succeed in preference to mother's brother's son. (*y*)

The order of succession amongst the maternal relations who come within the *sapinda* relationship expounded by Justice D N Mitter is in the order in which it has been numbered in the genealogical tree (*z*) It must be exactly similar to the order amongst the three paternal ancestors and their descendants, excepting this that the three maternal female ancestors are not recognised as heirs

The question whether the eight daughter's sons and the maternal relations other than the maternal grandfather and his three descendants, should be preferred to the *sakulyas* has not, as it has already been said, actually been judicially discussed and decided by the High Court in any case

Kasinath Roy's case

In the case of *Kasinath Roy,* (*a*) in which there was a competition between the brother's son's son and the brother's son's daughter's son, the former who is a *sakulya,* was preferred to the latter who is a *sapinda* according to Justice D N Mitter's exposition of the principle and the order of succession The learned judges could not accept the view that a cognate should take to the exclusion of an agnate of an equal degree.

Digumber v Motilal

The correctness of this decision was called in question in the case of *Digumber* v *Motilal,* (*b*) in which the competition was between the brother's daughter's son and the great-great-great-grandfather's great-great-great-grandson, and the question was referred to a Full Bench for their consideration. But this Full Bench refused to judicially decide the point, as the learned Judges thought themselves bound by the decision of the first Full Bench, although the Judges thereof were not called upon to decide the point, as it was not at all referred to them. The brother's daughter's son was held preferable.

Result of Full Bench decision

Thus has arisen an unsatisfactory and abnormal state of the law, in which certain cognate relations whose very exis-

(*y*) Braja *v* Jivan, 26 C, 285.

(*z*) *Supra p* 97.

(*a*) 24 W R, 229

(*b*) 9 C, 563.

tence may be unknown to the deceased proprietor, would become his heirs in preference to the *sakulyas* living, it may be, in the same house with him, and regarded by him as near and dear relations.

Principle enunciated by Full Bench

In discussing the question, the learned Judges have completely ignored the principle of propinquity and confined their attention exclusively to the principle of spiritual benefit alone. But it is absolutely impossible to explain and maintain the accepted and now settled and undisputed order as set forth in the Dàyabhàga without recourse to the principle of proximity. But yet it is not even alluded to in the decisions on the question

is opposed to texts,

It may be asked,—Does a Hindu, in the ordinary state of things, know even the existence of the daughter's son, of the son and the grandson of the maternal great-grandfather or great-great-grandfather, or even of the son and grandson of the maternal grandfather? The answer is obvious. Any one acquainted with the customs, manners and habits of the Hindus, and pausing to think about the matter, cannot but wonder how these daughter's sons could be preferred to *sakulya* relations who have to observe mourning at the death of the deceased proprietor for the same period as his own son.

though doubted still followed

The question is one which ought to be judicially considered and the law enunciated according to the true construction of the Bengal commentaries, by a Full Court of all the Judges, and there is a precedent for this course. Several times (*c*) such attempts were made, but on each occasion the High Court refused to re-open the question decided by the Full Bench. In one of these cases (*d*) Chief Justice Sir Lawrence Jenkins remarked "Undoubtedly there are, * * * a number of considerations that might be brought into play were the matter untouched by authority. * * * It has been treated

(*c*) Kedar Nath *v* Amritalal, 16 C L J 342, Kailash *v* Kurana, 18 C W N 477, Kedar Nath *v* Haridas, 43 C 1: 19 C W N 1181 , *see* also in this connection Dino Nath *v* Chundi, 16 C L J 14 (1889) , Radha Raman *v* Gopal, 24 C W N 316

(*d*) 43 C 1 10-11 19 C W N 1181

as governing cases of similar description by other distinguished Judges * * * And they one and all have felt that it is not for this Court, at any rate, to question the propriety of that Full Bench decision." There is a decision which even after these cases, has expressed that spiritual efficacy is not the only guide to trace the order of succession. (e)

Latest view.

As the High Court is not disposed to reconsider and overrule the Full Bench decisions, the Legislature ought to be moved to codify the law consistently with the feelings of the Hindus of Bengal, in consultation with learned Pandits and some English-educated Hindu lawyers.

Examination of spiritual benefit

Examination of the Principle of Spiritual Benefit.—At one time it was thought the doctrine of spiritual benefit is the key to the Hindu law of Inheritance It is now, however, admitted on all hands that the doctrine has nothing whatever to do with the *Mitakshara* law of inheritance But it must not be thought that the *Mitakshara* is silent about the *Sraddha* ceremonies forming the foundation of the doctrine On the contrary it will be found in the Acharakända a miuute and exhaustive description of the various matters concerning those ceremonies But the author of that does not even allude to those ceremonies whil dealing with inheritance so as to imply any sequence between the wo There are, however, a few passages in that part, implying ra r the converse of what is understood by the doctrine of spiritual benefit other words, relations that become heirs are required to perform the ex al ceremonies for the deceased, but they are not held to bocome heirs because they confer spiritual benefits

The expression "exequial ceremonies" means the sixteen *sräddhas* ending with the *sapindikaran* ceremony These are the most important cerimonies, but only one of them is (*f*) regularly performed by every Hindu that has not openly renounced Hinduism The last ceremony has, as has been already said, the effect of uniting the deceased with his departed *paternal* ancestors in the next world But for this, his spirit would have roved over the earth, in something like solitary confinement These ceremonies are required to be performed by relations male or female in a specified order, the next in order being competent to perform in default of the first Some of these relations, however, are not in the category of heirs (*g*)

The author of the Däyabhaga deals with the order of succession in the eleventh Chapter of that treatise In laying down the order he professes to interpret certain texts of the sages, which set forth the order to some extent by *naming* the relations, and then end with generic terms, and he refers to

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(*e*) Nalinaksha *v* Rajani, 35 C W N 725, 729, *see* also Akshoy *v* Hari, 35 C W N 721, 726

(*f*) *Supra p* 639

(*g*) *See supra pp* 630-631

the capacity for conducing to the spiritual benefit of the deceased as *one* of the many reasons in support of his exposition of the order of succession deducible from those texts

The author does not however, allude to the above mentioned sixteen *srāddhas* or to the *ekoddista srāddha*, in considering the capacity of a relation to confer spiritual benefit He confines his attention to the *pārvana srāddhas* alone for the purpose It has already been said that these ceremonies are regularly performed by none: and although the unwillingness of the people to regularly perform the ceremonies, has given rise to the rule that these may be performed once for a year, and a day named *māhalayā* is set apart for that purpose, still very few Hindus of the persent day observe these ceremonies This omission is rather to be regretted and is due mainly to the ignorance of the people in general as to what is meant by the ceremonial conducted in Sanskrit They are calculated to exercise a very salutary influence on the human mind, by forcing on it the idea of the vanity of the world, like a walk in a cemetery

One will be in a position to clearly understand the doctrine of spiritual benefit if he examines how the author of the Dāyabhāga makes use of that theory The following is a summary of the references in the Dāyabhāga to this principle —

1 A grandson by a predeceased son and a great-grandson whose father and grandfather are both dead, inherit together with a son The reason assigned is, that these three confer equal amount of spiritual benefits by performing the *pārvana srāddha* (*h*)

A grandson whose father is alive cannot perform the *pārvana* so he cannot take (*i*) Potential capacity is here disregarded

A son offers three oblations, a grandson two, and a great grandson one, but this difference in the number of oblations is taken to be of no effect It is also to be noticed that when they confer equal amount of spiritual benefit, why do they not take *per capita*, if the doctrine be the sole criterion of inheritance ?

2 Widow succeeds to the estate of the *sonless* husband, by virtue of express texts Conflicting texts are referred to They are reconciled by holding that the contrary texts do not intend to lay down the order of succession but to enumerate the heirs It will be borne in mind that from these texts the author of the *mitakshara* deduces three different modes of devolution

The author of the Dāyabhāga (*j*) invokes the aid of the doctrine of spiritual benefit in support of his conclusion in favour of the widow's succession He cites many texts in which the sages declare that the birth and existence of the three male issues are spiritually beneficial to the father and other ancestors, independently of the performance by them, of any religious ceremony for offering *pinda* (*k*) Upon the

(*h*) Ch iii, Sec 1 para 18
(*i*) Ch iii, Sec 1, para 19
(*j*) Ch xi, Sec 1, paras 31-44
(*k*) D B, xi, 1, 31

authority of those texts he explains the term 'sonless' to mean destitute of son, grandson and great-grandson, on the ground of spiritual benefit This latter position is again supported by an exposition of the *sapinda* relationship, by putting a novel meaning on the term *dàya* in a text of Baudhàyana, according to which, however, the first class *sapindas* only may come under that term He states that next to the male issue, the widow may confer spiritual benefits by practising austerities and adds that she might cause her husband's soul to fall to the lower region by leading a vicious ... of life for want of wealth

The widow cannot perform the *parvana sraddha* She succeeds for two peculiar reasons 1st, she is the surviving half of the deceased husband 2nd, her unique capacity for conferring spiritual benefit, very different from the rites upon which the full Bench relies.

3 Daughter's succession is based upon express texts She herself cannot confer any spiritual benefit, but her son may do so The daughters that are sonless and not likely to have sons, are excluded

The maiden daughter is preferred to others, as her marriage is requisite for the spiritual welfare of her departed paternal ancestors, who would otherwise fall to a region of torment But there is an express text for this preference

If the spiritual benefit derived from *sraddhas* were the only criterion, the daughter's son ought to have been held preferable to both maiden and married daughters

4 Daughter's son There are express texts in favour of his succession There are also texts to the effect that he confers peculiar spiritual benefit like the son's son, by his very birth and existence apart from the offering of *pindas* All these texts, however, really refer to the appointed daughter's son, *i e*, a kind of adopted son and not to the ordinary daughter's son

5 Father's succession is based upon express texts He is postponed to the daughter's son, because he offers two oblations and the daughter's son three

It will be observed that in this instance the potential capacity alone is looked to The daughter's son may not actully present any oblation at all For if his father be alive he is not competent to perform the *parvana sraddha*, and if predeceased his father he can bestow no spiritual benefit at all, by offering oblations The daughter's son's son does not offer any oblation.

It will be borne in mind that the *parvana sraddha* is not separately performed in honour of the maternal ancestors It is a ceremony in honour of the paternal ancestors alone When it is performed, then the maternal ancestors also are worshipped, but not in all cases

According to the doctrine of spiritual benefit, the father and the paternal uncle ought to have succeeded together, as both of them offer two oblations Propinquity alone can explain the father's preference

The father is preferred to the brother whose capacity for spiritual benefit is superior to the former's, but potential during his life one cannot prefer ... criterion for postpon-

ing, which he has not done in the case of the daughter's son, or unless he relies on propinquity whereby only he may prefer the father to the brother

6 Mother's right is based upon express texts Reasons for preferring her to a brother are, gratitude in return for secular benefits received,—a new factor, and her capacity to confer spiritual benefits by giving birth to sons

She can inherit when a widow, and if she has no male issue then, she cannot even indirectly confer any spiritual benefit in the said manner

In strict accordance with the doctrine of spiritual benefit as understood by the Full Bench, she ought to have been postponed to many others The doctrine must be given up in her case which can by no means be brought under it

7 Brother's succession after the parents is expressly mentioned in the texts There is an express text for the preference of whole blood An additional reason assigned is that the full brother offers oblations to the deceased's own mother to whom he was bound to present oblations in the *parvana srâddha*, whereas the half-brother offers to his own mother and not to the mother of the deceased

Following the spiritual benefit theory strictly, a re-united half-brother could not be held to succeed jointly with a full-brother not re-united Nor could reunion be taken to give preference in other cases

The oblation presented to the mother is a new factor

The full brother offers, therefore, six undivided oblations, or rather nine, three to paternal male ancestors three to the mother, the paternal grandmother and great-grandmother, and three, to the maternal male ancestors Still, he is postponed to the father who offers only four, and to the daughter's son who offers only three

8 After the brother comes the brother's son under the express texts He offers two oblations A full brother's son offers two more oblations to two female ancestors while a half brother's son presents only one such oblation to the deceased's paternal grandmother This is set forth as an additional reason for the preference of the former

Thus far, the order of succession is the same as under the Mitâkshârâ, with the slight difference as to the order between the parents, and the inheritance of barren and sonless widowed daughters

9 Then comes the brother's grandson, he is not expressly named but is included under the term *gotraja* He offers one oblation

The brother's son and grandson are preferred to the paternal uncle who offers two oblations inasmuch as they present oblations to the father who is to be principally considered

The brother's great-grandson being the fifth in descent offers no undivided oblation and therefore cannot take now

10 The sister's son comes in next. He presents three oblations

11. Then the author of the Dâyabhâga lays down generally that the grandfather's and great-grandfather's descendants inclusive of their daughter's son, will take in the same way as the father's descendants

The reasons assigned for the succession, in the above order, of the sons of daughters of the three paternal ascendants are, that they ought to take on the same grounds as the deceased's own daughter's son, and in the proximity of offering oblations and that they are included under the term *gotraja* in the text of Yâjnavalkya

The word *gotraja* is taken in the Mitâksharâ in the sense of *sagotra* or agnatic relation the author of the Dayabhaga takes it in its literal sense, namely, descended from the *gotra* in this sense the sons of daughters born in the family may be called *gotrajas*, though it is far-fetched

12 Then the author says that in default of the great-grandfather's descendants including his daughter's son, who offer oblations enjoyed by the deceased, the maternal uncle and the like succeed, because Yajnavalkya includes them under the term *bandhu*, and because they confer spiritual benefits upon the deceased by performing a duty which the deceased was bound to perform, namely by presenting oblations to their own paternal ancestors who are the maternal ancestors of the deceased

He says that uses of wealth are two, enjoyment and charity When it cannot conduce to the enjoyment of the deceased, it ought to be appropriated to charitable purposes such as are calculated to confer spiritual benefit upon the deceased He adds that the taking of the wealth by the maternal uncle and the like furnishes them with the means of presenting oblations to the maternal ancestors to whom the deceased was bound to *give* oblations; and the deceased is benefitted by *gifts* of oblations to maternal ancestors by the maternal uncle and the like

In Ch xi, Sect vi, paras 12-20 and 28-33, there is a lengthy discussion on this subject The real difficulty of the author, and the way in which he meets the same, will be better understood, if attention be paid to the following texts, one of Yâjnavalkya and the other of Manu

(1) The widow and the daughters also both parents, brothers likewise, their sons, the gentiles (*gotrajas*) the cognates *bandhus*, a pupil and a fellow-student in default of the first among these, the next in order is heir to the estate of a sonless deceased man — *Yâjnavalkya* (*l*)

(2) To three must libations of water be made, for three is the offering of funeral cake ordained the fourth is the giver of the same, the fifth has no concern in them To the nearest *sapinda* the inheritance next belongs After these the *sakulyas* or gentiles, the preceptor or the pupil —*Manu* (*m*)

Therefore according to the plain meaning of the text of Yajnavalkya the cognates or *bandhus* can be heirs only in default of the gentiles And this is the real difficulty in the way of the introduction of the maternal uncle and the rest before the *sakulyas* or gentiles

The expedient hit upon by the author of the Dâyabhâga is this Manu does not name the cognates in the category of heirs But there is a maxim that no code of law can be accepted if contrary to Manu Therefore, in order that *bandhus* who are mentioned by Yâjnavalkya may become heirs, it must

(*l*) *Supra* p 552
(*m*) *Supra* p. 80.

be held that Manu also has mentioned them by implication And the text—"To three must libations, &c"—is taken by the author to include the cognates by implication Agreeably to this view, the cognates come first in Manu's texts, and then the *sakulyas* The author means to say that neither the enumeration thus obtained nor the enumeration by Yájnavalkya of gentiles and cognates one after the other, does indicate the order of succession But the order is to be determined by the text "To the nearest *sapinda* the inheritance next belongs" The term 'nearest *sapinda*' is interpreted by the author to mean the *greatest-spiritual-benefit-giver*

According to the author of the Dàyabhàga, the cognates to whom he has given a position before the *sakulyas* confer a greater amount of spiritual benefit than the latter

They are the daughter's son, sister's son, father's sister's son, and grandfather's sister's son, as well as the maternal uncle and the like

The term 'maternal uncle and the like' has been explained by Srikrishna and Raghunandana to mean the maternal grandfather, the maternal uncle, his son and grandson The expression *traipurushikapinda*, used by the author of the Dàyabhàga in the course of the argument and the principle of reciprocity, may have influenced this explanation

13 The *sakulyas* come after the maternal uncle and the like There are express text for their succession They also confer spiritual benefit by offering *pinda-lepas* either to the deceased himself or to those to whom the deceased was bound to offer such oblations

The doctrine of spiritual benefit is not referred to in dealing with the succession of the *samànodakas* and the rest because both the schools agree as to their succession

14 The founder of the Dàyabhàga School intended to leave as the law of Bengal, the Mitàksharà order of succession as modified by himself, mainly by introducing the seven or eight cognate relations before the *sakulyas* It was not his object to deal with it in its entirety, but he may be mistaken to have done so by reason of the explanation of the texts cited by him on the order of succession, which clearly appears from the context to be merely parenthetical. It would be a great mistake to suppose that the order appearing from the said explanation is intended to be exhaustive, when the cognates that are expressly recognised as heirs in the Mitaksharà are not at all taken into cosideration by the author who would undoubtedly have done so, had he differed from the author of the Mitàksharà After having dealt with the order of succession, by way of explaining the texts cited, the author does, (*n*) again return to the discussion of the right of cognates to whom he has already given a preferable position in the order of succession, for therein he principally differs from the Mitàksharà He argues that the *order* of succession as modified by him, agreeable to the theory of spiritual benefit, is the proper one (*o*)

(*n*) In paras 21-33
(*o*) XI, vi, 30.

Then he concludes by saying that even if the learned be not satisfied that the *doctrine* is deducible from the texts of Manu, still the *order* of succession as laid down by him is supported by them

Srikrishna's comments on the above are that, according to the doctrine of spiritual benefit strangers might come in as heirs, for any person, by throwing into the waters of the Ganges the ashes of the deceased's body after cremation, may confer upon the deceased an inestimable amount of spiritual benefit This difficulty amongst many others, induced the author to make the last mentioned remark (*p*)

15 It has already been said that the order of succession amongst the paternal grandfathers and great-grandfather's descendants is not laid down in *extenso* by the author of the Dayabhaga But Raghunandana and Srikrishna place them in the following order, grandfather,—grandmother, uncle, uncle's son, uncle's grandson, grandfather's daughter's son, great-grandfather, great-grandmother, grand-uncle, his son, grandson and great-grandfather's daughter's son,—following the analogy of the order in which the parents and their descendants take But this is clearly indicated by Jimutavahana in Ch xi (*q*)

This order is not consistent with the oblation theory But nevertheless this order is laid down by the author of the Dayabhaga

Upon a review of the above reference to the capacity for conferring spiritual benefit, it is difficult to see how a clear and consistent principle

of inheritance The other heirs after the *sakulyas* do not confer any spiritual benefit As to libations of water, they are offered by strangers as well as by relations, nor is any authority cited supporting the rendering of the term *samanodakas* into those connected by libations of water

It has, however, been asserted that the whole of Chapter XI of the Dayabhaga is nothing but a mere elaboration of the doctrine of spiritual benefit But with the greatest deference to those that take this view, it cannot be seen how such a conclusion can be drawn to, on a perusal of that Chapter The object of the author appears, beyond the shadow of a doubt, to have been to lay down a particular *order* of succession, and to invoke the aid of that doctrine merely to fortify his positions That doctrine itself has nowhere been fully and completely explained nor independently dealt with, but it has only been, in a subordinate manner referred to in the course of the arguments put forward in support of his positions

And it may very fairly be doubted whether the induction of the doctrine of spiritual benefit and the generalizations made by the Full Bench in *Gurugobinda Saha Mondal's* case are correct, when these are admittedly inconsistent with the order of succession specified by the author of the Dayabhaga And nothing is found in that work from which the relative amount of spiritual benefits conferred by two relations can be ascertained in a case in which there is no opinion of the author himself, reading, of course, the work

(*p*) *See p* 93 *supra*.
(*q*) Sec iv, paras 4-6.

the way in which the Privy Council says it should be read, *viz* —"but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyayana's text taken by itself, as what are the conclusions which the author of the Dayabhaga has himself drawn from them" (*r*)

The doctrine appears, as has already been said, to have been introduced by the author of the Dayabhaga as a mere pretext for assigning in the order of succession a higher position to some dear and near cognates who, under the Mitakshara are all postponed even to the most distant agnate relation,—a pretext similar to that under which the Prætor Urbanus of Rome recognized the heritable rights of cognates

Too much appears to be made of this doctrine, for, the sole object of recognizing the heritable right of the remaining cognates about whose heritable right and position in the order, the author of the Dayabhaga is silent, inasmuch as he intended to leave them in the same state as they were under the Mitakshara, he had nothing to say about them

As to the cognates other than those named by all the authorities of the Bengal School as heirs before the *sakulyas*, their order is, no doubt, not mentioned in the Dayabhaga But that does not show any intention to exclude them unless the enumeration of heirs in that treatise be held to be exhaustive

Two questions arise with reference to this point, (1) How is their inclusion to be reconciled with their omission in the enumeration of the order? (2) Where are they to be placed?

Before proceeding to consider these questions, it ought to be mentioned that the term cognate meant to include all those that are included under the term *bandhu* in Yájnavalkya's text and in the Mitákshára They are divisible into those that confer spiritual benefits by offering *pindas*, and those that do not

The Full Bench decision in *Guru Govinda Shaha Mandal's* case is silent as to the second class, and the first class are held to be included in the category of heirs by the principle of spiritual benefit

Now, the term *bandhu* occurs in the text of Yajnavalkya laying down the order of succession That text has been cited by the author of the Dáyabhaga as an authoritative one while opening the subject of succession, (*s*) and its authority has been invoked throughout the Chapter Maternal uncle and the like are said by the author to come under this term *bandhu* But no explanation of the term has been given so as to indicate who else are included by that term The term *bandhu* has been explained in the Mitakshara, a work of the highest authority in all the schools not excepting Bengal where however it yields to the Dayabhaga, on points in which they differ But, when the Dayabhaga is silent, the Mitakshara is to be consulted in the

(*r*) 5 C, 776
(*s*) Ch xi, Sec 1, para 4

Bengal School as well. This has been laid down by the Privy Council at least in two cases (*t*) Hence all relations that are *bandhus* under the Mitakshara are also heirs in Bengal With this difference that the sister's son, the father's sister's son and the like who are descended from agnatic relations are included, by the author of the Dayabhaga, under the term *gotraja*

It has already been said that the enumeration of the distant heirs was object of the author of the Dayabhaga It is rather given by way of digression from the subject he was considering He was contending for the higher position of certain cognates , and, in doing so he cited certain texts bearing upon the order of succession , and, as a commentator, he offered parenthetically his explanations of the same and then returned to his subject with which he concluded It would, therefore, appear that he intended to leave the distant succession in the same state in which it was in the Mitakshara This view is supported by Raghunandana the next highest authority in Bengal, who introduces the cognates again after the agnates

As to the precise position, there would be no difficulty whatever if the rule contained in the Mitakshara and the Dayatattva be followed But this would be opposed to the present sense of natural justice The expression natural justice means, if it means anything definite, the speaker's sense of what ought to be

The question has, in several cases, arisen before the High Court with reference to the eight relations beginning with the son's daughter's son, four of whom may offer two oblations and the rest one oblation to be partaken of by the deceased

It has already been said that it is now settled by the High Court that those relations cannot be placed before the great-grandfather's daughter's son.

The contention therefore, must now be confined to this position that, they are entitled to take before the relations on the maternal side and before the *sakulyas*

Their position before the maternal side is in direct opposition to what the author of the Dàyabhàga has expressly said The author has laid down that the maternal uncle and the like are to succeed after the great-grandfather's daughter's son When the author of the Dàyabhága says so, it must be concluded that, after the great-grandfather's daughter's son the maternal uncle and the like confer the greatest amount of spiritual benefit, admitting that to be the sole criterion of inheritance Both these sets of relations confer spiritual benefit, and there is no reason to assume, in the face of what is said by the author, that the maternal uncle and the like confer a lesser amount of benefit There is nothing in the Dàyabhàga from which, directly or by implication, such a conclusion can be deduced (*u*)

Besides, there is no other ground for preferring the brother's daughter's son or the nephew's daughter's son to the mother's brother

(*t*) *See pp* 58-59 and the Unchastity Case
(*u*) See Ch xi, Sec vi, para 20

A plausible argument, however, may be raised in favour of the successions of the eight relations before the *sakulyas*, but there is not an iota of reason for placing them before the maternal uncle and the like

The competition between a maternal uncle or the like on the one hand, and any one of the eight relations on the other, presents a difficult question in consequence of the conflict between what is expressly stated in the Dàyabhàga and the view of its principle taken by the Full Bench

The point for consideration is whether those eight cognate relations and the maternal relations other than those specified above,—who are *sapindas* according to the Full Bench,—are to be preferred to *sakulyas*

It is contended that the three classes of *sapindas* must, according to the doctrine of spiritual benefit, be held to come before the *sakulyas* The former are assumed to confer a greater amount of spiritual benefit than the latter

A person does, according to the ceremony of *pàrvana srāddha* present three oblations to his father, paternal grandfather and great-grandfather, three to his three maternal *male* grandsires, and three *pinda lepas* or divided oblations to his 4th, 5th and 6th paternal male ancestors in the male line And, by so doing, he confers spiritual benefits on them Hence a person is bound to confer spiritual benefits on his six paternal male ancestors, on his three paternal female ancestors and on his *three* maternal *male* ancestors Those that confer spiritual benefits on those ancestors of a person are held to confer spiritual benefits upon him A person, after his death, partakes of undivided oblations presented to those ancestors with whom he is united by the *sapindikarana* ceremony Such ancestors must be his three *sagotra* male ancestors, *i e.*, his father, paternal grandfather and great grandfather While dealing with the *sapinda* relation-ship, it has been pointed out that such ancestors are not necessarily his three immediate ascendants, but may consist of his 4th, 5th and 6th ascendants, under certain circumstances The paternal great-grandfather may be considered to offer *pindas* enjoyed by the deceased agreeably to the foregoing rule, and the deceased becomes actually the *sapinda* of the 4th, 5th and even of the 6th ancestors

Spiritual benefit is, therefore, conferred in three ways (1) by offering an undivided oblation to the deceased himself or to those with whom he partakes of undivided oblations, (2) by conferring spiritual benefit, upon those on whom the deceased was bound to confer spiritual benefit, and (3) by offering *divided* oblation to the deceased and to his ancestors

A person conferring spiritual benefit in the first way is *assumed* to confer a greater amount of spiritual benefit than all relations conferring such benefits in the second way It is further *assumed* that no *sakulya* can confer spiritual benefit in the first way

There is nothing in the Dàyabhàga, expressly or impliedly, supporting the first assumption On the contrary, the position assigned to the maternal uncle and the like just after the great grandfather's daughter's son, negatives such an idea As to the second, suppose a man dies during the lifetime of his father, then he is united by the *sapindikarana* ceremony with his paternal-

grandfather, great-grand-father, *great-great-grandfather* and suppose the last to have a great-grandson living, then this great-grndson offers an undivided oblation to the *great-great-grand father*, and this oblation is participated in by the deceased. The second assumption too proves to be incorrect

The author of Dáyabhága does nowhere lay down as a general rule that the amount of spiritual benefit varies directly as the number of oblations, or that an oblation enjoyed by the deceased is more valuable than oblations offered to ancestors to whom he was bound to present oblations, or that undivided oblations are of greater value than divided ones

There is, however, one only sentence used by the author of the Dáyabhága in the course of an argument, that does apparently seem to support the last of three propositions mentioned above; and that is the slender basis upon which an argument may be based for the exclusion of the *sakulyas* by the three classes of *sapindas* (v) But that is not his conclusion, had it been so, it would not still have supported the above position in its entirety

His conclusion or rather the re-statement of his position set forth in paragraph 12, is contained in paragraph 20 paragraphs 13 19 contain his argument for that position, which is summarised in paragraph 19 and it is that the cognates already mentioned that offer *traipurushika pinda* are to be preferred to the *sakulyas* Everything therefore hinges on the meaning of the expression *trai-purushika pinda or pinda* offered to three *purushas* on the paternal or maternal side Now, the term *purusha* is used in Sanskrit law-books to denote an ancestor, and where a numeral is prefixed to the term, such as in the phrase 'three *purushas*' or 'seven *purushas*,' the person with reference to whom the expression is used is taken as one of the three or seven A brother or a son cannot be deemed a *purusha* of a person Now, if this is correct, then a person may be said to offer *trai-purushika pinda*, if he offers three *pindas* to the deceased and his two ancestors, or to his three ancestors only

Now a brother's daughter's son can by no means be held to offer *trai purushika pinda* The brother's daughter's son offers one *pinda* to the brother, another to the father and a third to the grandfather, so he offers *dvai-purushika pinda* or *pindas* to two ancestors only, namely, the father and the grandfather of the deceased Similarly, the son's daughter's son offers to the deceased and his father only It must be borne in mind that these daghter's sons offer no *pinda leaps* or divided oblations to their remoter maternal ancestors

It may be objected that how may then the maternal uncle's sons said to offer *trai-purushika pinda*, he offers one oblation to the maternal uncle, another to the maternal grandfather and a third to the maternal great-grand-father, so he offers to two ancestors only This objection may be obviated by the circumstance that he offers *pinda lepas* to his remoter ancestors, and so he may be taken to offer *trai-purushika pinda* This view is supported by what is said by the author in another place Besides, the

(v) *See* Ch xi S vi, 17

maternal uncle and his two descendants confer by their very birth inestimable benefits on the three maternal ancestors of the deceased, on whom he was bound to confer spiritual benefit

But still another objection may be raised, namely, how can the maternal grandfather be said to present *trai-purushika pinda* ? The answer is, that he offers *pindas* to his three ancestors who are also the ancestor of the deceased, although the deceased was not bound to confer spiritual benefit upon the third ancestor of his maternal grandfather It should, however, be noticed that the author himself does not mention the maternal grand-father by name, the expression used by the author of the Dáyabhága is, maternal uncle and the like although his succession before the maternal uncle is intended by him Raghunandana places him before the maternal uncle, following the analogy of the father's succession before the brother The reason appears to be that the maternal uncle and the like can confer no spiritual benefits so long as the maternal grandfather is alive, the maternal grandfather is nearer than his descendants, and the wealth taken by him will ultimately enure for the benefit, of his descendants The truth is, that capacity for spiritual benefit is only a mere pretext and has already been shewn to be not consistant

The traditional interpretation of the Dáyabhága supports the above exposition as the expression '*traipurushika pinda*' The only cognates, to whom the author of the Dayabhaga was all along understood to assign a higher position, were the brother's son, the sister's son, the father's sister's son, the grandfather's sister's son, the grandmaternal grandfather, the maternal uncle, his son, and his son The mother's sister's son also comes within the principle, and his place is after the maternal uncle's grandson, by analogy And the argument which contains the expression *trai purushika pinda* was advanced to support the succession of these cognates in the order already asserted by the author, and not to lay down any such general principle as is supposed by the Full Bench If the intention of the author were to include also the brother's daughter's son and the rest, he would certainly have named at least one of them, while there were so many occasions for doing it in the course of the arguments

As to the eight relations, namely, the sons of daughters born in the family it will be observed that their capacity for conferring spiritual benefits may be merely potential, and even when it is actual, it ceases with their own existence, they can leave no descendant that can conduce to any kind of spiritual benefit of the deceased There is no reason why the duration of the capacity should not be taken as a factor in calculating the amount of benefit With respect to this point, the *sakulyas* are superior to these eight relations With regard to the sons of the daughter of the *propositus* and of his three ascendants, there is an express text laying down that a daughter's son like a son's son confers peculiar benefit on his maternal grandfather from the moment of his birth So, these latter are in a different position But the above factor may have influenced the author of the Dayabhága in laying down, as he has done in one passage, that even the daughter's son is entitled to a life interest in the estate inherited from his maternal grandfather (*w*) This must not,

(*w*) Ch xi, ii, para 31

however, be mistaken for the law on the subject, because, the author having laid down that, goes on to say, 'or the female heirs will take a life interest.' The Courts have given effect to the latter alternative only. The daughter's son is now held to acquire an absolute title.

The position of all the second and third class *sapindas* before the *sakulyas* would be most anomalous.

Suppose A and B are two brothers, B dies leaving a son's son's son *x*, and a daughter's son *y*, or a son's daughter's son *z*, then A dies leaving no other heir but B's descendants. If the above order were to be accepted, then B's estate will descend to *x* to the exclusion of *y* or *z*, but the estate of his brother A will go to *y* or *z* to the exclusion of *x*.

It has been explained how some of the *sakulyas* may come under the term *sapinda*. So, the above order would be opposed to this. Besides, the benefits conferred upon the 4th, 5th and 6th ancestors must, at least in one case, be taken to be superior. The paternal great-grandfather offers oblations to those ancestors only, yet admittedly he is preferred to the eight daughter's sons and the maternal relations.

The grandson's, the nephew's, the uncle's son's, and the grand-uncle's son's daughter's sons are equal in degree respectively to their son's sons. But the former are *sapindas* and the latter *sakulyas*. Similarly, the maternal great-great-grandfather and his descendants are equal in degree to the paternal great-great-grandfather and his descendants. But the former are *sapindas* and the latter *sakulyas*. Cognates are preferred to agnates of the same degree. It ought to be remarked that the maternal great-great-grandfather cannot confer any spiritual benefit whatever.

Hence it is clear that the analogy is entirely false and misleading, whereby

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nt themselves to one

It has already been remarked that when there is a competition between two relations equal in degree, one of whom is a cognate and the other an agnate, to prefer the cognate to the agnate would be opposed to every system of jurisprudence.

The Hindu law of inheritance, as it is, may not in many respects commend itself to Europeans, whose family organisation is different. Some of the educated Indians also may feel it to be contrary to natural justice, and this may be the correct view. But nothing will be farther from truth than to mistake individual feelings for those of the Hindu community at large. Most of what are considered natural, originate in acquired habits of thought. The feelings of a people are moulded and shaped by its peculiar manners, customs and institutions. What is suited to the feelings of an imaginative people may be perfectly unsuitable to an objective race. What is suitable to an agricultural or pastoral nation may be altogether unsuited to a commercial people. What is agreeable to a community in its infancy may be quite disagreeable

to it in a later stage of development In the infancy of a society when the government could not be strong, and the protection of life and property depended more upon the exertions of the members themselves, people are observed to live in groups Persons connected by natural ties of birth continue to live together, and society is composed of families Society has been continuing in this stage longer in India than in any other country. Ritual and social rules, laid down upwards of three thousand years ago, are in most respects observed strictly to the present day They again re-act upon the feelings of the people. For example, the marriage law in order to preserve peace in families, it was ruled that two persons of different sexes, born in the same family cannot inter-marry This rule has the force of law even now, and no man of the twice-born classes can marry a girl of the same *gotra*, although their common ancestor may be distant by more than a hundred generations. But the rule was absolutely necessary when there was a local union of all the agnate families of the same *gotra* The Hindus are an agricultural people adhering to their ancestral homes and fields, and guided by their ancient customs and usages Daughters born in the family pass by marriage to strange families which, oftener than not reside in different and distant villages The feelings of two families allied by marriage are often very far from being amicable towards each other Hence it was enjoined that distant villages are preferable, since the communication not being easy, causes of friction and disagreement between the two families would be lesser, and accordingly the word *duhita* (=daughter) is derived from *du=dur=dure* and *hita*, meaning one who is beneficial (*hita*) when living at a distant place (*dure*) Persons having grandsons by daughters are found to adopt sons Seldom does a daughter come back to see her relations, and even when she comes, she is allowed but a few days to remain with them She and her children, being thus out of sight, become out of mind, nor can fathers have any power over their married daughters and their children who live separate from them While the agnate relations live together in the same village assisting and sympathizing with each other on joyous as well as on mournful occasions How strong is the tie that binds the agnatic relations together, and how complete is the estrangament between cognates, will appear in a glaring light if the rules of mourning are looked to A man shall have to observe the same period of mourning on the death of an agnatic relation, male or female, who may be on the extreme verge of *sapinda* relationship extending to seven degrees, as he has to observe on the death of his own father; whereas a brother's daughter's son or a son's daughter's son is not required to observe the same even for a day There are many and various other circumstances in Hindu society and families, to account for the preference given by the Hindu law to agnates But things which present themselves often are the very things which are least observed

The feelings of the majority of the Hindus of Bengal seem to be against the introduction before the ***sakulyas***, of the second and the third classes of ***sapindas***, other than those who are admitted on all hands to have a preferable position under the Dayabhaga, and who, in the later stage, under altered cir-

cumstances, have been thought so nearer and dearer in the estimation of the Hindus of Bengal (x)

The law of inheritance can, by no means, be so framed as to suit the feelings of all persons of a community It is therefore supplemented in every civilized country by the law of testamentary succession. The people of the Lower Provinces of Bengal have now the power of devising their property by Will Those therefore that think the law of inheritance to be unsuited to their feelings are no longer fettered by its rules

Inheritance is so important a branch of law, that it ought to be placed beyond the possiblity of any doubt or dispute It ought to be as simple and clear as possible Anything ought to be deprecated that is calculated to throw any doubt upon the same

(x) See the Preface to the second edition of the Dayatattva where the reasons for the changes of law, introduced by Jimutavahana are fully explained

CHAPTER X

EXCLUSION FROM INHERITANCE AND DIVESTING

Sec 1—ORIGINAL TEXTS

१। सर्वे हि धर्मयुक्ता भागिनो द्रव्यम् अर्हन्ति, यस्त्वधर्मेण द्रव्याणि प्रतिपादयति, ज्येष्ठोऽपि तम् अभागं कुर्वीत। तथा अपपात्रितस्य ऋक्थपिण्डोदकानि निवर्त्तन्ते।

आपस्तम्ब।

Causes of exclusion

1 All co-heirs, who are endued with religion, are entitled to the property, but he, who dissipates wealth by his vices, should be debarred from participation, even though he be the first-born. So, of one who has been excommunicated, the heritable right and connection through oblations of food and libations of water, become extinct —A'pastamba

1 moral defects,

२। शास्त्रशौर्यार्थरहित स्तपोविज्ञानवर्जित.।
आचारहीन पुत्रस्तु मूत्रोच्चार-समस्तु सः॥ वृहस्पतिः।

2 A son who is devoid of Sàstras, prowess and good purposes, who is destitute of devotion and knowledge, and who is wanting in conduct, is similar to urine and excrement —Vrihaspati

३। सर्व्वे एव विकर्म्मस्था नार्हन्ति भ्रातरो धनं। मनु., ९ २१४।

3 All those brothers, who are addicted to vice, lose their title to the inheritance —Manu, ix, 214

४। (अर्हति स्त्री) न दाय निरिन्द्रिया अदायाश्च स्त्रीयो मता इति श्रुतेः।

बौधायन.।

4. A woman is not entitled to the heritage: for, a text of the Revelation says—"Females are devoid of prowess and incompetent to inherit,"—Baudhàyana cited in D. B, xi, vi, 11

II sex,

५। अनंशौ क्लीवपतितौ जात्यन्धवधिरौ तथा।
उन्मत्त-जड़मुकाश्च ये च केचिन् निरिन्द्रियाः॥ मनुः, ९, २०१।

5. An impotent person and an outcaste are excluded from a share of the heritage, and so are those deaf-and-blind from-birth, as well as madman-idiots and the-dumb and any others that are devoid of an organ of sense or action —Manu, ix, 201

The words connected by hyphens are compound words in the original Organs of action are five, namely, organ of speech, both hands, both feet,, excretory organs, and generative organs, organs of sense are also five namely eyes or the organ of sight, ears or the organ of hearing, nose or the organ of smell, palate or the organ of taste, and and skin or the organ of touch These are called the *external* organs of sense, for an *internal* organ of sense is admitted, and is named *manas* (=mind) which is the necessary channel of communication between the external organs of sense and the soul, and which accounts for the absence of simultaneous perception of the sensa-

tions on the five external organs in inasmuch as it is supposed to be atomic in size and incapable of conveying more than one sensation at the same time.

६। पितृद्विट् पतितः षण्ढो यश्च स्याद्-औपपातिकः।
औरसा अपि नैतेऽंशं लभेरन् क्षेत्रजाः कुतः॥ नारद, १३, २१।

Who are excluded from inheritance

6 An enemy to his father, an outcaste, an impotent person, and one who is addicted to vice (or excommunicated) take no shares of the inheritance even though they be legitimate much less, if they be sons of the wife by a man appointed to raise issue on her —Narada, xiii, 21

७। मृते पितरि न क्लीब कुष्ठ्युन्मत्त-जडान्धकाः।
पतितः पतितापत्यं लिङ्गी दायांशभागिनः॥
तेषां पतितवर्ज्येभ्यो भक्तवस्त्रं प्रदीयते।
तत्सुता पितृदायांशं लभेरन् दोषवर्जिताः॥ देवल।

Maintenance of disqualified heirs.

7 When the father is dead an impotent person, a leper, a madman, an idiot, a blind man, an outcaste, the offspring of an outcaste, and a person wearing the token of a religious order are not entitled to a share of the heritage, food and raiment should be given to them, excepting the outcaste, but the sons of such persons being free from similar defects, shall obtain their father's share of the inheritance,—Devala

८। क्लीबोऽथ पतित-स्तज्ज पङ्गुरुन्मत्तको जडः।
अन्धोऽचिकित्स्य रोगाद्या भर्तव्याः निरंशकाः।
औरसाः क्षेत्रजास्त्वेषां निर्दोषाः भागहारिणः॥
सुताश्चैषां प्रभर्तव्या यावद् वै भर्तृसात् कृताः।
अपुत्राः योषितश्चैषां भर्तव्याः साधुवृत्तयः।
निर्वास्याः व्यभिचारिण्यः प्रतिकूलास्तथैव च॥ याज्ञवल्क्यः, २, १४१-१४३।

Sons of disqualified heirs free from defects are heirs

8 An impotent person, an outcaste and his issue, one lame, a madman an idiot, a blind man, and a person afflicted with an incurable disease, and the like, are excluded from participation, but are to be maintained But their sons, whether real legitimate or born of the appointed wife, are entitled to allotments, if free from defects, and their daughters must be maintained until they are provided with husbands, and their sonless wives conducting themselves aright, must be supported, but such as are unchaste should be expelled, and so indeed should those who are perverse Yâjnavalkya, ii, 141-143

EXCLUSION FROM INHERITANCE AND DIVESTING.

Sec 2—CAUSES OF EXCLUSION

It should be remarked that sex is a cause of exclusion, for, females are, as a general rule, excluded from inheritance

and except such as have been expressly enumerated as heirs. The other causes of exclusion are certain moral or religious, mental and physical defects and deformities. They may be classified thus :—

Sub-Sec 1—MORAL AND RELIGIOUS DEFECTS

Religious disability and Act XXI

Religious disability and Act XXI of 1850—The renunciation of Hindu religion, and consequent excommunication are no longer causes of exclusion from inheritance, since the passing of Act XXI of 1850 which provides —

"1 So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by the Royal Charter within the territories"

The language of this section, so far
Hindu law, shows that it relates to a person who had been

born a Hindu, but has renounced the *Hindu religion, or has* been excluded from the communion of the Hindu religion, or has been deprived of caste but its wording cannot apply to a person who is born a non-Hindu, although his father or mother might be a Hindu by birth, but had become a pervert from Hinduism before he was born. This Act removes the disability of the person who renounces Hinduism, hence, his Hindu son is entitled to inherit the property of his father who was converted to Mahomedanism, (*a*) his non-Hindu descendants cannot claim any benefit under this Act

but not his descendants.

A non-Hindu's right under Hindu law,

A person who is from birth a non-Hindu cannot be subject to the personal law of the Hindus, and cannot therefore lay claim to a right which is conferred on Hindus by the Hindu law to which he is not amenable Nor can a Hindu claim to inherit from a Mahomedan or a Christian, for, succession to their property is governed by the Mahomedan law or the Succession Act respectively, neither of which applies to the Hindus

and Hindu's claim under non-Hindu law

Contrary Allahabad view,

But the Allahabad High Court has held that a person who is bron a Mahomedan, his father having renounced the Hindu religion, is entitled to inherit his Hindu paternal uncle's estate, by virtue of the provision in the above Act XXI of 1850 (*b*) It is difficult to follow the argument set forth in the judgment

not reasonable

Reg VII of 1832

Section 9, Regulation VII of 1832 provides, "whatever, therefore, in any civil suit, the parties to such suit may be of different persuasions, * * * the laws of those (Hindu and Mahomedan) religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled In all such cases the decision shall be governed by the principles of justice, equity and good conscience, it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rule not sanctioned by those principles"

applied in Bengal,

This regulation was enacted to be in force throughout the provinces subject to the Presidency of Fort William.

(*a*) Hassomal *v* Ghulam, 27 I C 357 (S)

(*b*) Bhawant *v* Kallu, 11 A 100, followed Rupa *v* Sardar, 55 I C 420 (L.) (a Christian convert to Islam)

The preamble of Act XXI of 1850 recites this Regulation and says that "whereas it will be beneficial to extend the principle of that enactment (*c*) *throughout* the territories subject to the Government of the East India Company, it is enacted as follows" .—

Preamble of Act XXI of 1850,

Thus it will be seen that what was intended to be done by Act XXI of 1850, is to extend that to the whole of British India, which was in force only in the Presidency of Fort William.

...ws application in whole India.

Now, is it at all conformable to the principles of justice, equity, and good conscience to hold that the son born to a person after he had renounced Hinduism and become a Mahomedan or a Christian, is entitled to be heir of that person's Hindu brother or other relations, when it is notorious fact that they become totally excommunicated and estranged, and are no longer recognized as relations by the Hindus ? (*d*)

The Madras High Court (*e*) in dissenting from the above Allahabad case, has held that the protection is given by the Act only to one person, the convert, and should not be extended to others.

All view dissented by Madras

Deprivation of caste and Act XXI of 1850—According to Hindu law, persons who are guilty of certain heinous sins are considered degraded and deprived of caste, that is to say, they are deemed dead so far as their relations and caste-people are concerned, there being a complete cessation of all social intercourse as well as of the mutual right of inheritance.

Deprivation of caste

Now, an important question arises for consideration, namely, whether Act XXI of 1850 was intended to remove the disqualification based upon deprivation of caste by reason only of change of religion ? or irrespective of the same ?

by change of religion only protects rights.

If the Act be read and construed by the light of its Preamble, there cannot be any doubt that deprivation of caste, owing only to change of religion, is what is intended by the Act to be declared as having no legal effect so as to affect

(*c*) S 9 of Reg vii of 1832
(*d*) See Ganga *v* Begum, 35 I C 549 57 P R 1916 ; 159 P W R. 1916.
(*e*) Vaithilinga *v*. Ayyathorai, 40 M 1118 ; 37 I.C. 753 , Sundarammal *v*. Ameenal, 1927 M. 72

the rights of a person changing his religion. The Act does not affect the principles of the Hindu moral law, and is operative only when there is a change of religion. This was the view taken by the Suddar Dewany Adawlut of Bengal, (f) differing from the contrary view taken by Sir Lawrence Peel (g) the latter view, however, is supported by the weighty opinion of Sir Barnes Peacock. (h)

but not by moral offences,

But with the greatest deference to that eminent Chief Justice, it may be asked, was it the intention of the Legislature to do away with the disabilities imposed by Hindu law, on persons guilty of gross moral offences? Are religion and morality to be utterly ignored by the Indian Legislature and the Indian Courts?

Was the intention of the Act,

If that be so, then it cannot but be held that the whole Chapter of Hindu law on Exclusion from Inheritance, has been abolished by the above Acts for the defects or deformities causing exclusion from inheritanc are supposed and believed to be the consequences of sins committed in the past forms of existence, but if heinous sins perpetrated in the present life which cause deprivation of caste and exclusion from inheritance, be taken to have no longer any legal effect in consequence of the said Act, why then should similar sins committed in past forms of existence, and manifested by the deformities, have the effect of excluding from inheritance the unfortunate persons affected thereby?

present Calcutta view

But a recent decision of the Calcutta High Court has clearly explained the law in the lines of the remark made above holding that "Deprivation of caste in the Section means deprivation of caste by reason of change of religion and not merely for moral degradation. (i)

Madras followed Bengal Sudder Dewany

The Madras High Court appears to take the same view as the Bengal Sudder Dewany Court, namely, that the Act contemplates deprivation of caste by reason of change of religion. For, it was held that as regards inheritance to the property left by dancing girls or prostitutes, their sister or adopted niece belonging to their fallen class succeed in preference to a brother remaining in caste. (j) This principle of succession, however, is not approved of on other grounds (k)

(f) Rajkumari v Golabee, Sudder Decisions of 1858 p 1891
(g) Sarnamoyee v Nemy, 2 Taylor and Bell, 300
(h) Matunginy v Joykali, 14 W R O J 23
(i) Nalinaksha v Rajani, 35 C W N 726, 730
(j) Sivassangu v Minal 12 M 277, Narasanna v Gangu 13 M 133
(k) *See infra pp.* 667-669

It has been held by the same Court that marriage is dissolved by a Hindu husband becoming a Christian, which is tantamount according to Hindu law, to becoming degraded and outcasted, (*l*) but a subsequent decision of the same Court, (*m*) having regard to a view expressed in another dispute regarding the same marriage which came before the Madras High Court for the second time, (*n*) has come to the conclusion that under the Hindu law apostacy does not dissolve the marriage tie.

but recent view contra

The Calcutta High Court held that the general rule, that the tie of kindred between a woman's natural family and herself ceased when she became degraded and an out-caste, applied with even greater force as between her and the members of her husband's family, the husband's sister's son, therefore, had no right of inheritance in property acquired by a woman who became a prostitute, (*o*) but the rule of law has been reversed by a Full Bench of the same Court. (*p*)

Degradation severes relationship, but held otherwise by F B

In the absence of any communal custom rendering a marriage with a woman of lower grade of the same caste, invalid, the party to such a marriage nor the issues of such marriage, forfeit their rights of inheritance in the family property. (*q*)

Deprivation of caste operates as civil death.

In the case of deprivation of caste, also, the privilege conferred by this Act is only personal, as applying to the person who having been in the caste is deprived of it, it cannot apply to his descendants coming in to existence after he has become an outcaste For an outcaste is beyond the pale of Hinduism to whom the Hindu law cannot apply The outcaste is deemed dead and funeral ceremonies are performed for him, by his relations in caste (*r*)

Re-marriage of widows and Act XV of 1856 —A Full Bench of the Madras High Court, (*s*) disagreeing with a decision of the Allahabad High Court, (*t*) has come to the

Widow forfeits her rights by re-marriage

(*l*) Sinammal *v* Administrator 8 M 169
(*m*) Budansa *v* Fatma 26 M L J 260 15 M L T 107 22 I C 697, *see p* 185 *ante*
(*n*) Administrator *v* Anandachari 9 M 466
(*o*) *In the goods of*, Kaminy, 21 C 697
(*p*) *See p* 667 *infra*
(*q*) Har Prasad *v* Kewal, 47 A 169 83 I C 163 1925 A 26
(*r*) *See* Manu, xi, 183 et seq, *see ante pp* 659-660, *but see contra* 18 C 264
(*s*) Vatta *v* Chatakondu 41 M 1078, *see* Md Umar *v* Man 21 C W N 906
(*t*) Abdul Aziz *v* Nirma, 35 A. 466 11 A L J 678 21 I C 2, *see supra p* 552

conclusion that a widow who embraces Mahomedanism and then marries a Mahomedan husband, forfeits her rights in her Hindu husband's property under Hindu law and not under Section 2 of Act XV of 1856.

Unchastity of daughter and mother

Unchastity—of woman is highly condemned, and it is admitted by all the schools to exclude the widow from inheriting her husband's estate, in fact a wife's right to be her husband's heir is founded on her fidelity and loyalty to him. It is her devotion to the husband that consitutes her to be the half of her husband, in which capacity she inherits his estate, and of which estate she becomes divested by giving up that character by re-marriage An unchaste wife may be divorced by the husband thus, Manu cited in the Vivada-Ratnakara p 426 (Calcutta Asiatic Society's Edition) declares,—

स्वच्छन्दगा च या नारी तस्यास्त्यागो विधीयते ।
न चैव स्त्रीवधं कुर्य्यात् न चैवाङ्गविकर्त्तनं ॥

which means—"If a woman is licentious, her abandonment is ordained the woman, however, should not be killed, nor should her limbs be mutilated"

Unless condoned by husband

Unless condoned by the husband (u) unchastity and disloyalty before the husband's death, according to the Bombay and Allahabad High Courts, would exclude the widow The Calcutta High Court dissented from this view. (v) But unchastity subsequent to the husband's death will not divest the estate already vested in her. (w) The latter proposition, however, is true only in a qualified sense, as will presently appear.

Unchastity excludes the widow's right of inheritance

Allahabad Bombay & Madras hold no bar

But there is a conflict of decisions with respect to the effect of unchasity of the daughter and the mother on their right of inheritance The Allahabad, Bombay and Madras High Courts have held that neither the daughter nor the mother is excluded by reason of unchastity which, as a cause of disinherison, applies to the widow alone. (x) But the Calcutta High Court has held that the condition of

(u) Gangadhar v Yellu, 36 B 138, Radhe v Bhawani 40 A 178, *see ante p 559 foot note (m)* (v) Ram Dasya v Golapi, 34 C W N 648
(w) Moniram v Keri, 5 C 776, affirming 19 W R 367
(x) Ganga v Ghasita, 1 A 46, Baldeo v Mathura, 33 A 702, Dal v Dini 32 A 155 5 I C 521, Advyapa v Rudrava, 4 B 104, Kojiyadu v Lakshmi, 5 M. 149.

chastity applies not only to the widow but also to the daughter,(*y*) to the mother (*z*) and to all women. (*a*)

Calcutta holds it a bar,

There is nothing, however, in the Dàyabhàga in support of this view taken by the Calcutta High Court, and the reasoning by which that conclusion is arrived at, appears to be, as pointed out by Madras High Court, disapproved by the Privy Council in the Unchastity case It must not, however, be supposed that under the Dàyabhàga the daughter or the mother is under no circumstances excluded from the inheritance by reason of unchastity even if it be of the gravest character There are different grades of unchastity under Hindu law and a woman is certainly excluded, if her incontinence causes excommunication, or is followed by child-birth, as will presently be explained

whether supported by Dayabhàga

The chastity of the mother and the daughter is not required by any commentary, as a condition of their succession The reasons assigned in the Dàyabhàga for the mother's succession are the secular benefits received from her by the deceased, and her capacity to confer spiritual benefit by giving birth to other sons, but the existence of the second reason is not at all necessary (*b*) As regards the daughter, her capacity to be mother of sons, and her descent from the *p opositus*, are set forth as the reasons for her succession Their unchastity does not prejudicially affect the spiritual welfare of the deceased, in the same way as that of the wife or the widow. The Viramitrodaya (*c*) appears to declare by necessary implication, that the mother's unchastity is no disqualification for inheritance (*d*)

Chastity of mother and daughter not condition of succession

In the two cases before the Calcutta High Court, the two women concerned were not only unchaste but were also degraded and outcasted, and their exclusion could be justified on the latter ground, if Act XXI of 1850 be taken to remove the disqualification of being deprived of caste by reason only of renunciation of the Hindu religion The Judges, however, avoided deciding that question.

In Calcutta cases the women were outcasted

Mere unchastity when not followed by conception or by loss of caste in an expiable and venial offence and cannot justify exclusion from inheritance, of female relations other than the wife whose case stands on a different footing altogether, for conjugal fidelity to the husband is of the essence of the notion of a wife and forms the foundation, and is the *sine qua non*, of her heritable right.

Degree of unchastity.

The Madras High Court has held that unless there has been expulsion from caste on account of unchastity, or the

(*y*) Ramananda *v* Rai Kissori, 22 C 347, and Sundari *v* Pitambari, 32 C 871
(*z*) 4 C 550, Trailokhya *v* Radhasundari, 23 C W N 970 30 C L J 235
(*a*) Rajabala *v* Shyama, 22 C W N 566
(*b*) *See p* 649 (*c*) Author's Translation, p 190 (*d*) *See supra p* 563.

circumstances that lead to an irresistible inference that she treated herself or was treated by her community as an outcaste, the Court should not treat her as degraded for the purposes of law. (e)

Parasara, who is said to ordain the law for this Kali age, declares—

रजसा शुध्यते नारी विकलं या न गच्छति ॥ ७, ४ ।
सकृद् भुक्ता तु या नारी नेच्छन्ती पापकर्मभि. ।
प्राजापत्येन शुध्येत ऋतु-प्रस्रवणेन तु ॥ १०, २६ ।
जारेण जनयेद्गर्भं गतेऽव्यक्ते मृते पतौ ।
तां त्यजेद् अपरे राष्ट्रे पतितां पापकारिणीं ॥ १०, १० ।

Parasara on grades of unchastity

which means,—'A woman (committing adultery) is purified by catamenia, provided she did not conceive (vii, 4) If a woman has committed adultery once, and is not desirous to commit that sinful act again, she becomes pure by *Prajapatya* rite and by the flow of the catamenia (x 26) If a woman becomes pregnant by her paramour when her husband is dead or is missing, she being a wicked and degraded woman should be carried to the territory of a different king and be abandoned there (x 20)" Thus it will be seen that there are different grades of unchastity and the offence is an expiable one in light cases It should be noticed that a widow becoming pregnant by adultery must become deprived of her husband's estate by reason of the punishment of banishment inflicted on her

Yajnavalkya also ordains the same rule —

हृताधिकारां मलिनां पिण्डमात्रोपजीविनीं ।
परिभूताम् अध.शय्यां वासयेद् व्यभिचारिणीं ।
सोम शौच ददौ तासां गन्धर्वाश्च शुभां गिर ।
पावक सर्वमेध्यत्व मेध्या वै योषितो ह्यत. ॥
व्यभिचारात् ऋतौ शुद्धि गर्भे त्यागो विधीयते ।
गर्भभर्तृवधादौ च तथा महति पातके ॥ १, ७० ७२ ।

Yajnavalkya on unchastity

which means,—"A woman guilty of unchastity shall be deprived of her position and possessions, shall wear dirty clothes, shall live upon starving maintenance, shall be humiliated and made to sleep on bare ground The moon has given the purity, the Gandarvas have given them sweet voice, the Firegod has given them permanent sanctity, women are therefore always pure A woman guilty of adultery is purified by catamenia, but her abandonment is ordained in case of conception by adultery, and in case of causing abortion or killing the husband, as well as in case of committing heinous sins "—i, 70-72

Texts not placed before Court in Unchastity case

The above texts were not before the Courts in the Unchastity case. They show that unchastity alone is a light

(e) Kothandaram v. Subbiar, 1927 M 576.

offence, it becomes very grave if followed by conception, and that then a widow's right to her husband's estate must cease.

It should be remarked that unchastity of women is not expressly enumerated in the Chapter on Exclusion, as a cause of exclusion from inheritance.

Unchastity, Prostitution, Degradation and Tie of kindred.—According to the Hindu law of moral and religious offences, a man becomes liable to be degraded and excommunicated for sinful acts of heinous character, and an outcaste or an excommunicated sinner is deemed civilly dead, so that exequial rites are directed to be performed for him in the same manner as if he were dead. A woman also is degraded for the same sinful offences, and specially for the heinous crimes set forth in the following texts,—

Prostitution

degrades a woman

नीचाभिगमनं गर्भ-पातनं भर्तृहिंसनं ।

विशेष-पतनीयानि स्त्रीणामेतान्यपि ध्रुवम् ॥ याज्ञवल्क्यः ३, २९८ ।

which means,—"Sexual intercourse with a low caste man, causing abortion of a child in her womb, and killing her husband these are certainly additional causes of women's special degradation"—Yàjnavalkya iii, 298

Yajnavalkya

चतस्रस्तु परित्याज्याः शिष्यगा गुरुगा च या ।

पतिघ्नी च विशेषेण जुङ्गितोपगता च या ॥ वशिष्ठः—

which means,—"Four (descriptions of) women must be abandoned namely, (1) one cohabiting with a pupil (of the husband), (2) one cohabiting with Guru (or father or father-in-law), (3) one cohabiting with a *Chandàla* or with a man of any other very low caste, and (4) specially one killing her husband"—Vasistha

Vasistha

चण्डालान्त्यस्त्रियो गत्वा भुक्त्वा च प्रतिगृह्य च ।

पतत्यज्ञानतो विप्रो ज्ञानात् साम्यन्तु गच्छति ॥ मनुः ११, १७६ ।

which means,—"A Bràhamana who has cohabited vith a woman of the *chandàla* or any other very low caste or has eaten food (given by a person of such caste) or has accepted gifts (made by such person) becomes degraded, if he has done so through ignorance, but if with full knowledge, then he becomes their equal"—Manu, xi, 176

Manu

These and similar texts show that a woman becomes an outcaste for adultery, only when it is committed with a man of a very low caste, and according to the Mitàksharà, in case she refuses to perform the penance prescribed for the same

Mitakshara,

A woman living in adultery with a man of equal or superior caste does not become an out-caste

What makes a prostitute,

When a woman leaves her father's or husband's house where she has been living, and goes away with a paramour and lives with him elsewhere, she is ordinarily called a *prostitute* by the Hindus, and as such is assumed to to be degraded

But this is a mistake, for, a woman can properly be called a prostitute or *vesyâ*, if she sells her person for money to men of all castes and submits to their embrace, and such an unchaste woman becomes an outcaste, and is excluded from social intercourse, and the tie of kindred becomes severed

when penance restores to caste

According to the Mitâksharâ, even a person guilty of the most heinous sinful acts that cause degradation and excommunication, may be restored to social intercourse after due performance of the prescribed penance, except when it consists of self immolation of the sinner, although the sin itself may not be purged off when the sinful act is intentionally committed

The Mitâksharâ says that **द्वे हि पापस्य शक्ती नरकोत्पादिका व्यवहार-निरोधिका च**—"A heinous sin, has twofold capacity (1) causing liability to go to hell, and (2) causing exclusion from social intercourse,"—and although the former cannot be removed when the sinful act is intentionally committed, the latter can be, and the sinner is restored to social intercourse after the performance of penance, by the force of the divine ordinance But some other commentators read the ordinance differently and maintain the opposite view, namely that the liability to go to hell may be removed by penance, but not the exclusion from social intercourse

An outcaste becomes civilly dead,

A person becoming an outcaste in consequence of the commission of sinful acts most heinous in character, becomes also civilly dead if he persists in the vicious course, and omits to perform penance, and his relations are enjoined to perform his exequial rites so says Manu,—

पतितस्योदकं कार्यं सपिण्डैर्बान्धवैर्बहिः ।
निन्दितेऽहनि सायाह्ने ज्ञात्यृत्विग्गुरुसन्निधौ ।
दासीघटमपां पूर्णं पर्यस्येत् प्रेतवत् पदा ।
अहोरात्रमुपासीरन्नशौचं बान्धवैः सह ॥ मनु., ११ १८३-४ ॥

according to Manu

"To an outcaste (libation of) water shall be offered (as if he were dead) by the *sapindas* and the *samanodakas*, outside (the village), on an inauspicious day, in the evening, in the presence of the agnates, the officiating priest and the preceptor of the Vedas A female slave shall upset with her foot a pot filled with water, as if it were for a deceased person, for a day and a night impurity (or mourning) shall be observed (by the *sapindas* and) by the *samanodakas*" — Manu, xi, 1834

Yajnavalkya, and Mitakshara

Yâjnavalkya also ordains the same rites in Ch iii, 295, and the Mitâksharâ says that this abandonment of an outcaste is to be made, if he refuses to perform the penance though required by his kinsmen

Outcaste or unchastity civil death

It appears, therefore, that when a woman becomes an *outcaste* by reason of unchastity, and is deemed dead, the tie of kindred with her undegraded relations becomes severed. The conflict of decisions on this point appears to have

arisen in consequence of the indiscriminate application of the term *prostitute* to all women guilty of unchastity, and of the mistake in regarding them all to be *outcaste*. The tie of kindred can be deemed severed or not, according as the unchaste woman is outcaste and civilly dead or not, having regard to the nature and character of her unchastity. But this principle of distinction is not taken into consideration (*f*)

but not otherwise

A Full Bench of the Calcutta High Court, (*g*) contrary to the texts already mentioned and contrary to the sentiments of the Hindus, has held that · "Upon an examination of the original texts, and upon a review of the judicial decisions on the subject, * * * * the mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood, and, that consequently, the *stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law." It has been so held by some other High Courts. (*h*)

Full Bench case of *Hiralal v Tripura*

On the decision of the Full Bench Sir Gooroodass Barerjee observed as follows (*i*) "With all respect for the learned Judges who decided that case, one cannot help saying that, though the judgment of the Full Bench elaborately notices all the texts and decisions for and against the conclusion it has arrived at, it has attached undue weight to, and drawn incorrect inference from, those apparently in its favour, and has failed to attach due weight to, and to draw correct inferenee from those against its conclusion"

observation of *Sir* Gooroodass on F.B,

One of the arguments adopted by the Full Bench in support of its conclusion was that in the absence of any provision for order of succession to the property of prostitutes, the ordinary law is applicable It may be true that the ordinary law of succession is applicable, but from this no conclusion can be drawn that the tie of kindredship with her former relations is not severed The order of succession applicable to a prostitute's property should be the ordinary order of succession to the property of a woman.

Full Bench decision criticised.

(*f*) Sarna *v* Secretary, 25 C, 254, Sundari *v* Nemye, 6 C L J, 370, 23 M, 171, Narain *v* Tirlok, 29 A, 4, *In the goods of*, Kaminey, 21 C., 697, 7 Sel Rep, 325

(*g*) Hiralal *v* Tripura, 40 C 650 17 C W N 679 17 C L J 438 19 I C 129

(*h*) Visvanatha *v* Doraiswami, 48 M 944 49 M L J 684 1926 M I, Narain *v* Trilok, 29 A 4, Meenakshi *v* Muniandi, 34 M 1144 27 M L J 353 25 I C 957 Narumayya *v* Tiruvangadatan, 24 M L J 223, Subbaraya *v* Ramasami, 23 M 171, Kothandaram *v* Subbier, 1927 M 576

(*i*) Tagore Law Lectures on Marriage and Stridhan 5th Edition *p* 463.

Inspite of what the Full Bench has said her relations existing at the time of her degradation being severed from her on account of her civil death, her property should devolve on her heirs that may come into existence after she becomes a prostitute, e g, her illegitimate issue and their children, failing which the property will go to the king

In equity this ought to be the proper interpretation of the law, inasmuch as it will solve the question of competition of rival claimants of the same degree, e g, her sons, legitimate and illegitimate, to the property of a prostitute. It stands to reason that the illegitimate son, who is not responsible for the manner in which he is brought into existence, should inherit the prostitute's property to the exclusion of the legitimate son *Firstly*, because the tie of relationship of the mother with her legitimate son is cut off from the moment of her degradation *Secondly*, because the legitimate son will have the right of inheritance from his father and other relations, whereas the illegitimate son who is not responsible for her mother's sin, has no body else to inherit from except his mother and in some cases from the putative father *Thirdly*, it will be against the sentiments of the Hindus and against public policy to allow a legitimate son of a prostitute, born before her degradation, to inherit her property, expectancy to which may naturally induce him or the undegraded members to keep up some connection with the fallen woman, a circumstance dangerous to the Hindu society *Fourthly*, when the Hindu law-givers make provision for maintenance even to these fallen women, it seems unreasonable that according to Hindu law, a prostitute's son, be he an infant or major, should be excluded from his mother's property by his mother's relations before degradation however distant they may be

The Calcutta High Court has held that by prostitution a woman's connection is cut off from her relations before degradation but such severance does not operate to sever a prostitute from her sons and chaste daughters born after her degradation so as to disable them from inheriting from her. (*j*) The Full Bench of the Calcutta High Court, however, did not express any opinion about the relationship of a prostitute with her issue The Patna High Court has gone a step further and held that a prostitute is an outcaste and hence, she retains her right of inheritance whether it accrues before, or after the exclusion from the caste under Act XXI of 1850. (*k*)

According to Hindu law the *Stridhan* of a married woman who has died without *issue*, goes to her husband. The Bombay High Court has held that *issue* means the

(*j*) Tripura *v* Harimati, 38 C 493, 500

(*k*) Ram *v*. Dhan, 3 P 152 5 P L T 203 78 I C 749 1924 P 420

issue of a marriage in the approved form, hence the *Stridhan* property of a prostitute goes to her husband in preference to her son born of prostitution, but the court, however, did not discusss whether her relationship with her husband is severed or not. (*l*)

The succession to a prostitute's property, has been held to be governed by the ordinary Hindu law of succession. (*m*)

Preference between degraded and undegraded heir of prostitute

The Sudder Court (*n*) of Bengal and the Madras High Court (*o*) have held that in a competition between degraded and undegraded relations for the property of a prostitute, the degraded relation is preferred to the undegraded relation A subsequent Division Bench of the Madras High Court, (*p*) however, without referring the matter to a Full Bench has preferred an undegraded relatian to a degraded one. The Full Bench of the Calcutta High Court, however, inspite of the question of precedence being raised, has kept open the question. (*q*)

The cause of the difference of opinion is due to the adoption of the proposition that the tie of relationship of a degraded woman is not cut off from her undegraded relation The degraded relation of a prostitue should be her relation that may come into existence after she became degraded and not another degraded person both of whom were originally related to each other If the tie of relationship is not cut off, how the question of precedence between degraded and undegraded member arises one cannot understand

Unchastity whether excludes from *Stridhana* property

Unchastity and Stridhanam —It has been held that unchastity does not exclude a Hindu woman from inheriting *Stridhan* property. (*r*) It does not seem to be correct to suppose that there is any distinction between a man's property and a woman's property, with respect to exclusion from

(*l*) Jaganath v Narayan, 34 B 553, 558
(*m*) Shaik Taleb v Shaik 29 C W N 624; Hiralal v Tripura, 40 C, 650, see *foot-note* (*j*) *above*, Visvanatea v Doraiswami, 48 M. 944 49 M L J. 684 1926 M 14, 3 P 152, 1924 P 420
(*n*) Tara Munee v Moti, 7 S D A 273
(*o*) Sivasangu v Minal, 12 M 277, Narasanna v Gangu, 13 M 133, *see* Maharana v Thakur, 12 I C 778 14 O C 234
(*p*) Narumayya v Tiruvangadathan, 24 M L J 223, Meenakshi v. Muniandi, 38 M 1144.
(*q*) 40 C 650, 674
(*r*) Nogendra v Benoy, 30 C, 521; Angammal v Venkata, 26 M 509, Ganga v Ghasita, I A 46, Adyapa v Radrara, 4 B 140, 122

inheritance, the causes for which apply to both. Incontinence followed by child-birth appears to debar the woman from inheritance, and to cause an inexpiable degradation and absolute excommunication from caste, as well as severance of relationship, so that she would no longer be recognised as a relation, the status of which is the foundation of inheritance. It operates as civil death.

A sister is entitled to succeed to the property of her sister who was a prostitute. (s)

Vice, whether cause of exclusion

Addiction to vice.—A man of vicious habits is excluded from inheritance. Under this head one may include unchaste women. But if one excludes females on that ground, he must disinherit also males who dissipate wealth in wine and women, or by gambling. There is, however, no reported case in which a male has ever been excluded on account of vice, though instances are unfortunately too frequent, of young men inheriting property being led astray to a vicious course of life by designing and unprincipled people.

Enmity to father, causes exclusion

Enmity to the father.—The father is so great a benefactor of the son, that the Hindu law requires a son to respect the father, the author of his being, as a god, in fact the idea of father is associated with the idea of the Creator of all beings, or God the Father. A son who does not respect his father is highly censured and a son who is habitually inimical to his father and beats him or otherwise ill-treats him is excluded from inheritance, as being an ungrateful wretch and heinous sinner, and as such unworthy of having the status of son. Hence, particide is excluded from inheritance. (t)

Enmity to psopositus causes exclusion,

Enmity to propositus.—It should be born in mind that in the Hindu law of inheritance what in terms applies to father and son, is intended to be applicable to any two relations, one of whom becomes heir to the other, the son being the prior heir, rules of general application are often laid down in terms that apply only to father and son. For instance,

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(s) Narayan v Laxman, 51 B 784 1927 B. 456

(t) Nilmadhab v. Jotindra, 17 C W. N 341. 181 C. 764.

Partition of Heritage is defined by Nàrada as "the division of *paternal* property by the *sons*. (u)

Pitri-dvit whether applies other cases

Similarly the term *pitri-dvit* or "enemy to the father" used by Nàrada and the commentators may be taken to be intended to apply to any relation who is inimical to the person whose heir he would otherwise be entitled to become, in the circumstances.

The term s not explained in many commentaries But the two principal commentaries of the Mithilà school explain the term —the Vivàda-Ratnàkara says—पितरं यो द्वेष्टि स पितृद्विट्, द्वेषश्च पितरि जीवति मारणादिफलः, मृते तु तदुद्देश्यजलाद्यदानरूपः.—"He who is inimical to the father is enemy to the father, and the enmity when the father is alive, is such that its result is killing or the like, and when he is dead it consists of non-offering of libations of water and the like to him" and the Vivàda-Chintàmani says,—पितृद्विट् पितरि जीवति ताडनादिकृत्, मृते तच्छ्राद्धादिविमुखः—"The father's enemy is one who, when the father is alive, ill treats him by beating or the like, and when he is dead, is averse to the performance of his Sàraddha and the like"

Murderer of propositus is excluded

Hence a participator in a murder is not entitled to inherit the estate of the person murdered by himself or with his aid, or at his instigation. So a murderer is excluded from succession to the estate of the murdered. (v) It was been held that he (a son) is entitled to maintenance from the person excluding him from inheritance after serving out the punishment inflicted upon him. (w)

Madras on *pitri-dvit*

The Madras High Court, however, appears to take the term *pitri-dvit* or *father's enemy* in its primary sense, and accordingly holds that the question whether a Hindu who has been a party to a murder is excluded from inheriting the estate of the murdered person, is not answered by the Hindu law. But it is submitted that the case under their Lordships' consideration may for the foregoing reasons be held to be included under that term in its secondary meaning, namely "*enemy* to the *propositus*."

(u) Mit, 1, 1, 5, D B, 1, 1

(v) Senyellappa v Girimalappa, 29 C W N, 271 (P C) : 85 I. C. 324 1925 P. C. 209. 48 Bom 569

(w) Nilmadhab v Jotindra, 17 C W N 341 : 18 I C 764.

Their Lordships, however, held, having regard to equity, justice and good conscience, that the principle that no one shall be allowed to benefit by his wrongful act is of universal application. hence a party to a murder is not entitled to any beneficial interest in the estate of the person murdered, although the vesting of it in him by inheritance is not prevented. (x)

Adoption of religious order operates

Adoption of religious order *—Entrance to a religious order is tantamount to civil death so as to cause a complete severance of his connection with his relations, as well as with his property, inheritance to which opens on his renouncing the world by the adoption of a religious order, any property which may be subsequently acquired by persons adopting religious orders passes to their religious relations. Such persons might be of three descriptions, namely, (1) *Naishthika Brahamachàri* or life-long student, (2) *Vànaprastha* or retired to a forest, meaning one adopting the third order or stage of retired life for religious purpose, (3) *Bhikshu* or *Yati* or *Sannyàsi* or one who renounces the world and becomes a religious mendicant. The adoption of the first two orders is included under practices to be avoided in this *kali* age, (y) persons of the last description are still found, who renounce all worldly concerns and cut off all connection with their relations, and they are excluded from inheritance.

civil death but renunciation must be complete,

But the renunciation must be complete and not nominal only, (z) as in the case of persons entering the *Vaishnava* sect in lower Bengal, called *Byragis* by name, but who, do not mean thereby to renounce worldly affairs and relinquish property. Such a *Byragi* is not excluded from inheritance (a) and his property passes on his death to his ordinary relations. (b) So, in the absence of any custom to the contary, a *Sùdra* is not excluded from inheritance on his enter-

(x) Vedanayaga v Vedammal, 27 M, 591, 31 M, 100

* *See* Ch XIV, Sec 2 *post*

(y) *See supra p* 8

(z) Gauri v Nidder 18 C W N 59, *see post*, Ch XIV, Sec 2 "Vaishnavas."

(a) Teeluk v Shamma, 1 W R 209

Juggunnath v Bidi inundi 10 W R, 172, Khoodeerem v Rookhinee 15 W R 197,

ing the order of *Yati* or *Sannyasi* inasmuch as a *Sûdra* cannot adopt the life of a *Yati* or *Sannyasi.* (*c*)

Sub-Sec. ii—MENTAL DEFECTS

Idiocy and Insanity.—In the Dâyabhâga(*d*) *jada* or an idiot is defined to be a person not susceptible of instruction. It is a congenital and incurable mental infirmity arresting development of the intellectual faculties: the onus lies on the party asserting the existence of the disqualification. (*e*)

Insanity, need not be congenital.

Insanity is a disease of the mind, which need not be congenital nor incurable to exclude from inheritance the person affected thereby at the time the succession opens. (*f*)

A member of a joint family governed by the Mitâkshâra, will be precluded from participating in a share as co-parcener if at the time of partition, he is affected by insanity, although he was free from that disease before and did acquire a right to the ancestral property from his birth (*g*)

He is therefore divested of a vested right, and thus it is apparent that the strict rule of vesting and divesting does not apply to Mitakshâra joint family, and it follows therefore that if the malady is cured after partition, he would be entitled to a share by re-opening partition, like posthumous son. But the Allahabad High Court has held that subsequent insanity does not divest a co-parcener, of the interest vested in him by birth (*h*) It is so held in the Central Provinces. (*i*) The Madras High Court on a careful consideration of all the important cases on the point has come to the conclusion that "the right comes into existence at birth, subsists all through, although it is incapable of enforcement at the time of partition, because of the disqualification then existing" (*j*)

Allahabad holds a contrary view

(*c*) Harish *v* Ater, 40 C 545, Somasundaram *v* Vaithilinga, 40 M 846
(*d*) Ch V 9
(*e*) Surti *v* Narain, 12 A, 530
(*f*) Ram *v* Bhani, 38 A 117 32 I C 127 14 A L J 11, Wooma *v* Giris, 10 C 639 Deo *v* Budh, 5 A. 509, see also Muthusami *v* Meenammal, 43 M 464 · 38 M L J 291, Bapuji *v* Dattu, 47 B 707, 73 I C 279, *see* Act XII 1928 p 674 below
(*g*) Ram *v* Lalla, 8 C 149, and Ram *v* Ram, 8 C 919, Vithol *v* Waman 68 I C 111 18 N. L R 80
(*h*) Tirbeni *v* Mahammad, 28 A 247
(*i*) Dada *v* Chandra, 1920 N 93
(*j*) Muthusami *v* Meenammal, 43 M 464, 473 : 38 M L J 291

Act XII of 1928.—The question of exclusion from inheritance due to idiocy and insanity, developing after birth has now, excepting persons governed by the Dàyabhàga school, (*k*) been settled by this legislation, enacting that no person shall be excluded from inheritance or from any right or share in the joint family property by reason only of any disease, deformity or physical or mental defect (*l*) This Act shall not have any retrospective effect (*m*)

Sub-Sec iii—PHYSICAL DEFECTS

Defects of organs must be congenital,

Defects of external organs of sense and of action *— Blindness (*n*) and deafness and dumbness (*o*) must be congenital, according to Manu, and it follows *a fortiori* and by necessary implication, that the defects of other organs, namely, dumbness, lameness, (*p*) impotency and the like must be of the same character, *i e*, congenital If the defects of the two principal organs of seeing and hearing, cannot disinherit when they arise subsequently to birth, (*q*) why then should the defect of minor organ, exclude from inheritance, if it be not congenital? Otherwise, the accidental loss of a limb or organ of action, as in the case of a soldier and hero, may have the effect of exclusion. It has been held that lameness must be congenital to exclude from inheritance (*r*)

It appears to be necessary that these defects must also be incurable (*s*)

An incurable tumour in the nasal cavity and on the nose is not a disease which disqualifies a person from inheritance. (*t*)

The onus of proving that a person was congenitally blind

*In this connection *see* Act XII of 1928 above

(*k*) Sec 1, (3) (*l*) Sec 2 (*m*) Sec 3

(*n*) See Gunjeshwar *v* Durga, 45 C 17 P C 22 C W N 74 26 L J 557 34 C M I J 1 16 A L J 1 20 Bom L R 38 45 I C 459, Pudiava *v* Pavanasa 45 M 945 F B 69 I C 313 43 M L J 596 31 M L T 302, overruling Surayya *v* Subhamma, 43 M 4 37 M L J 405 53 I C 498

(*o*) Savitri *v* Bhaubhat, 1927 B 103, Dhaniya *v* Kausalyabai, 1927 N 235

(*p*) Rawel *v* Jai, 52 I C 919 69 P R 1919

(*q*) Umabai *v* Bhavu, 1 B 557, see 1 B 117

(*r*) Venkata *v* Purshottam, 26 M 133, see *foot note* (*p*) above

(*s*) Mohesh *v* Chunder, 23 W R 78 (blindness), Murarji *v* Parvatibai, 1 B 117, Charu *v* Nobo, 18 C 327, Bharmappa *v* Ujanganda, 65 I C. 216 Bom L R 1320 (dumbness)

(*t*) Subba *v* Venktrama, 26 M L.J 508 23 I C 528

so as to be excluded from a share in the joint property lies on the party asserting the same. (*u*)

Leprosy and other incurable diseases *—Leprosy may be taken as a defect of the organ of touch. It need not be congenital but it appears that it should be incurable. (*v*) It must assume a virulent and aggravated type, in order to operate as a cause of exclusion from inheritance (*w*) It is not easy to determine what other incurable diseases will be held to be disqualifications for inheritance, but the strictest proof of the disease must be given (*x*)

Leprosy need not be so

The Privy Council in the case of *Ramabai* v *Harnabai* (*y*), has approved the following proposition laid down in the case of *Kayarohana* v. *Subbaraya* (*z*) "Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and decisions as the most satisfactory test."

Sec. 3—EFFECT OF DISQUALIFICATION

Exclusion not total.—From the foregoing texts it is clear that the persons that are exlcuded from participation of shares on partition are, with their wives and children entitled to maintenance, save and except one who is degraded and excommunicated and his issue born after his degradation , so they cannot be said to be totally excluded from the inheritance.

Disqualification personal.—If the person affected by a disqualification, has a son or other descendant of his body, who would by right of representation take his place and inherit in case he were dead, then such a descendant will, if he is himself free from similar defects, inherit, notwithstanding the exclusion of his father or other ancestor. Thus a

Disqualification does not extend to sons

(*u*) Budh Sagar *v* Bisnun, 47 A 327 23 A L J 141 86 I C 554 1925 A 336

*In this connection *see* Act XII of 1928 above

(*v*) Ananto *v* Ramabai 1 B 554

(*w*) Rangayya *v* Thanikachalla 19 M 74 , Kayarohana *v* Subbaraya, 38 M 250 25 M L J 251 , Raju *v* Ramaswami, 25 I C 968 16 M L T 254 14 L.W 715 , Mohunt Bhagoban *v* Raghunandan, 22 I A 94 22 843, Karali *v* Ashu, 50 Cal 604

(*x*) 2 W R 125 , 21 W R 249

(*y*) 29 C W N 129, 48 Bom 363.

(*z*) 38 M. 250 . 25 M.L J 251

son of a blind person, if not affected by any disability, is entitled to succeed to his grandfather's property, notwithstanding the exclusion of his father. So in Bombay the wife of a disqualified person is not excluded from inheritance. (*a*) This rule, however, does not apply to a son born to an outcaste after his degradation, nor to a son adopted by a disqualified person, nor to a son of a disqualified brother or other collateral, when there is another brother or collateral of the same degree, free from defects, as right of representation does not apply to collaterals.

Cure of defect or after-born son does not divest

Cure of defect, after-born son, and divesting.—But if there be no such son or descendant in existence at the time when the succession opens, but comes into existence afterwards, then such a son is not entitled to take by divesting the heir in whom the succession has already vested. It has been so held by a Full Bench of the Calcutta High Court in the blindman's son's case of *Callydoss* v. *Krissan* (*b*) governed by the Bengal school. It has been held that even the widow is not divested by a son of a disqualified son, born subsequent to her succession. (*c*)

Nor will the removal of the defect subsequent to the opening of the inheritance, entitle the affected person to claim the heritage by divesting the person in whom it has already vested.

According to Mit defects need not be congenital,

nor the disqualification absolute,

This rule cannot apply to Mitakshara family.—The Mitákshára deals with the subject of exclusion in connection with the partition of joint property; it does not require any defect to be congenital; if the disqualification arises before partition, it will cause exclusion of the affected person; if again the disqualification is subsequently removed, he will be entitled to take his share by re-opening the partition, like a posthumous son. (*d*) It has already been observed that the strict rule of vesting and divesting cannot apply to a Mitákshára joint family, for vesting and divesting

(*a*) Gangu *v* Chandra, 32 B. 275.
(*b*) 2 B L R F B, 103 11 W R, O J, Ap. 11.
(*c*) Pawadewa *v*. Venkatesh, 32 B., 455.
(*d*) Mit 2, 10, 6-7.

continually go on in such a family by births, adoptions, and deaths. How else could a person becoming insane after birth but before partition, be excluded from participating a share of the ancestral property in which he had acquired an interest from his birth ?

Accordingly in a case where one of two brothers died leaving a deaf and dumb son, and afterwards a son was born to the latter, it has been held by the Madras High Court that this after-born grandson is entitled to take his grandfather's undivided co-parcenary interest which may be said to have passed on his death by survivorship to his brother's descendants, subject, however, to the charge of the maintenance of the disqualified son and his family (e) The Madras High Court followed the principle underlying the case of *Rogunanda* v *Brozo Kishoro*, (f) in which the last holder of an impartible estate died leaving a widow authorized to adopt a son, and an undivided brother in whom the estate vested by survivorship to the exclusion of the widow who subsequently adopted a son, and it was held by the Judicial Committee that this adopted son was entitled to take the estate by divesting his uncle.

approved by Madras,

It should be borne in mind that the ancestral property of a Mitákshara joint family is really vested in the family and not in the individual members thereof, although it is possible that at a particular time one member alone possesses the right of alienation over it for family purposes. It is quite erroneous to suppose in either of the above two cases that the family property was *absolutely* vested in the surviving brothers or brother's son, when the maintenance of the disqualified son and the female members is a charge upon the property, and those among the latter, that are wives or widows of male members, are co-owners in a subordinate character.

The English lawyers create a confusion in Hindu law by introducing the distinction of legal and equitable estates and

(e) Krishna v Sami, 9 M 64

(f) 1 M. 69 4 I.A 154.

charges. It has already been observed that in Hindu law a person is deemed to have ownership in immoveable property when he is entitled to any benefit arising out of the same. (*g*)

If a man may become divested of half the ancestral estate by the birth of a son to him, where is the incongruity if he be divested of the same half by the birth of a son to his disqualified nephew who also has an interest in the estate from which he gets his maintenance ?

but Bombay holds a contrary view

But in a case similar to the above Madras case, the Bombay High Court has taken a contrary view by holding that a grandson born after the death of the grandfather, to his deaf and dumb son, is not entitled to take the undivided moiety of the grandfather, which passed by survivorship to the latter's surviving brother and his son (*h*)

It should, however, be remembered that properly speaking, the undivided co-parcenary interest of a deceased member does not really pass to anybody, but simply lapses , no survivor acquires on his death any right to the family estate, which he had not before. No question of shares arises so long as the family remains joint, in this case, there were the surviving brother and his son forming a joint family, of which the deaf and dumb person also was a member, and when a son was born to the disqualified member, he also became a member of the joint family , and there is no reason why he should not get a share on partition of the family of which he is a member. The Hindu law says that "their sons if free from defects shall get their shares, out of the hereditary source of their maintenance." The operation of this equitable rule cannot be restricted, unless there be equitable considerations of a different kind.

Disqualified persons are entitled to maintenance,

Maintenance —Excepting the outcaste, the disqualified persons are not really excluded from inheritance, but they do not get shares on partition of the family property, while they and their wives and children are entitled to get maintenance out of the property.

(*g*) *Ante pp* 362-363

(*h*) Bapuji v Pandurang, 6B, 616.

It should be observed that agriculture is the chief source of wealth of the people of this country, and the ancestral fields form the productive property of families. But the infirmities causing the so-called exclusion from inheritance, incapacitate the persons affected thereby for carrying on the cultivation of their shares of the land Hence what the Hindu law seems to provide, is, that their shares should be in the possession of the other members who must furnish them and their family with maintenance, and defray the expenses of the marriage of their daughters. So these disqualified persons enjoy the rights of co-sharer so far as their necessary expenses are concerned , and thus the Hindu law is not really hard on those to whom nature has been so unkind.

and thus enjoy rights of co-sharer

Of excluded females —According to both the schools of Hindu law, a woman becomes *sapinda* in the sense of blood relation, of her husband and of his relations, and also becomes a member of his *gotra* , accordingly, if there had not been the general rule excluding women from inheritance, (*i*) a woman would have been an heir of her husband's relations in the same way as in Bombay. The rule that persons who are excluded for causes other than degradation, are nevertheless entitled to maintenance (*j*) applies also to women that are excluded by reason of their sex, or any other cause of disqualification other than degradation The text of Baudhâyana, ordaining the exclusion of women, is cited in the Vivâda-Ratnâkara, Ch. V, in which exclusion from inheritance is discussed In that Chapter are cited the texts of Manu, Vishnu, Yâjnavalkya, Nárada, Devala and Baudháyana, providing maintenance for all the excluded relations. In the Viramitrodaya (*k*), it is expressly declared that the daughter-in-law is excluded from inheritance of the mother-in-law's *stridhana*, by reason of her sex, but is entitled to maintenance. Hence, a sonless widowed daughter, who is according to the Dayabhága excluded from inheriting her father's estate, is

Excluded women but not degraded entitled to maintenance

(*i*) Text No 4
(*j*) Texts Nos 7 and 8 (*k*) Author's translation p. 248

certainly entitled to maintenance. But in *Mokhoda* v. *Nundo* (*l*) the authorities do not seem to have been placed before the Court.

Sec. 4—EVIDENCE

Onus.

The onus of proving disqualification—lies on the person who seeks to exclude one who would be an heir; should no cause of exclusion be established, (*m*) the presumtion of Hindu law being against disqualification. (*n*)

(*l*) 27 C 555 affirmed in 28 C. 278
(*m*) Puttie *v* Juggut 22 W R. 348, Kerali *v* Ashu, 50 Cal 604
(*n*) Chunder *v* Kristo, 18 W.R 375

CHAPTER XI

MAINTENANCE

Sec. 1—ORIGINAL TEXTS

१। मणि मुक्ता-प्रवालानां सर्वस्यैव पिता प्रभुः ॥
स्थावरस्य समस्तस्य न पिता न पितामहः ॥ याज्ञवल्क्य ॥

Father's rights over properties.

1 The father is master of all of the gems, pearls and corals but neither the father nor the grandfather is so, of the whole immoveable property — Yâjnavalkya

२। ये जाता येऽप्यजाता वा ये च गर्भे व्यवस्थिता. ।
वृत्तिं तेऽपि हि काङ्क्षन्ति वृत्तिलोपो विगर्हित. ॥ मनु ॥

Persons entitled to maintenance,

2 They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require means of support the dissipation (of their hereditary source) of maintenance is highly censured — Manu cited in D B, i, 45

३। भरणं पोष्यवर्गस्य प्रशस्तं स्वर्गसाधनं ।
नरकं पीडने चास्य तस्माद् यत्नेन तं भरेत् ॥ मनु: ॥

Why dependants to be maintained,

3 The support of the group of persons who should be maintained, is the approved means of attaining heaven, but hell is the man's portion if they suffer. therefore he should carefully maintain them —Manu cited in D B, ii, 23.

४। पिता माता गुरुर्भार्या प्रजा दीना समाश्रित ॥
अभ्यागतोऽतिथिश्चैव पोष्यवर्ग उदाहृत. ॥ मनु: ॥

Who are to be maintained,

4 The father, the mother, the Guru (an elderly relation worthy of respect), a wife, an offspring, poor dependants, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained.— Manu, cited in Srikrishna's commentary on the Dàyabhàga, ii, 23

५। वृद्धौ च माता पितरौ साध्वी भार्या सुत शिशु ।
अप्यकार्य्य-शत कृत्वा भर्त्तव्या मनुरब्रवीत् ॥ मनु: ॥

even by misdeeds

5 It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds —Manu, cited in the Mitàksharà while dealing with gifts

६। न माता न पिता न स्त्री न पुत्रस्-त्यागम् अर्हति ।
त्यजन्नपतितान् एतान् राज्ञा दण्ड्य शतानि षट् ॥ मनु., ८, ३८९ ॥

Punishment for abandonment

6 Neither mother, nor father nor wife, nor son, deserves abandonment, one abandoning these when not degraded (or outcasted for commission of any heinous sin), shall be punished by the king six hundred (Panas) —Manu, viii, 389. Abandonment is explained by commentators to mean refusal to maintain, and in the case of parents, also to serve and attend.

७। पितापुत्र स्वसृभ्रातृ-दम्पत्याचार्यशिष्यकाः।

एषाम् अपतितान्योन्य त्यागी च शतदण्डभाक्॥ याज्ञवल्क्यः, २, २३७॥

7 Father and son, sister and brother, wife and husband, and preceptor and pupil, of these one forsaking the other if not outcasted, deserves the punishment of (the fine of) one hundred (Panas).—Yâjnavalkya, ii, 237.

८। स्वं कुटुम्बाविरोधेन देयं। याज्ञवल्क्यः, २, १७५।

8 Property other than what is required for the maintenance of the family may be given Yâjnavalkya, ii, 175

९। पुत्रान् उत्पाद्य संस्कृत्य वृत्तिञ्चैषां प्रकल्पयेत्।

Father's duty over sons

9 A father shall perform the purificatory ceremonies for his sons, and provide them with a source of maintenance —Mitaksharâ.

१०। मृते भर्तर्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः।

विनियोगेऽर्थरक्षासु भरणे च स ईश्वरः॥

परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये।

तत् सपिण्डेषु वासत्सु पितृपक्षः प्रभुः स्त्रियाः॥ नारदः॥

Who is guardian of widow.

10 When the husband is dead the husband's side (kin) is the guardian of his sonless wife in disposal of property, in protection of the wealth, and as regards her *maintenance*, he has full power if the husband's family be extinct or destitute of male member, or helpless, and there be no *sapinda* of his, then the father's side kin) is the guardian of the widow —Nârada cited in D B, xi, 1, 64

११। पितृव्यगुरुदौहित्रान् भर्तुः स्वस्त्रीय मातुलान्।

पूजयेत् काव्यपूर्ताभ्यां वृद्धानाथातिथीन् स्त्रियः॥ वृहस्पतिः॥

Duty of widow inheriting husband's estate

11 (A widow inheriting her husband's estate) should honour with food and presents (for their benefit) the husband's paternal uncle, (and the like) venerable elderly relation, daughter's son, sister's son, and maternal uncle, as well as aged and helpless persons, guests and females (of the family)—Vrihaspati cited in D B, xi, 1, 64

MAINTENANCE

Sec. 2—LIABILITY FOR MAINTENANCE

Two-fold liability for maintenance

Two-fold liability for maintenance—A person's liability to maintain other persons, is of two descriptions. one is limited by his inheritance of the ancestral and other property, while the other is absolute and independent of such property, and is determined by certain relationship (*a*) The maintenance of wife and infant son is a personal obligation and the payment of debts takes precedence over such right of maintenance. (*b*)

(*a*) Savitri v Luxmi, 2 B 573, 597 (*b*) Sunder v Ram, 7 L 12

i Absolute,

Absolute liability.—A man is bound to maintain his aged parents, his virtuous wife, (*c*) and his minor children, (*d*) whether he inherited any property or not. He is also bound to support his infant illegitimate child. (*e*)

ii Limited by inherited property

Liability limited by inherited property.—The ancestral immoveable property is the hereditary source of maintenance of the members of the family, and the same is charged with the liability of supporting its members, all of whom acquire a right to such property from the moment they become members of the family, by virtue of which they are at least entitled to maintenance out of the same (*f*)

Ancestral property when sold

The ancestral property cannot be sold or given away except for the support of the family a small portion of the same may be alienated, if not incompatible with the support of the family. (*g*)

Schools on ancestral property and maintenance

There is no difference between the two schools as regards the view that the ancestral property is charged with the maintenance of the members of the family, and that no alienation can be made, which will prejudicially affect the support of the group of persons who ought to be maintained. (*h*) Hence heirs are bound to maintain those whom the last holder was bound to maintain (*i*)

Son's right according to Daya,

Hence, although according to the Bengal School a son does not acquire a right to ancestral property co-equal to that of the father, and is not therefore competent to enforce a partition of the same against the father, yet the father is not absolute master of the same, so as to be competent to alienate it and deprive the son and other members of the family, of their source of maintenance.

but Courts hold otherwise.

This is the view which is propounded in the second chapter of the Dàyabhàga, but it should specially be borne in mind that the said view has been departed from by the

(*c*) Rattamma *v* Seshachalam, 1927 M 502

(*d*) Text No. 5.

(*e*) *See* Criminal Procedure Code, Section 488, and Ghana *v* Gerela, 13 C.W N 150.

(*f*) *See supra*, *p* 362 *et seq*

(*g*) D. B 2, 22-26.

(*h*) Text No 4.

(*i*) Baijnath *v*. Mangala, 1926 P. 1.

Courts of Justice, who hold that there is no distinction between ancestral and self-acquired property as regards the father's right of disposal over the same. But still this modern development of law cannot affect the question of the son's right of support from ancestral property so long at it has not been actually disposed of.

Maintenance to husband's relations

A widow in possession of her husband's estate—appears to be bound to maintain her husband's poor relations in addition to those already mentioned, and especially the presumptive reversioner, when he is in need of it (*j*) Here gifts to husband's relations are declared to be conducive to the spiritual benefit to the husband (*k*)

Sec 3—WHO ENTITLED TO MAINTENANCE

Persons entitled to maintenance

Persons entitled to maintenance from ancestral property *—According to the true view of Hindu law, and to the exigencies of Hindu society, as well as to Hindu feelings, the persons that are entitled to maintenance from ancestral and inherited property, are—

1 All male members of the family, including those that are excluded from inheritance. (*l*)

2. Their wives or widows.

3. Their unmarried daughters.

4. Their married or widowed daughters when they cannot get maintenance from their husband's family.

5. The dependent members or the poor relations whom the deceased proprietor used to maintain, *i e*, helpless indigent relations who did actually depend on him for their livelihood, if sufficient property has been left by him.

Mitakshara

As regards the Mitâkshara school there is no doubt as to the right of the persons under heads 1, 2 and 3, to maintenance out of ancestral property.

Dayabhaga.

In the Bengal school, however, a doubt may be raised as to the right of an adult son and consequently of his wife or widow and daughter But it should be remembered that

(*j*) D B 11, 1, 63 (*k*) Text No 11, *ante* *p* 682.

**See ante p* 678.

(*l*) *See* Sri Raja Rama *v* Sri, 41 M 778 : 28 C L J 428 35 M L J 392.

the Hindu law makes provision for the maintenance of even an illegitimate son.

Sub-Sec i—SON, DAUGHTER-IN-LAW ETC.

Sons, daughters-in-law entitled to maintenance

Sons—It has already been seen that adult sons and their wives and children are entitled to maintenance from the ancestral property in both the schools. (*m*)

Their rights under Mit. in ancestral property,

Daughter-in-law—Under the Mitàksharà the daughter-in-law does, in right of her husband, acquire a right to the ancestral property, since her marriage, in fact she becomes her husband's co-owner in a subordinate sense, (*n*) and the principal legal incident of this co-ownership is the right to maintenance, which cannot be defeated by gift or devise made by the holder of such property. (*o*) It has already been observed that there is no valid reason for the extinction of this co-ownership on the husband's death, the subordinate character of which must then be taken to be relatively to that of the surviving male members who stand in the husband's shoes as her legal guardian. But her right to maintenance against the surviving co-parceners is taken to depend not on her co-ownership, but on the obligation imposed on them to maintain the widow of a deceased co-parcener. (*p*)

in self-acquired property of father,

It is to be now considered whether they are entitled to claim maintenance from the father's self-acquired property. It should be observed that the Mitàksharà recognises the right by birth, of the son and the like male descendant, to even the self-acquired property of the father and the like. This right is a subordinate right like that of the wife, and is recognised for the self-same reason, namely, enjoyment by sons, of father's property . hence sons must be held entitled to claim maintenance from such property. Where there is no ancestral property, a Mitàksharà father-in-law is under no obligation to maintain his widowed daughter-in-law. (*q*) His obligation is merely a moral or an imperfect obligation

(*m*) *See ante pp* 372-3, 592 , Cnanvirgavda *v.* District, 1927 B 91.

(*n*) Jamma *v* Machul, 2 A 315 (*o*) Becha *v.* Mothina, 23 A 86.

(*p*) Devi *v* Gunwanti, 22 C 410 , Surampalli *v* Surampalli, 31 M 338

(*q*) Meenakshi *v.* Rama, 37 M. 399

which, however, ripens into a legal obligation on the part of the heirs who gets his estate. (*r*) But where there is ancestral property (*s*) or self-acquired property treated as family property, (*t*) the daughter-in-law is entitled to maintenance out of such property.

under Bengal School

The Bengal School, however, does not admit right by birth. But it has been held that there is no difference between the two schools as regards the daughter-in-law's right to claim maintenance from the father-in-law who has only self-acquired property. (*u*)

Usage now prevailing,

If the actual usage be looked to even now prevailing in Hindu society, we find that the sons continue to live with their fathers even after attaining majority and also after marriage, and to be supported by them, when not earning anything. In fact it is the father who celebrates the son's marriage, the son being merely a passive agent in the transaction, the father decides whether the son should marry, and it is he who selects the bride, and it is he who settles the terms with the bride's father. After marriage the bride comes to her "father-in-law's house," and not to her "husband's house." A man consents to give his daughter in marriage, when he is satisfied that her *father-in-law* is possessed of means so as to be able to support her. Can there be any doubt that under the feregoing circumstances the father-in-law is bound to support her and the children born of her?

Although the general usage of the Hindu fathers maintaining their adult sons, and the fact of a particular son's being always maintained from his birth by his father, would not create a legal liability of a father for furnishing adult sons with maintanance out of his self-acquired property, yet there are strong equitable considerations arising from his conduct, which tend to fix him with a legal liability to maintain that son's wife and children, for, there is an implied

(*r*) Indubala *v* Panchumani, 19 C W N 1169 21 C L J 292 28 I C 578, Bhagwanti *v* Thakur, 1926 L 198 Gopal *v* Kadambini, 73 I C. 235
(*s*) Bhudan *v* Radha, 32 I C 33 108 P R 1915
(*t*) Thyalambal *v* Krishna, 32 I C 955
(*u*) Siddeshury *v.* Jonardan, 6 C W N 530, Gopal *v* Kadombini, 73 I C 235.

if not an express, contract on his part, with the infant bride's guardian, that he will support her, the bridegroom being unable at the time of his marriage even to maintain himself.

shows implied liability of father-in-law to maintain daughter-in-law,

But this aspect of the question, arising out of the actual usage of marrirge among Hindus, appears to have been not placed before, nor taken into consideration by the Courts, while dealing with it It has therefore been held that there is only a moral obligation on the fathere-in-law, to maintain his widowed daughter-in-law, out of his self-acquired property, which however ripens after his death into a legal obligation on the inheritor of his property, (*v*) but it has been held by the Bombay High Court that she cannot claim it against the universal legatee of her father-in-law's whole self-acquired property (*w*) The Madras High Court, however, holds that her legal right is not affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide maintanance. (*x*)

liability is moral to father but legal with his heirs,

And the Allahabad High Court holds that the right to maintenance is not lost even if the son gets the property by gift and not inheritance. (*y*)

A Full Bench of the Oudh Chief Court, on a careful consideration of the question, has held that a daughter-in-law is entitled to maintenance out of the property acquired by the father-in-law after the death of her husband and which is in the prossession of her husband's brother or the son of the latter either by right of inheritance or of survivorship. (*z*)

Residence of daughter-in-law.—But a widowed daughter-in-law who left her "father-in-law's house" without any just cause, has been held to be not entitled to claim separate monetary maintenance from her father-in-law, to be enjoyed by her while living in her "father's house," the "father-in-law's house" being the proper place of residence for a married or a widowed woman, (*a*) except when the father-in-law is in

but she must not leave father-in-law's house without just cause

(*v*) Siddesury *v* Jonardan, 5 C W N, 549, 6 C W N 530, Jeot Ram *v*. Lanji, 1929 A. 751
(*w*) Bai *v* Tarwadi, 25 B 263
(*x*) Rangammal *v* Echammal, 22 M 305
(*y*) Jeot Ram *v* Lanji, 1929 A 751.
(*z*) Jai Nand *v* Parandei, 1929 O 251
(*a*) Khettur *v*. Kashee, 10 W R 89 F B 2 B L R 15

possession of ancestral property in which her husband had an interest. (*b*)

Marriage expense of son's daughter —The debt incurred by a Hindu widow in possession of her husband's estate to celebrate the marriage of the daughter of a son who had died before his father, has been held to be a valid charge on the estate passing to the reversioner after the widow's death. (*c*)

It follows therefore that her maintenance is also a charge on her grandfather's estate.

Sub Sec ii—WIFE*

Position of wife,

According to both the schools, the lawfully wedded wife acquires from the moment of her marriage a right to the property belonging to the husband at the time and also to any property that may subsequently be acquired by him, so that she becomes a co-owner of the husband, though her right is not co-equal to that of the husband, but a subordinate one, owing to her disability founded on her status of perpetual or life long tutelage or dependence. (*d*) It has already been pointed out the reason why this is recognized. (*e*)

Under Section 488 of the Criminal Procedure Code every person having sufficient means is liable to maintain his wife, but a *Jain Sadhu* may be exempted from this liability if by his vows he cannot hold property or earn money. (*f*)

This right of the wife to maintenance from her husband is not lost even if the husband renounce Hinduism. (*g*)

after husband's death,

This right subsists even after the husband's death although her husband's right as distinguished from hers may pass by surviorship or by succession to sons or even to collaterals, these simply step into the position of her husband, and she is required by Hindu law to live under their guardianship after her husband's death. The reason for

(*b*) Surampalli v Surampalli, 31 M 338
(*c*) Ramcoomar v Ichamayi, 6 C 36
*In this connection *see ante pp* 372-3, 592, 682
(*d*) Jamna v Machul, 2 A 315, Becha v Mothina, 23 A 86, Narbada v. Narayan, 5 B 99, Sorolah v Bhoobun, 15 C 292, 304, *see also* Srinath v Probodh, 11 C L J 580
(*e*) *See ante p* 371
(*f*) Muni v. Bai Lilawati, 56 B 260, *see* Ch XIV, S. 2
(*g*) Mansha v Jiwan, 6 A 617

recognising her right continues even after the husband's death. The inferior dependent status of her sex prevents her from taking the husband's interest by survivorship while she is the surviving half of her husband's body, a male issue is his co-substantial, and in a joint family, the female members occupy an inferior position, and must live under the protection and guidance of the male members, but their interest in the family property remains unaffected by the husband's death

Dayabhaga and Mit on window's rights in husband's estate

There are, however, a remark in the Dàyabhàga (h) and another in the Vîramitrodaya (i) which are made for meeting an adverse argument, and which may mislead the reader to think that the right is extinguished by the husband's death, but which are not intended to be taken as the correct doctrine Jîmûtavàhana maintains that the widow is entitled to inherit her husband's estate in preference to his undivided brethren, who are according to the Mitàkshara *joint-tenants* with the deceased, and are therefore entitled to take by survivorship to the exclusion of the widow The Dayabhàga does not admit joint-tenancy of co-heirs, but maintains that they take as tenants-in-common, and that therefore survivorship does not app'y (j) But the author of the Dàyabhàga proceeds further, and controverts the Mitàksharà doctrine of survivorship even assuming the joint-tenancy of co-parceners by putting forward the argument that the wife was also a co-owner of the husband, and is therefore entitled to take by survivorship, hence, she cannot be excluded even on that ground by the husband's undivided brehren (k) But then an objection might arise to this argument, namely, that why should not the widow take by survivorship to the exclusion of the male issue This is obviated by the author by saying that, in that case her right might be *inferred* to be extinguished by the death of the husband, because there are express texts providing the succession of the male issue to the exclusion of the widow But it should be observed that the only inference that ligitimately arises, is not the extinction of her co-ownership, but the extinction of only one of its incidents, namely, taking by survivorship, and that is what is really contemplated by the author, since he asserts that there is no authority for the position that the wife's right in the husband's property accruing to her from their marriage ceases on his death (l)

And it should also be noticed that the whole of this is merely an argument against the Mitàkshara doctrine of survivorship excluding the widow, even assuming the correctness of the theory of joint-tenancy upon which same is based And therefore the last assumption of the extinction of her right is not the author's own view of the nature of the wife's co-ownership (m)

(h) XI, 1, 27
(i) Author's translation of Viramitrodaya p 165
(j) XI, 1, 26
(k) XI, 1, 27
(l) XI, 1, 26.
(m) D B, XI, 1, 26

Viramitrodaya,

The Viramitrodaya again, while controverting the Dayabhaga doctrine of the widow's succession in all cases, takes advantage of the last assumption made by Jimutavahana, and maintains that the widow's right to her husband's property, accruing from marriage, must be taken to be extinguished in all cases, by the death of the husband, so as to disentitle her to take by survivorship in any case But this assumption is not at all necessary to be made, nor is there any authority in support of it, for the continuance of the widow's subordinate right is perfectly consistent with the right of the co-parceners by survivorship, as it was with the right of the husband himself

Contrary to Mitakshara.

Besides, it is contrary to the reason for recognising this right, and contrary to the Mitakshara itself (on Yajnavalkya, ii, 52), and to its fundamental doctrine, namely, that partition cannot create any right, but proceeds upon the footing of pre-existing rights, and that it is by virtue of the wife's right to the husband's property, that she obtains even when partition is made by her sons after the husband's death, and that it is by virtue of this right that she continues to enjoy the family property so long as it remains joint after the husband's death

Is widow entitled to maintenance when she has other source?

According to both the schools, the right which a woman acquires to her husband's property subsists after his death, whether his interest passes by succession or by survivorship to the male issue or any other person, and that this right does not depend upon the widow's not possessing other means of support. (*n*) But the Calcutta High Court which has been dissented from by the above Madras case has held that a widow is not entitled to maintenance from her husband's co-parceners if she has got other source of income to support herself. (*o*)

When wife can claim separate maintenance

Place of residence—It has already been said (*p*) that the wife is bound to reside with the husband, she cannot claim separate maintenance (*q*) except for such ill-treatment as would amount to cruelty (*r*) in the estimation of an English Matrimonial Court, (*s*) and when she declines to live with him on account of his being a leper. (*t*) But if the

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(*n*) Darbha Lingaya *v* Darbha, 28 M L J 260 38 M 153 28 I C 200, Bhagatram *v* Sahib, 3 L 55 67 I C 848 21 P W R 1922
(*o*) Ramawati *v* Manjhari, 4 C L J 74
(*p*) *p* 172 *supra*
(*q*) Bommadevara *v* Rajya, 48 C L J 171 P C 1928 P C 187 Yusubai *v* Sadashiv 30 I C 934
(*r*) Bommadevara *v* Naganna, 21 L W 451 87 I C 571 1925 M 757 reversed on fact by P C, 48 C L J 171
(*s*) Matangini *v* Jogendra, 19 C 84, *see* Sitabai *v* Ramchandra, 12 Bom L R 373 6 I C 525
(*t*) Sheehappaiya *v* Rajama, 45 M 812 43 M L J 174 69 I C 25

husband refuses to receive the wife into his house without sufficient cause, she is entitled to separate maintenance (*u*)

Usual place of residence of widow

But it has been held that a *widow* is not bound to live in her husband's house, though undoubtedly it is the proper place for her to reside, which she cannot be permitted to leave for unchaste purpose and retain her maintenance (*v*) She is, therefore, entitled to maintenance including arrears of maintenance. (*w*)

Right of residence of women,

A widow, however, whose husband has directed that she shall be maintained if living in the family or any other specified house, is not entitled to maintenance if she resides elsewhere without just cause (*x*)

A widow or other dependent woman has a right of residence in the family house and she cannot be ousted except to satisfy claims which are paramount to her right of residence or payment of debts not tainted with immorality (*y*) and (*z*) unless some other place is provided for her. But if she deliberately abstained from giving notice to the purchaser of her right of residence even when she was aware of the sale by her son, her right is defeated. (*a*) This right is included in the right of maintenance. (*b*)

Family necessity takes precedence

Precedence over her maintenance.—But a debt contracted for family necessity takes precedence even over the widow's claims for maintenance, and by the sale of the family dwelling-house to satisfy such a debt, the widow

(*u*) Nitye *v* Soondaree, 9 W R 475

(*v*) Ekradeshwari *v* Homeshwar, 8 P 840 33 C W N 637 49 C L J 579, Sajanisundari *v* Jogendra, 58 C 745, Goki *v* Lakhmidas 14 B 490, Pirthee *v* Raj, I A Supp 203 20 W R 21, Siddesswry *v* Janardan, 29 C 557, Surampalli *v* Sirampalli, 31 M 338 Parwatibai *v* Chatru 36 B 131 12 I C 708 13 Bom L R 1023, see also Sukin *v* Gangajali 13 I C. 136 (C), Srinivasa *v* Lakshmi, 1928 M 216

(*w*) Ekradeshwari *v* Homeshwar, *supra*

(*x*) Girianna *v* Honama, 15 B 236, Bhoba *v* Peary 24 C 646, Promotha *v* Nagendrabala, 12 C W N 808, see also Brojo *v* Swarna 22 C W N 433 P C. 47 I C 36 (1918) M W N 313

(*y*) Budh *v* Sahib, 1930 L 288, Nanki *v* Firm, 89 I C 874, *see ante p* 460

(*z*) Asa *v* Bashi, 56 I C 198 (L), Mungola *v* Dino, 12 W R O C 35, Bhagat *v* Ram, 69 I C 602, Suriyanarayana *v* Balasubramania, 43 M 635 38

(*a*) Gotiram *v* Kesarbai, 1930 B 47
M L J. 433; but see Olagayee *v* Pichhammal, 21 M L J 303

(*b*) Charandas *v* Nagubai, 1929 B. 452; Rambhabai *v*. Doongersi, 1929 S. 102; Kewalmal *v*. Isribai, 1926 S 135.

is liable to be evicted. (c) So her right to maintenance will be defeated where husband's property is attached under Sections 87 and 88 of the Code of Criminal Procedure. (d)

Secs 87, 88, Cr P Code.

But the Privy Council (e) in an old decision has laid down that the right to maintenance is not lapsed when the Crown takes the estate by escheat or by forfeiture.

Unchastity a bar to maintenance,

Unchastity.*—An unchaste wife (f) or widow is not entitled to any maintenance from the husband or his heirs respectively. That the husband's successors, taking his estate by survivorship, descent or devise, are not bound to maintain his unchaste widow, is a proposition which is beyond all doubt (g)

when starving maintenance allowed

A widow is entitled to a starving maintenance only if she reforms her conduct. (h)

But it has been held that a wife, who led an adulterous life and as a result gave birth to an illegitimate child is entitled to maintenance if she ceased to carry on such a life before suit. (i)

Sec 488 Cr P Code

The Calcutta, (j) Madras, (k) Bombay, (l) and the Allahabad (m) High Courts have put an interpretation on the words "*living in adultery*" in Section 488 of the Criminal Procedure Code to mean *adultery* continued till the time of claim, and a single lapse from virtue, resulting even to birth of an illegitimate child, will be no bar to her getting maintenance under this Section. This principle, so far as it affects the Hindus, is directly against the clear texts of law (n) and is also revolting to Hindu sentiments.

(c) *See ante* p 460, Jamiat v Malan, 13 L 41, Lakho v Lachman 1926 L 241

(d) Durgi v Searetary, 1929 L 528 (attachment of property of absconding person)

(e) Golab v Collector, 4 M I A 246

* *See ante pp* 662-670

(f) Debi v Dauiata, 39 A 234 39 I C 10 15 A L J 169, Chirukala v. v Visvananda, 23 M L J 289 169 I C 389 Subhayyah v. Bhabani, 24 I C. 390

(g) Roma v Rajani, 17 C 674 Mahajan v Purbo, 11 L 424, but see contra Parami v Mahadevi, 34 B 278 5 I C 960 12 Bom L R 196

(h) Bhikubai v. Hariba, 49 B 459, Sathyabhama v Kesavacharya, 39 M. 658

(i) Subhayya v Bhavani, 24 I C 390

(j) Jatindra v Gouri, 29 C W N 647

(k) Atchamma v Mahalakshi, 30 M 332

(l) Fulchand, *In re*, 52 B 160, for comment *see* 32 C W N. cxxxiv.

(m) Kallu v Kaunsilia, 25 A 326

(n) *See ante pp.* 662-670 specially *pp* 664-665.

It was, however, held that unchastity cannot affect the right of a widow to whom the income of certain property was assigned by her brother-in-law under an agreement compromising a suit by her against him, when there was no express stipulation about chastity, (*o*) but the decision is dissented from, (*p*) and the correct view is thus laid down. Unchastity cannot affect the right of a widow to get an annuity granted without condition by her husband by a Will (*q*)

When unchastity not a bar

Re marriage **—It has been held by the Allahabad High Court that when re-marriage is permitted by the customary rule of a caste, it does not disentitle a widow from recovering maintenance, charged by a decree against the husband on his property. (*r*) This view appears to be contrary to the interpretation put by the Calcutta and the Madras High Courts (*s*) on Section 2 of the Hindu Widow's Re-marriage Act, though it is consistent with the construction put on by the Allahabad High Court. (*t*)

Whether re-marriage a bar

Starving maintenance.—The provision, made by Hindu law, for starving maintenance of an unchaste but penitent wife, is only a moral injunction on the husband, for, it has already been observed that the husband is competent to divorce an unchaste wife (*u*)

Grant of starving maintenance, a moral injunction

Husband's liability, a charge on porperty—When the husband is alive, he is personally liable for the wife's maintenance, which is also a legal charge upon his property, this charge being a legal incident of her marital co-ownership in all her husband's property (*v*) The maintenance of abandoned wife even can be made a charge on her husband's interest in the joint family (*w*) But after his death, his widow's right of maintenance becomes limited to his estate,

Wife's or widow's maintenance

(*o*) Bhup *v* Lachman, 26 A 321
(*p*) Brijbhukhan *v* Ram, 1927 A. 695 Sita *v* Gopal, 1928 P 375 the decision upheld by P C 55 C L J 66
(*q*) Parami *v* Mahadevi 34 B 278
***See ante pp* 661 662
(*r*) Gajadhar *v* Kaunsilla, 31 A 161 1 I C 761 6 A L.J 107; Balkrishna *v* Paij, 1930 A 593
(*s*) Matungini *v* Ram, 19 C 289, Rasul *v* Ram, 22 C 589, Murugayi *v* Viramakali, 1 M 226
(*t*) Har *v* Nandi 11 A 330
(*u*) *p* 662 *supra.*
(*v*) *See ante p* 370
(*w*) *See* Gopala *v* Parvathi, 1929 M 47

which, when it passes to any other heir, is charged with the same. (*x*) There cannot be any doubt that under Hindu law the wife's or widow's maintenance is a legal charge on the husband's estate, but the Courts appear to hold, in consequence of the proper materials not being placed before them, that it is not so by itself, but is merely a claim against the husband's heir, or an equitable charge on his estate: hence the husband's debts are held to have priority, (*y*) unless it is made a charge on the property by a decree (*z*).

How rate of maintenance determined

Rate of maintenance—The amount of the widow's maintenance is to be settled having regard to the *value of the estate,* to the *position and status* of the deceased *husband* and of the *widow,* as well as to the mode of life of the family during the husband's life-time, and also having regard to what amount would be sufficient to allow the widow to live consistently with a widow's position, in the same degree of comfort and with the same reasonable luxury of life as in the husband's life-time, (*a*) and her proper maintenance should include "not only the ordinary *expenses of living,* but also that which she might reasonably expend for *religious and other duties* incident to the station in life which she might occupy" (*b*) It has been held by the Privy Council that "the question of determining the amount of maintenance is always a question for the discretion of the Court and such discretion will be exercised having regard to all the circumstances affecting the case," (*c*) and such discretion should not be lightly interfered with (*d*)

The Court, in the absence of any contract to the contrary, may in a proper case vary the rate of maintenance (*e*)

(*x*) *See* Veeranna *v* Sitamma, 27 M 83
(*y*) Jayanti *v* Alangamma, 27 M 45, see Kanta *v* Nonichora, 35 I.C 566
(*z*) Somasundaram *v* Unnamalai, 43 M 800
(*a*) Ekradeshwari *v* Homeshwar, 8 P 840 66 I A 112 33 C W N 637 4 C L J 579, Sujanisundari *v* Jogendra, 58 C 745
(*b*) Nittokissore *v* Jogendra, 5 I A 55, 56-7, Dalel *v* Ambica, 25 A 266, 270, Adhibai *v* Cursandas, 11 B 199, 206, Baisni *v* Rup, 12 A 558, Devi *v* Gunwanti, 22 C 410, 417, Karoonamoyee *v* Administrator, 9 C W N 651, Pushnavalli, *v* Raghuvaiah 23 I C 413, 15 M L T 95, Subramania *v* Muthammal 21 M L J 482 9 I C 614 9 M L T 316, Panchakshara *v* Pattammal, 1927 M 805 Pratap *v* Mul Shankar, 26 Bom L R 269
(*c*) Brojo Sunder *v* Swami, 22 C W N. 433, 436 47 I C 36
(*d*) Ekradeshwari *v* Homeshwar, 8 P 840, 845 33 C W N 637 49 C L J 579.
(*e*) Chinnammal *v* Venkatasami, 1927 M. 705, *see post* 7(2 *foot note* (*x*) (*y*)

The amount of maintenance to which a widow should be entitled as being proper under the above rule, cannot be curtailed by her husband by Will. (*f*) The maintenance to which a wife who has been driven out by the husband for no fault of hers, is the same to which she had always been accustomed, provided the family is in a position to pay. (*g*)

Sub-Sec. iii—STEP-MOTHER

Step mother's maintenance

Although a widow's maintenance is a charge on the entire estate of her deceased husband, yet it has been held that *after* partition between her son and her step-sons, it will be a charge only on the share of her son, and not on that of her step-sons—an inequitable rule due to misapprehension of the Dàyabhàga. (*h*) The Courts have been misled by the *ill-digested Digest* of Jagannàtha who was a mere Sanskritist without law, and also without logic, though a *logician* he professed to be.

Bengal view.

But the Madras High Court has held that the mother is entitled to have her maintenance from both son's and step-son's interest in the entire family property. (*i*)

Madras view

The maintenance granted to the step-mother is to be presumed not to be an absolute estate but it may yield to the evidence on the record, and an allotment of a definite share charged with definite share of debts creates an absolute interest in her when the transaction had stood for a long time (*j*)

Sub-Sec iv—DAUGHTERS AND GHARJAMAI*

Unmarried daughters

Unmarried daughters of the deceased proprietor are to be maintained by the heir until marriage (*k*) It has already been seen that the unmarried daughters of disqualified members are to be so maintained. (*l*)

(*f*) Promotho *v* Nagendrabala, 12 C W N 808
(*g*) Gopala *v* Parvathi, 1929 M 47
(*h*) Hemangini *v* Kedar, 16 C 758 16 I A 115,
(*i*) Srinivasa *v* Thiruvengada, 38 M 556 25 M L J 644 15 M L T 307 23 I C 264, Kannepalli *v* Kannepalli, 28 I C 349 17 M L T 188, in this connection see Subbrayalu *v* Kamalavelli, 35 M 147 21 M L J 493 10 I C 347, (widow of a co-parcener entitled to maintenance from entire undivided property) Veeranna *v* Sitamma, 1927 M 83
(*j*) Sahab Rai *v* Shafiy, 31 C W N 972 1927 P C 10[illegible]
* *See ante pp* 170-171
(*k*) *See ante pp* 161-162
(*l*) *See ante p.* 678

Married daughters.

A married daughter is ordinarily to be maintained in her husband's family. But if they are unable to maintain her, she is entitled to be maintained in her father's family. It has, however, been held by the Bombay High Court that an indigent widowed daughter, who fails to get maintenance from her father-in-law's family and is supported by her father, is not entitled after his death to claim her maintenance from his heirs. (*m*) This view, however, is not approved by the Calcutta High Court which holds that she must, in the first instance, look for her maintenance to her husband's family; if she fails to show her inability to obtain maintenance from her husband's family, she can claim the same out of her deceased father's estate. (*n*) The Madras High Court also does not approve of the view expressed by the Bombay High Court. (*o*)

Widowed daughter, Bombay view,

Bengal view

Madras view

That a widowed daughter, who used to live and be maintained in her father's house, is not entitled to be so, and that her father's heir can turn her out into the public street in a destitute condition, seem to the orthodox Hindus to be monstrous propositions being most abhorrent to their feelings, and are due to the misapprehension of the usages and the meaning of the term "dependent member" In the Original Side of the Calcutta High Court and in the Appeal Court, the question whether a sonless indigent widowed daughter, who used to live as a dependent member of her father's family, is entitled to maintenance from her father's estate in the hands of his heir, was discussed as if it was one of first impression in the case of *Mokhada Dassee* (*p*) But the affirmative appears to have been accepted as settled law in the Appellate side In 1796 Jagannatha (in Colebroke's Digest, Book V, verse 399) put forward *kulinism* in Bengal as the reason in support of the proposition that a married or widowed daughter is entitled to maintenance from her father's estate

Sir William Macnaughten gives a case in which a widowed sonless daughter who was excluded from inheritance was held entitled to maintenance Sir Thomas Strange also is of the same opinion Babu Shyamacharan Sarkar, whose Vyavasthadarpan used to be consulted as authority by the Courts in Bengal until replaced by Mayne's work, is of the same opinion (*q*) There are many unreported cases in which a widowed daughter, who used to be maintained as a dependent member of her father's family was held by the

(*m*) Bai Mangal *v* Bai, 23 B, 291

(*n*) Mokhada *v* Nundo, 28 C 278 appeal from 27 C 555

(*o*) Gudimetta *v* Bolloju, 23 M L J 223 16 I C 139

(*p*) 27 C 555 and 28 C 278

(*q*) *See p* 170 of the second edition

High Court to be entitled to get maintenance from her father's heir In one case, Justice Norris, after having referred to the Vyavasthadarpan supporting the decision of the lower Appellate Court decreeing the daughter's claim, observed—"Even if there be a shred to hang a peg on to support this decision, we will do it" That was also the sentiment of the Vakils who appeared against the danghter, but had not the heart to argue their client's case, as their contention was unnatural and most repugnant to their own feelings.

Son-in law or Gharjamai * —Sometimes, the married daughter does not leave her father's house after her marriage but continues to live with her husband as *ghar-jâmâi* in her father's house in such cases, she, her husband, and her children are entitled to maintenance from her father and his estate The father-in-law when gave in marriage his daughter with the express understanding to maintain the bridegroom and in fact maintained him after marriage, the son-in-law is entitled to maintenance, (*r*) and even to separate maintenance in some cases

Son-in-law.

Sub-Sec v—SISTER

The maintenance of an unmarried sister and the expenses of her marriage (*s*) are charges on the brother's estate, especially when it was inherited by him from an ancestor. It is most unfortunate that the sister was not recognised as heir , but the legislature (*t*) has now removed the difficulty by placing her in the category of heirs (*u*) so far as the Mitâksharâ school is concerned. Maintenance of the widowed sister of the husband who was maintaining her in his life-time, is a legal necessity (*v*)

Sister,

Sub-Sec vi—DEPENDENT MEMBERS

Poor relations and other dependent members whom a person used to maintain, as being morally bound to do so, are after his death entitled to maintenance from his heirs, (*w*) provided he left sufficient property Thus, it has been held

Dependent members

* *See ante pp* 170-171

(*r*) *See supra p* 170-171

(*s*) *See* Srinivasa *v* Thirvengada, 38 M 556 25 M L J 644 23 I C 264 15 M L T 307 this followed in Gopalam *v* Venkataraghavela, 40 M 632 : 29 M L J 710 31 I C 574 dissenting from Narayana *v* Ramalinga, 39 M 587 this reversed by P C 45 M 489 , *see supra p* 161-163

(*t*) *See* Act II of 1929

(*u*) For her position in the order *see ante p* 567

(*v*) Sailabala *v* Baikuntha, 1926 C 485

(*w*) See Bhali *v* Dwaraka, 84 I C 168 1925 L R 32

that a person succeeding to his father's self-acquired property is bound to maintain his predeceased brother's widow who used to be maintained by her father-in-law. (*x*)

its meaning;

There has been some misconception about the meaning of the term *dependent member* a person is called a *dependent member*, who depends on the family for his maintenance and actually gets his or her food and raiment from the family and lives in the family dwelling-house as a member of it. The *dependent members* are, no doubt, relations near or distant, but persons are not to be deemed *dependent members* by reason of their relationship only, irrespective of actual residence and support as members, inasmuch as these appear to be the *sine qua non* of one's character of being a *dependent member*. This appears to be the true meaning of the term दीना समाश्रिताः (*poor dependants*) in original Sanskrit hence the view taken by the Original Court of the term *dependent member* appears to be in accordance with the meaning of the original Sanskrit term (*y*) and that of the Appeal Court seems to be contrary to the same (*z*) If the actually existing state of things be not the criterion or test of the *dependent* condition, it is difficult to say what kind of relationship should be taken as the test to determine the same. The daughter-in-law and the daughter in these two cases respectively had been *dependent members* of their father's family, in the sense of the original Sanskrit words, and therefore were not entitled to claim maintenance from their father-in-law's family of which they were not *dependent members* in that character they could look to their father's heir for support. But their claim *as daughter-in-law* was different and not affected by this character.

reciprocal duty of these members

But persons in this predicament are not entitled to separate maintenance except for very special causes, they are bound to reside in the house with the heir and to perform the reciprocal duty in connection with the household

(*x*) Janaki *v* Nand, 11 A 194, Kamini *v* Chandra, 17 C 373
(*y*) Siddesuri *v* Janardon, 5 C W N 549, 558
(*z*) 29 C 557, Mokhada *v* Nanda, 28 C 278

affairs as is ordinarily expected of him or her in Hindu society, otherwise the burden would be very heavy on the heir, unless the inherited property be very large. It may be observed in this connection that female members of orthodox Hindu families have the duty of preparing the food for the family. so, one claiming the right cannot justly refuse to perform the corresponding duty of such a member, and the amount must be fixed on a reduced scale, should separate mintenance be awarded. (*a*)

Under this head are included invalid adopted sons, concubines, (*b*) illegitimate sons, (*c*) sons-in-law who are *ghar-jamais.* (*d*)

Sub-Sec vii—CONCUBINE AND ILLEGITIMATE ISSUE

Concubine

Concubine*—is entitled to maintenance under certain conditions and limitations, (*e*) namely, that she must have been permanently and exclusively kept by her paramour in his family, (*f*) that she must be the mother of illegitimate children by him, (*g*) and that she should be chaste and keep undefiled the bed of her lord and master, (*h*) in the last-mentioned Bombay case (*i*) it has been held that a kept mistress whose husband is alive is not entitled to maintenance. But the Judicial Committee of the Privy Council has reversed the above Bombay decision (*j*) and held that in the country governed by the Mayukha School, a permanent concubine, though she lived separately from her paramour's family, is entitled to maintenance out of her deceased paramour's estate. (*j*)

living in paramour's family entitled

but not so in Bombay

(*a*) Bhagwan *v* Bindoo, 6 W C 286

(*b*) Ningareddi v Lakshmawa, 26 B 163, Raman irasu *v* Bnchammi, 23 M. 282, Monghi *v* Nagubai, 47 B 401 24 Bom L R 1009 69 I C 291, see *foot note* (*j*) *below* and *p ante* 332, Behari *v* Achraj, 68 I C 364 (Nag)

(*c*) Ghana *v* Gereli, 32 C 479, Lingappa *v* Esudasan, 27 M 13 & Gopalasami *v* Arunachurn, 27 M 32, 68 I C 417 (Nag)

(*d*) *See supra pp* 170 171 and 697

* *See ante pp* 332-334

(*e*) Rama *v* Pahammal, 48 M 805 49 M L J 348 90 I C 983 1925 M 1230

(*f*) Monghi *v* Nagubai, *see above*, and 48 M 805 *above*

(*g*) Khemher *v* Umiashankar, 10 Bom H C R 381

(*h*) Yashvantran *v* Kashibai, 12 B 26, Anandilal *v* Chandrabai, 48 B 203

(*i*) 48 B 203, but *see* Kamtabai *v* Umabai, 1929 N 127.

(*j*) Bai Nagubai *v* Monghi, 50 B. 604. 31 C.W N. 128 44 C L J 53 1926 P.C. 73; *see p* 333 *ante.*

Illegitimate son

Illegitimate son**—of a Sudra is entitled to maintenance out of the properties belonging to the joint family of the putative father for his whole life. But it is held that all that is necessary is that the connection between the parents should be continuous and neither adulterous nor incestuous. (*k*)

Illegitimate daughter—is entitled to maintenance till she is married or attains majority. (*l*) But on appeal from this case it has been held that an illegitimate daughter of a Sudra is not entitled to maintenance out of the estate of her putative father, though the putative father had a personal obligation under Section 488 of the Criminal Procedure Code (*m*) But on a further appeal from the said case the Privy Council upheld the decision with certain modification of the decree (*n*)

Sub-Sec viii—JUNIOR MEMBERS OF IMPARTIBLE ESTATE

Nature of *Khorposh* grants

When the family property is held by a single member by primogeniture prevailing in certain cases according to custom, the junior members are entitled to a provision for maintenance out of the property. Usually some property is assigned to them in lieu of maintenance, the nature and character of the tenure of which are also determined by custom. Usually the *khorposh* grants in Chhota-Nagpore where many impartible estates are found, are like *estates tail-male*, held by the grantees and the heirs male of their body in succession to each other, and on failure of such heirs at any future time, they revert to the holders of the estate for the time being, in some cases these maintenance grants are resumable on the death of the grantees, it depends entirely on custom in each case. (*o*)

Sec 4—LEGAL INCIDENTS

Sub-Sec i—AMOUNT OF MAINTENANCE

Amount of maintenance how determined

As regards the amount of maintenance to which a widow is entitled out of her husband's estate, it has already been

*******See ante pp* 331-332, 334-336

(*k*) Natarajan *v* Muthia, 22 L W 650 1926 M 261.

(*l*) Natarajan *v* Muthia, 22 L W 650 1926 M 261

(*m*) 1927 M 387, *see* Nagarathnammal *v* Chinnu, 1928 M 127

(*n*) 35 C W N 1278 55 C L J 451

(*o*) *See* Section 124 of Act 1 of 1879, B.C. repealed, *see* also *infra* Chapter XV, Sec 5

stated, (*p*) the question is now considered generally in respect of all cases. If a person be entitled to separate maintenance, then the question will arise as to its amount, the solution of which will depend upon the extent of the property, (*q*) the position of the family, the nature of the claimant's right, the number of other members of the family and other peculiar facts of each case, (*r*) at the date of the suit (*s*)

In case of proprietor's widow,

Where the right to maintenance is the legal incident of a right to property, such as that of the widow of the deceased proprietor, the lowest limit is to be determined by having regard to the extent of the property, and to similar right, if any, of any other person.

The widow of the undivided co-parcener has been held to be not entitled to claim from the survivor, more than the proceeds of the share which would have been allotted to the husband, had there been a partition during his life-time. (*t*)

When, however, the property is very large, the maximum limit is to be ascertained by having regard to the expenses which the claimant will have to incur for living in the style suitable to the position of the claimant and of the family, that is to say, to the charges for establishment, food, clothing, religious ceremonies and the like, due to the claimant. The amount is not to bear any fixed ratio to the property · the sufficiency of the maintenance is the criterion. (*u*) But position depends partly on property.

It should be noticed in this connection that the share which is allotted to the father's wife on partition is held to be given in lieu of maintenance the same therefore affords a guide in fixing the amount. (*v*)

(*p*) *p* 694 *supra*

(*q*) The family income at the date of suit and not at the death of her husband is to be taken into consideration, Manikka *v* Soubagia, 27 M L J 291 25 I C 897, Shamrao *v* Chandrabhagabai, 1929 N, 366 (income from *Deshmuki* and *Patwaripari* is not to be included), Kodandarami *v* Chenchamma, 1930 M 479 (income from private funds not to be taken into account), *see also*, Charandas *v* Nagubai, 1929 B 452

(*r*) Baisni *v* Rup Sing, 12 A 558, 15 W R 73, Nitya *v* Jogendra, 5 I A 55, Devi Prasad *v* Gunwanti, 22 C 410, 417 (*s*) *See foot note* (*q*) above

(*t*) Madhab *v* Ganga, 2 B 639, Adhibai *v* Cursan, 11 B 199, Rungathaiy *v*. Neli, 21 M L J 706 —Mitakshara cases

(*u*) Tagore *v*. Tagore, 18 W R at 373, Krishna *v* Brojo, 25 C W N 403.

(*v*) Hemangini *v*, Kedar, 16 C. 758, 765, Jogendra *v*. Fulkumari, 27 C 77,

and in case of those who have no legal right

As regards the amount, a distinction should be drawn between those that are entitled to maintenance as the legal incident of their right to the property and those who have no such right. The question of amount of bare maintenance can and should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. (w)

Amount when varied

The amount decreed may be reduced or increased on a change of circumstances (x) But when the rate of maintenance was the subject of a compromise and incorporated in a decree, the Court cannot, without the consent of parties, alter the rate (y)

The maintenance charges include the right of residence, (z) education and marriage expenses. (a)

Amount when claimant has other source

Other Sources of maintenance—If the claimant for maintenance is possessed of property yielding an income, that must be taken into consideration, (b) but possession of jewels by a widow cannot reduce the maintenance she is entitled to, specially when she belongs to a community in which widows are not prohibited from wearing jewels. (c) It is doubtful whether a person possessed of sufficient means for support, derived from a different source, can claim maintenance from another person who would otherwise be liable to maintain him or her Take, for instance, the case of a woman who has inherited her father's estate the income of which is more than sufficient for her maintenance. A widow was held to have no cause of action for a suit against her brother-in-law when she had in her hands funds apper-

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(w) Chikubai v Haribai, 49 B 459 27 Bom L R 13 1925 B 153

(x) Gopikabai v Dattatraya, 32 B 485, Bangaru v Vijayamachi, 22 M 175; Venkatappa v Thimma, 27 M L J 656 27 I C 379, Narasamma v Venkataraya, 1926 M 634, Kewalmal v Isribai, 1926 S 135, Shanti, 1925 [illegible] 539, Chinnammal v Venkatasami, 1927 M 705, *see ante p* 694 *foot note* (c)

(y) Thimmanayanim v Venkatappa, 1928 M 713

(z) Charandas v Nagubai, 1927 B 452, Isribai, 1926 S, 135

(a) Baijnath v Mangla, 1926 P I

(b) Lingayya v Kanakamma 38 M 153 28 M.L J 260 28 I C 200.

(c) Shyama v Purushottamdas, 90 I C 124 21 L W 551, 1925 M. 645.

taining to the family estate, sufficient for five year's subsistence. (*d*) If the right to maintenance depends on necessity for the same, then surely a person whose maintenance is otherwise satisfied, is not in need of it, and therefore cannot lay a claim for what is *non est* The right, however, seems to remain, but the amount must be *nil* or nominal, as that must be fixed having regard to the need which does not exist. But all this is open to the objection that the right to maintenance being a right to property, which the law confers on one person against another, and annexes it to some estate, why should any such extraneous consideration affect it in the manner set forth above, when the law does not say so ?

Sub-Sec ii—CHARGE ON PROPERTY

Maintenance of imperfect co-owner is a charge,

There seems to be a misconception on this subject owing to the disregard of the subordinate co-ownership or imperfect rights in property, which Hindu law recognises, and of which the right to maintenance is one of the legal incidents The maintenances of all person having this imperfect co-ownership in the property must be a legal charge on the same , whilst, that of others, having no such right, may be deemed only an equitable charge on the property. (*e*)

according to Jimutavahana

But it should be specially noticed that the ancestral immoveable property is regarded by Hindu law as the hereditary source of maintenance of all the members of the family, dependent or independent and no holder of it in whom it may be deemed vested, and who is described as "proprietary member," by Mr Justice West, is competent to alienate it except for the support of the family This is the view propounded even by Jimutavahana, upon the authority of the text No 1 cited above (*f*)

The whole spirit of Hindu law is against alienation of ancestral immoveable estate which is the only source of maintenance of the helpless females, and also of the males in this country where agriculture is the chief source of wealth and the Hindus depend solely on the produce of land for subsistence

Thus, both law and equity are in favour of the proposition that maintenance is a legal charge on the estate, the holder of which cannot alienate it so as to defeat the right of maintenance, at any rate, of those that have an imperfect co-ownership in the property, such as the wife of an owner of the property Besides, it is erroneous to suppose the proprietary member to be absolute

(*d*) Dattatraya *v* Rukma, 33 B , 50
(*e*) *Ante pp* 362-363
(*f*) *See* D. B , ii, 23-26

owner when there exists a female member who acquired a right to it which also is proprietary though subordinate (*g*)

Bonafide purchasers for value—without notice are great favourites of the English law recognizing legal and equitable estates, charges and liens.

but Courts held widow has no lien,

Upon the analogy of English law the Courts have held that *bonâ-fide* purchasers for value without notice of the claim for maintenance, from the heir or other holder of the property are not liable for the same. The learned judges proceed to discuss the question on the assumption that the widow has no lien on her husband's estate in the hands of his heir for her maintenance, and that is only a claim against the heir personally (*h*)

due to Colebrooke's non-translation

The wife's subordinate proprietary right to the husband's property is not at all noticed by the judges in these cases It is unfortunate that, that part of the Mitakshara in which this right is recognised, was not translated by Colebrooke, and the consequence is that it is ignored both by lawyers and judges The restrictions on the proprietary member's power of disposing of ancestral immoveable property, is also overlooked in this connection

What constitutes notice of claim

Purchaser for value with notice—It has further been held that mere notice of the existence of her claim will not make the property in the hands of the purchaser liable, unless he had notice of the vendor's intention to defeat the claim for maintenance, or as Mr Justice West puts it, a notice to be sufficient, must be "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction" (*i*)

When maintenance a legal charge.

Decree charging property—But if a decree has been made in favour of the claimant charging certain property with maintenance then and then only it will be a legal charge on the property, to whatsoever person's hands it may go, (*j*)

(*g*) Jamna *v* Machul, 2 A, 315, Bechi *v* Mothina 23 A, 86, Narbadabai *v* Mahadeo, 5 B, 99, Sorolah *v* Bhoobun, 15 C, 292, 305, Promotha *v* Nagendrabala, 12 C W N, 808, 815

(*h*) Bhuggobutty *v* Kanai, 8 B L R, 225 17 W R, 433, Adhirani *v* Shona, I C, 365, Lakshman *v* Satyabhama, 2 B, 494

(*i*) 2 B, at p 517, Ram Kunwar *v* Ram, 22 A, 326; Bharatpur *v* Gopal, 24 A, 160, Shri *v* Bai 23 B, 342

(*j*) Jamiat *v* Malan, 13 L 41, Tara *v* Sarup, 10 L. 706 1930 L 117, 2 B, 494, I C, 365, Kulada *v* Jogashar, 27 C, 194, Muttia *v* Virammal, 10 M, 283, Juggernath *v* Mahārānee, 20 W R, 126, 4 A, 196, Sobagia *v* Manicka, 33 M L J 601

a mere money-decree will not have that effect But when no charge is made on the porperty in the decree, the widow cannot proceed against the property of the person against whom the decree was made. (*k*)

Precedence of charge

A charge on joint family properties created by, a decree for maintenance obtained by a widow, takes precedence over the right of a subseqent purchaser of the same properties in execution of a money decree binding on the family. (*l*)

A decree for maintenance obtained against a member representing a joint family can, after his death, be executed against joint property in the hands of the other members. (*m*)

It has also been held that even express notice at an execution sale will not affect the rights of the purchaser. (*n*)

This view appears to be embodied in Section 39 of the Transfer of Property Act.

Alienee bound when existence of widow known

The Calcutta High Court, in a suit for enforcement of the right to obtain maintenance by a predeceased son's widow, out of the estate of her father-in-law, has held that the daughter-in-law is entitled to enforce it against the estate left by the father-in-law, even to a portion of it in the hands of an alienee who had notice of her existence, and did not deny that he had no knowledge that the intention of the alienor was to defeat the interests of the widow (*o*)

A widow, however, cannot set up her claim for maintenance or residence against property alienated during the lifetime of her husband. (*p*)

Hardship on women due to case-law.

Hardship on women.—The result of the above view has been disastrous on Hindu women The Courts think themselves bound as Courts of equity to protect the rights of those who are from their situation most helpless. The Hindu law assigns to women the status of perpetual dependence or tutelage : and having regard to their actual condition, they are

(*k*) Radha *v* Krishna, 1929 C 423, *see* original Judgment in 15 C W N 205 12 C L J 173 7 I C 118
(*l*) Somasundaram *v* Uunnamalai, 43 M 800.
(*m*) Subbanna *v* Subbanna, 30 M., 324
(*n*) Sooraj *v* Nath, 11 C, 102
(*o*) Syed Abu *v* Saraswati, 43 C L J 604 : 1926 C. 1068, *see* in this connection Phuljhari *v* Har, 1925 O 338
(*p*) Ramzan *v* Ram, 40 A 96.

regarded by both the Legislature and the Courts, to be incapacitated and incompetent to manage their estates and to protect their own interests. Accordingly it is held by the Courts that a document executed by a woman in this country, cannot be binding on her and affect her interests, unless it be proved not only that its meaning and legal effect were fully explained to, and understood by her, but also that she had independent and disinterested advice about the same They are really incapable of protecting their own interests, and are no better than children. In this state of things, they are completely at the mercy of their male relations for the protection of their rights · and if they have rights against those very relations, and if these feel no compunction to deprive the women of those rights, there is none to help them, except the Courts.

Illustration.

To what miserable state ladies of respectable families are often reduced, will appear from one typical instance of a class of cases that are unfortunately rather frequent. A man of property dies leaving young sons, and his widow, mother, and the like , the sons often become very soon surrounded by bad company containing some money-lenders, and are led astray to squander property in a vicious course of life ; debts have soon to be contracted, but there is no difficulty, the money-lender companion is ready to advance money on promissory notes at first, and then on mortgages , all other properties are gradually sold, sometimes in execution , and last of all comes the turn of the family dwelling-house, when, however, a difficulty presents itself in consequence of the ruling in the case of *Mungala Devi* v. *Dinonath Bose*, (q) according to which women residing in the house cannot be turned out by the purchaser into the public street. But the money-lender is equal to the occasion , he advances some money to the now utterly depraved sons, to send away the women on pilgrimage, who are not aware of the actual state of things, and would gladly accept the proposal , and when they leave the house, the purchaser is put in possession of the same. On their return, the women find that their home

Rule in *Mungala Devi* v *Dinonath*

(q) 12 W R , O C. 35 4 B L R , O.C 72, *see supra p* 691.

is gone and that they have nothing to live upon. This is not an imaginary case, but an actual one that happened.

These money-lenders are often mistaken for *bona fide* purchasers for value.

The Purdanashin ladies are completely in the dark as to what is being done by the "proprietary members" of the family, with respect to its property so long as they go on receiving their ordinary maintenance, until when the whole property has become dissipated, and it is too late for them, according to the above decisions, to get any remedy

Result, if right view adopted

If the right view be adopted and acted upon, the helpless women would be saved, while *bona fide* purchasers would have their conveyances executed by the proprietary members as well as by these women whose rights would then be secured to some extent at least.

If, however, the property has been sold for the support of the family or for the benefit of the estate, or for like necessity, the purchaser must be safe. But if the sale is made for the proprietary member's personal purposes, the purchaser cannot claim to have more than that member's personal interest in the property.

To hold that the Hindu women must secure their right of maintenance by decrees declaring the same to be a charge on certain property, is practically the same thing as to deprive them of the right

Court created anomaly.

Besides, it is difficult to understand how a Court of Justice can pass a decree converting a personal right against the defendant, into a charge on his property. A Court of Justice can only declare the pre-existing rights of suitors, but cannot confer any rights to them, except by importing the peculiar artificial distinctions between law and equity, which are not necessarily founded on broad principles of justice universally applicable.

Nature of right in maintenance.

Interest of Women in property for maintenance.— The property given to a woman in lieu of her maintenance does not become her Stridhana and so an alienation of such

property by her will be operative during her life-time. (r)

Sub-Sec iii—TRANSFER OF MAINTENANCE

A right to maintenance being from its very nature a right restricted in its enjoyment to the claimant personally, cannot be transferred, (s) nor seized and sold in execution of decree (t)

Arrears of maintenance but not future may be sold

But although the right to future maintenance is not liable to sale, yet arrears of maintenance may be sold. (u)

Sub-Sec iv—CLAIM AND DECREE

It is not necessary that a demand for maintenance should be made by the person having the right to it, in order to be entitled to claim arrears. (v)

But in assessing the amount of arrears the Court may take into consideration as to how the claimant was actually maintained Suppose, a widow was maintained by her own father who is also morally bound to maintain his daughter, and no demand was made from the husband's relations, in such a case it is doubtful whether she can claim any arrears under such circumstances

Distinction between decree and declaratory decree

When a decree awards future maintenance at a fixed rate, payable monthly or annually during the life of the claimant, the same when falling due can be recovered in execution of that decree without further suit (w) But a mere declaratory decree for maintenance cannot be so enforced (x) The decree should direct the payment of amount of maintenance by only one or more persons in possession of the estate to the extent of the estate in his possession, on particular dates to be specified by the Court (y)

Sub-Sec v—LIMITATION

Maintenance not affected by lapse of time

Lapse of time—Whether the right to maintenance is affected by lapse of time the Judicial Committee observe,—"By

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(r) *See* Jagmohan *v* Praving, 6 P L J 206 87 I C 4731 · 1925 P 523.
(s) *See* Transfer of Property Act, Section 6 clause (*dd*)
(t) Civil P Code, Section 60, (1), (*n*) and Diwali *v* Apaji, 10 B 342.
(u) Hoymobutty *v* Kerunn, 8 W R 41, Raje *v* Nana, 11 B 528
(v) Jivi *v* Ramji, 3 B 207, Parbati *v* Chatru, 36 B 131 12 I C 708 13 Bom L R 1023, Subramania *v* Muthammal, 21 M L J 482 19 I C 614 9 M L T. 316
(w) Ashu *v* Lukhi, 19 C 139, 39 M 324
(x) *See* Venkanna *v* Aitamma, 12 M 183
(y) Sarasuti *v* Nandan, 18 A L J 828

common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow ; and a Statute of limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable " (z) The fact that a widowed daughter-in-law had not received any maintenance, nor in any way asserted her right thereto, even for the long period over twenty-five years, does not affect her right prejudicially, when it ripens into a legal one and she is obliged to demand it, from her wants and exigencies, by reason of the inability of her paternal relations to maintain her through some change of fortune. (a)

Arrears of maintenance – In dealing with claims for arrears of maintenance, the Court cannot disallow or cut it down, (b) but it has discretion to grant or withold those arrears with special reference to the urgent need and necessities of the widow, which amounts virtually to saying that every such case must be decided upon its own facts. (c) It can be refused on justifiable causes such as abandonment, but waiver or abandonment cannot be necessarily inferred from the fact of separate residence alone (d) The person who pleads waiver of a widow's right to arrears of maintenance, is to show that the widow agreed to waive her right or led the objector to believe as a reasonable man that she would not claim arrears. (e)

Waiver

(z) Narayan v Rama, 6 I A 114, 118 3 B 415, see Rangubai v Subaji, 14 I C 801 14 Bom L R 267

(a) Siddeswri v Jonardan, 6 C W N 530, 542

(b) Rohini v Kusum, 1928 C 195.

(c) Karbasappa v Kallava, 43 B 66, Lakshmamma v Venkatasubbiah, 48 M L J 866 : 87 I C 210 1925 M 795, Krishnamacharıar v Chellammal, 1928 M 561 ; Rungubai v Subaji, 36 B 383

(d) Pushpavalli v Raghavaiah, 23 I C 413 15 M L T 95, Rangathayi v Neli, 21 M.L J 706 10 I C 110 9 M L T 461

(e) Subramania v Muthammal, 21 M L J 482 9 I C 614

CHAPTER XII

FEMALE HEIRS AND STRIDHANAM

Sec. 1—ORIGINAL TEXTS

१ । भार्यापुत्रश्च दासश्च त्रय एवाधना. स्मृता. ।

यत् ते समधिगच्छन्ति यस्यैते तस्य तद् धनं ॥ मनु: ॥

Persons not entitled to own property

1. A wife, a son, and a slave, these three even are ordained destitute of property whatever they acquire becomes his property, whose they are — Manu—viii, 416

२ । पिता रक्षति कौमारे भर्त्ता रक्षति यौवने ।

पुत्रो रक्षति वार्द्धक्ये न स्त्री स्वातन्त्र्यम् अर्हति ॥ मनु: ॥

Tutelage of woman according to Manu, and

2 The father protects in maidenhood, the husband protects in youth, the son protects in old age, — a woman is not entitled to independence —Manu — ix, 3

३ । रक्षेत् कन्यां पिता, विन्ना पति: पुत्रस्तु वार्द्धके ।

अभावे ज्ञातयस्तेषां, न स्वातन्त्र्यं क्वचित् स्त्रिया. ॥ याज्ञवल्क्य: ।

Yajnavalkya,

3 A woman is not entitled to independence in any period of her life, her father shall protect her when she is maiden, her husband when she is married, her son when she is old, and in their default their kinsmen shall protect her — Yàjnavalkya—i, 85

४ । अध्यग्न्यध्यावाहनिकं दत्तञ्च प्रीतित: स्त्रियै ।

भ्रातृ मातृ पितृ-प्राप्तं षड्-विधं स्त्रीधनं स्मृतं ॥ मनुकात्यायनौ ॥

Woman's Property or *Stridhanam* defined

4 What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the wife through affection, and what has been received by her from her brother, her mother, or her father, are ordained the sixfold *stridhanam* or woman's property —Manu and Kàtyàyana, D B. iv, 1, 4

५ । अध्यग्न्यध्यावाहनिकं भर्तृदायस्तथैव च ।

भ्रातृदत्तं पितृभ्याञ्च षड्विधं स्त्रीधनं स्मृतं ॥ नारद: ॥

Six kinds of Stridhan.

5 What is given before the nuptial fire, what is presented in the bridal procession, likewise her husband's donation (*daya*) and what is given by her brother or by her parents are ordained the sixfold *stridhanam* —Nàrada

६ । पितृ मातृ-सुत-भ्रातृ-दत्तम् अध्यग्न्युपागतं ।

आधिवेदनिकं बन्धुदत्तं शुल्कमन्वाधेयकम् इति स्त्रीधनं ॥ विष्णु: ॥

Vishnu adds more

6 What is given by her father, or mother or a son, or a brother, what is received before the nuptial fire, what is presented to her on her husband's marriage to another wife, what is given by a relation, the *sulka* or bride's price, and gift subsequent,—these are *stridhanam* Vishnu

७ । पितृ-मातृ पति-भ्रातृदत्तम् अध्यग्न्युपागतं ।

आधिवेदनिकाद्यञ्च स्त्रीधनं परिकीर्त्तितं ॥ याज्ञवल्क्य: ॥

7 What is given by her father, mother, husband, or brother, or what is received before the nuptial fire, or what is presented to her on her husband's marriage to another wife, or the like (*dàya*), is denominated *stridhanam* or woman's property.—Yàjnavalkya

Yajnavalkya almost follows Vishnu

८। वृत्तिराभरणं शुल्कं लाभश्च स्त्रीधनं भवेत् ।
भोक्त्री तत् स्वयमेवेदं पतिर्नार्हत्यनापदि ॥ देवल ॥

8 Her subsistence, ornaments, bride's price, and her gains (or profits of her *stridhana*), she herself exclusively enjoys it, her husband has no right to use it except in distress —Devala

Husband's right over Stridhan

९। विवाहकाले यत् किञ्चित् वरायोद्दिश्य दीयते ।
कन्यायास्तद्-धनं सर्व्वम् अविभाज्यञ्च बन्धुभिः ॥ व्यासः ॥

9. Whatever is (formally) given at the time of the marriage to the bridegroom (intending to benefit the bride), belongs entirely to the bride and is not to be shared by kinsmen —Vyàsa, cited in D. B, iv, 1, 16

Kinsman's right over the same

१०। यद्-दत्तं दुहितुः पत्ये स्त्रियम् एव तद्-अन्वयात् ।
मृते जीवति वा पत्यौ तदपत्यम् मृते स्त्रिया ॥

10 What is presented to the husband of a daughter, goes to the woman, whether her husband live or die, and after her death, goes to her offspring.—Text cited in D B, iv, 1, 17

Gifts to son-in-law is Stridhan.

११। प्राप्तं शिल्पैस्तु यद्-वित्तं प्रीत्या चैव यद्-अन्यतः ।
भर्त्तुः स्वाम्यं भवेत् तत्र शेषन्तु स्त्रीधनं स्मृतं ॥ कात्यायनः ॥

11. The wealth which is earned by mechanical arts, or which is received through affection from any other (than a relation), becomes the subject of the husband's ownership, but the rest is ordained *stridhana*—Kàtyayana cited in D. B. iv, 1, 19

Wife's earnings and some gifts are not o

१२। यत् पुनर्लभते नारी नीयमाना हि पितृकात् ।
अध्यावाहनिकं नाम तत् स्त्रीधनम् उदाहृतं ॥ कात्यायनः ॥

12. Whatever again, a woman receives at the time she is taken from her father's house (to her father-in-law's house), is denominated her *stridhana* under the name *adyavahanika* or presented in the bridal procession—Kàtyayana, D B, iv, 1, 5

Adhyavahanika defined

१३। विवाहात् परतो यत् तु लब्धं भर्त्तृकुलात् स्त्रिया ।
अन्वाधेयं तद् उक्तन्तु लब्धं बन्धुकुलात् तथा ।
ऊर्द्ध्वं लब्धन्तु यत् किञ्चित् संस्कारात् प्रीतितः स्त्रिया ।
भर्त्तुः पित्रोः सकाशाद्-वा अन्वाधेयन्तु तद् भृगुः ॥ कात्यायनः ॥

13. But whatever is, after marriage, received by a woman from her husband's family is called gift subsequent, and likewise what is received from the family of her relations, whatever is received by a woman through

Gifts subsequent

affection after marriage, from her husband or her parents is gift subsequent according to Bhrigu Kátyáyana, D B, iv, 3, 16 and 18.

१४। अदृया काश यथा वापि पत्यु पितृगृहेऽथवा।
भर्तुः सकाशात् पित्रोर्वा लब्धं सौदायिकं स्मृतम् ॥ १ ॥
सौदायिकं धनं प्राप्य स्त्रीणां स्वातन्त्र्यमिष्यते।
यस्मात् तदानृशंस्यार्थं तैर्दत्तं तत्प्रजीवनम् ॥ २ ॥
सौदायिके सदा स्त्रीणां स्वातन्त्र्यं परिकीर्तितं।
विक्रये चैव दाने च यथेष्टं स्थावरेऽष्वपि ॥ ३ ॥ कात्यायनः ॥

Stridhan and woman's power,

14 (1) That which is received by a married woman or a maiden in the house of her husband or of her father, from her husband or from her parents, is termed the gift of affectionate kindred (2) The independence of women who have received such gifts, is recognized in regard to that property for, it is given by them for the women's maintenance out of kindness to them (3) The power of women over the gifts of their affectionate kindered is ever celebrated, both in respect of donation and of sale according to their pleasure, even in the case of immoveables --Kátyáyana, -D B., iv, 1, 21

१५। भर्त्रा प्रीतेन यद्दत्तं स्त्रियै तस्मिन् मृतेऽपि तत्।
सा यथाकामम् अश्नीयाद् दद्याद् वा स्थावराद्-ऋते ॥ नारदः ॥

over husband's gift,

15 What is given to the wife by the husband through affection, she may, even when he is dead, consume as she pleases, or may give it away, excepting immoveable property —Nárada

१६। (a) भर्तृदायं मृते पत्यौ विन्यसेत् स्त्री यथेष्टतः।
विद्यमाने तु संरक्षेत् क्षपयेत् तत् कुलेऽन्यथा ॥
(b) अपुत्रा शयनं भर्तुः पालयन्ती गुरौ स्थिता।
भुञ्जीतामरणात् क्षान्ता दायादा ऊर्ध्वम् आप्नुयुः ॥ कात्यायनः ॥

over husband's estate after his death,

16 (a) The husband's (*daya* gift (or heritage), a woman may deal with according to her pleasure when the husband is dead, but when he is alive, she shall carefully preserve it, or if she is unable to do the same, she shall commit it to the care of his kindred

(b) A sonless (widow) keeping unsullied the bed of her lord and abiding by her venerable protector, shall, being moderate, enjoy until death, afterwards the heirs shall take --Kátyáyana (a)

[This second Sloka which is cited in the Dayabhaga Ch XI, Sect 1 paragraph 56, as the only authority for restricting the widow's rights in her, relates really to Stridhana consisting of immoveable property given by the husband And the Sloka immediately preceding it, is cited in DB, Ch iv, Sect 1, para, 8]

१७। न भर्ता नैव च सुतो न पिता भ्रातरो न च।
आदाने वा विसर्गे स्त्रीधने प्रभविष्णवः ॥

(a) See comment *post p* 722 *et seq*

यद्येषां कतरस्तेषां स्त्रीधनं भक्षयेत् बलात् ।
स वृद्धिं प्रतिदाप्य. स्यात् दण्डञ्चैव समाप्नुयात् ॥ कात्यायन: ।

17 Neither the husband, nor the son, nor the father, nor the brothers, can assume power over a woman's property, to take it or to bestow it If any of these persons by force consume the woman's property, he shall be compelled to make it good with interest, and shall also incur punishment — Katyayana, D B, iv, 24.

Dayabhaga's application of Stridhan law on inheritance

१८ । जीवन्तीनान्तु तासां ये तद्धरेयुः स्वबान्धवा ।
तान् शिष्यात् चौरदण्डेन धार्म्मिक. पृथिवी-पतिः ॥ मनु ॥

18 Those relations of women who take their Stridhana during their life without their consent, shall be punished by a virtuous king by inflicting the punishment of a thief —Manu cited in the Vivada-Ratnakara

Asolute nature of right over Stridhan

१९ । दुर्भिक्षे धर्म्म-कार्य्ये च व्याधौ सम्प्रतिरोधके
गृहीत स्त्रीधनं भर्त्ता न स्त्रियै दातुम् अर्हति ॥ याज्ञवल्क्य ॥

19 A husband (may take and) is not liable to make good the property of his wife (so) taken by him, in a famine, or for the performance of an imperative religious duty, or during illness, or under restraint —Yajna valkya —ii, 147

When husband may take Stridhan

२० । (अर्हति स्त्री,न दाय ,—निरिन्द्रिया ह्यदायाद्या. स्त्रियोऽनृतम्—इति श्रुतेः ॥
बौधायन ॥

20 A woman is not entitlad to inherit, for, a text of revelation says,— "Devoid of prowess and incompetent to inherit, women are useless —Baudhayana cited in D B Ch XI, Sect VI, para. 11

Women cannot inherit according to Baudhayana

FEMALE HEIRS AND STRIDHANAM.

Sec 2—GENERAL OBSERVATION

Sub Sec 1—WOMAN'S RIGHTS

Causes of woman's bondage.

Women in ancient law—Lifelong subjection was the condition of women according to ancient law This appears to have been due to the physical weakness and the impulsive nature of the fair sex, as well as to two peculiar institutions common to most systems of archaic jurisprudence, namely, *patria potestas* and slavery, the latter of which appears to have owed its origin to the former.

Father's right in ancient law

Patria potestas—is the father's absolute and unlimited power over his children, in the exercise of which he could sell, give, abandon or even kill his child. The reason assigned by Vasistha (*b*) to explain this power is, that the

(*b*) *Ante p* 187.

father and the mother are the cause of a child's existence, and so they are entitled to full authority over his person, extending even to the undoing of it. This natural reason, though equally applicable to the mother, is qualified by her personal disability

Position of slave

Slavery consisted in the proprietary right of man over man; one might own and have dominion over another man, in the same manner as he can own a cow or a dog. A slave is contemptuously termed a *biped* in Sanskrit, to indicate his similarity to a quadruped

Dominion after marriage

Marriage in ancient law consisted in the transfer of dominion or *patria potestas* from the father to the husband, (*c*) so that in Roman law a wife was deemed to be a *daughter* of the husband for the purpose of the *patria potestas*.

son and wife were similar

Hence it is clear that during the life of the *pater familias* the condition of a son, a daughter, a wife, and a slave was exactly similar, as regarded the power of the former over the latter, who could not hold any property, being themselves in the category of property belonging to the *pater familias* who therefore, became entitled to their earnings (*d*) On his death, however, a change took place in the condition of the son, who became emancipated and *sui juris*, and succeeded to the deceased's position as regards his property But the condition of the women at first, and of the slaves, seems to have remained unchanged, there being only a change of masters

Emancipation of sons at father's death

But the women appear to have very soon acquired a higher status than that of the slaves, so far as regarded their relation to the husband's heir, who became their guardian by ceasing to be their master.

Change in woman's position,

As incidents of their status, women could not, according to early law, hold any property, and consequently they could not become heirs to their relations. (*e*)

(*c*) *Ante, pp* 121 and 1

(*d*) Text No 1

(*e*) Text No 20

Sub-Sec ii—WOMAN'S RIGHTS UNDER CODES

Women's property and heritable right under the Codes—To the general rule of women's incapacity to hold property, exceptions appear to have been gradually introduced, similar to the son's *peculium* in Roman law according to which a son in the power of his father could not acquire property for himself, all his acquisitions, like those of a slave, belonged to his father.

gradual

At first six descriptions of property were recognised as woman's property, and these consisted of gifts received by a woman from four relations, namely, the father, the mother, the brother, and the husband, as well as of gifts received at the time of marriage when the ceremony was actually being performed before the nuptial fire, and of gifts received when the bride was taken to her father-in-law's house. (*f*)

Six kinds of Stridhan:

To this list, other items *ejusdem generis* appear to have been added, as will appear from a perusal of the above texts, gifts from all other relations, and certain other descriptions of property are included as falling within the category of woman's peculiar property. Upon a consideration of all the items described as *stridhana*, it appears that woman's property under the Codes consisted only of gifts or grants made by her relations. and some of them are separately enumerated either to remove some doubt, or to mark the occasions of the gift.

subsequent additions

It would be better to enumerate and explain different items of *stridhana* mentioned in the Codes —

Items of Stridhan explained

I Gifts at the time of marriage or *yautuka* (*g*), they are—

Yautuka

(1) Gifts before the nuptial fire, or at the actual ceremony of marriage.

(2) Gifts received in her father's or father-in-law's house either before or after the actual ceremony, but at a time when various other rites appurtenant to marriage are performed, commencing from several days before, and

(*f*) Text Nos 4 and 5

(*g*) Limits within which these presents are made are somewhat narrow

continuing several days after, the principal nuptial ceremony. *Adhyàvàhanika* or gifts in the bridal procession come under it; but this term may also be explained to mean gifts made at the time of the *Dviragamana* ceremony, or of the *gamana* called *gowna* ceremony in Behar and N. W Provinces. But a gift to the girl's father for the girl in consideration of a proposed marriage which is to take place when the bride and the bridegroom will attain majority does not become her *stridhana* (*h*)

(3) *Sulka* or the bride's price. The question whether a property is *sulka* or not depends on the circumstances under which the gift was made with the intention of treating it as the price of the bride. (*i*)

(4) To these must now be added the bride-groom's price.

Gifts at the time of marriage are the most important, because all women get some property at that time. It should be observed that what is given before the nuptial fire by the bride's father intending to benefit her, is formally given to the bridegroom. It should be borne in mind that the bride herself is the subject of gift to the bridegroom , and the dress, the ornaments and the household furniture, &c., which are intended for her, are all given together with her to the bridegroom. In fact, the principal ceremony of marriage consists of the ceremonial gift of the bride made by the father or the other guardian to the bridegroom and the ceremonial acceptance of her by the bridegroom Hence Vyàsa ordains (*j*) that all these belong to the bride , and besides, these are separately enumerated as *stridhana* under the name of "gift before the nuptial fire" (*k*) A gift at the time of

(*h*) Chedi *v* Jawahir 1927 A 160 Bhupendra *v* Goonendra 32 C W N 133

(*i*) Bhola *v* Dhani, 1929 A. 25

(*j*) Text No 9, *see* p 711 para 2 second referenee.

(*k*) *See* Janku *v* Zeboo, 1925 N 350

marriage to the son-in-law by the bride's parents cannot be the bride's property unless, perhaps, it clearly appears that the girl could not be married unless accompanied by such a gift. (*l*)

Sulka or the bride's price was originally appropriated by the bride's father, but Vishnu (*m*) and Devala (*n*) enumerate it as *Stridhana,* and therefore the father or other gurdian taking it, must hold it as trustee for the bride.

The bridegroom's price also, which according to recent practice originating in the moral and religious degradation of the so-called educated men, is extorted by the bridegroom's party from the bride's father, must in the similar and stronger grounds of equity, be considered to be the bride's *Stridhana*, and the recipient must be held to be a trustee for her

Adhyavdhanika

II *Adhyàvdhanika* consists of what is given to the bride when she is *conveyed* from her father's to her father-in-law-house In Bengal proper, there are two occasions for such gifts. the first occasion is just after the nuptial ceremony, when the bride is taken to her father-in-law's house to stay there only a few days which are included under the time of marriage, so that gifts then made may be called *yautuka* , the second occasion is called *Dwiragamana* or *second coming*, of the bride to her father-in-law's house, after attaining puberty, for the purpose of living there permanently as a member of his family and performing the duties of a wife to her husband, when she receives some gifts from her father. In Behar and N W Provinces, however, there is an usage according to which the bride is not taken to her father-in-law's house just after marriage, but she goes there for the first time after attaining puberty for the purpose of permanently residing with her husband. this is called *gowna* or *going* ceremony, when some property is usually given

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(*l*) Gundappa *v* Narasappa 1927 M 455

(*m*) Text No 6

(*n*) Text No 8.

to her by her parents and other relations also, and this is called *gift in the bridal procession.* (o)

Adhivedanika

III *Adhivedanika* or the gift which a husband is to make to a wife on the occasion of marrying another wife.

Anvadheyaka.

IV. *Anvadheyaka* or "gift subsequent" is a term used is contra-distinction to *Yautuka* or gift at the time of marriage, it means and includes a gift made, or property received, subsequently to the marriage. So a gift of immoveable property, seven years after the marriage by her brother in apparent fulfilment of a promise made at the time of marriage, is nevertheless *ayautuka* (p) The gift of property to the wife after marriage by her husband has been held to be her *stridhana* under this class. (q) In the Bengal school, the courses of descent of these two descripitions of *stridhana* are different

Vritti,

V. *Vritti* or subsistence or property given for, or allotted in lieu of maintenance, is *stridhan,* such as the mother's share on partition , but it is not so held by the Courts (r)

Ornaments

VI. Ornaments form the kind of *stridhana,* which is possessed by every woman. These are *stridhana* when they have been the subject of gift to her. (s) There may be family jewells, which any women of the family is allowed to put on particular occasions, but which may not be given to any one of them , these cannot be regarded as *stridhana.*

except the family jewels

Many Hindus are found to convert all their savings into gold ornaments worn by themselves or by their wives , these also cannot be regarded as the wife's *stridhana* , for, these can not be presumed to be subjects of absolute gift by the husband to his wife if that were so, a man might be deprived of the savings of his whole life by the death of his wife before him.

(o) Churamon v Gopi, 10 C I J 545 . 13 C W N 994

(p) Mahendra v Giris 19 C W N 1287

(q) Jagannath v Narayan 34 B 553 12 Bom I R. 545 7 I C 459

(r) *Ante pp* 523, 605

(s) *See* Harkishan v Sundro, 89 I C 424

VII. Acquisitions made by a woman by the practice of a mechanical art, are subject to the control of the husband who appears to be entitled to the fruits of the wife's bodily labour. But the wife's interest in the joint acquistions of the husband and herself is, howeve, her *stridhan*. (*t*)

Wife's interest in joint acquisitions.

VIII. So also a present made to a woman by a stranger *i. e.*, by one who is not a relation, belongs to her husband and cannot become her *stridhan*. Hindu law is ealous of women's connection with strangers, the present is really made to please the husband by a friend or a subordinate of his, consisting, however, of a thing that may be used by a woman only, such as an ornament or a woman's dress, and so intended for the wife

Gifts from stranger

IX. Gifts by affectionate kindred (*u*) or near relations, *Saudáyika*, constituted, as has already been said, the peculiar property of women, under the Codes, though there are some vague terms used in a few texts, which may be construed to include other descriptions of property. The husband has no right of control over these properties of the wife (*v*)

Saudayika

X. The husband's gifts require special notice From the peculiar character of the relationship a gift by the husband to the wife should not be taken as absolute, so as to extinguish completely the husband's right to the thing given As regards even the moveable property given by the husband she cannot deal with it according to her pleasure during his life time, but may do so after his death, (*w*) and when the subject of gift is immoveable property, she has no right to dispose of it even after the husband's death. (*x*) But it has been held that gift after marriage of property by the husband to the wife becomes her *Strìdhana* of the kind known as *Anvádheyaka*. (*y*)

Husband's gifts

The original general rule that women are incompetent to inherit, was departed from by the Codes, to a limited extent; and the lawfully wedded wife, the daughter, the

Removal of in competency to inherit by Codes

(*t*) Muthu *v* Marimuthu, 38 M 1036 26 M L J 532 24 I C 363
(*u*) Muthukaruppa *v* Sellathammal, 39 M 298 · 26 I C, 785 16 M I T 587
(*v*) Muthukaruppa *v* Sellathammal, 39 M 298 23 I C 785 16 M L T 587, Vithu *v* Maroti, 1928 N, 92
(*w*) Text No 16-a
(*x*) Text Nos 15 and 16-b
(*y*) *See p* 718 *foot note* (*o*)

mother and the paternal grandmother, are declared entitled to inherit the property of males ; and certian women are declared heirs to *Stridhana* property.

Inherited property is Stridhan in Codes

According to the Codes, the property inherited by women became their *Stridhana*, because the very fact of one's becoming heir to another's estate, means, that the fromer acquires all the rights of the deceased over his property and because there is no expressed text restricting women's heritable right.

There is, however, one rule relating to *Stridhana* property which may be extended by analogy to the husband's immoveable estate inherited by the wife, namely, the rule which restricts the wife's right over the husband's *gift* of immoveable property to her, may be deemed to restrict by necessary implication her heritable right over his immoveable estate.

Court's interference

But there is nothing in the Codes to curtail the rights of the other female heirs over property inherited by them either from males or from females The curtailment of women's right in property inherited by them from *males* became necessary in the Bengal school for reasons which cannot at all apply to the Mitàkshàrà school. The Bengal school conferred heritable right on women by abolishing survivorship which excludes women from inheritance in joint families governed by the Mitàksharà. And thus the Bengal women's position with curtailed heritable right is superior to that of the Mitàksharà women whose rights in inherited property were not curtailed in any way by that treatise which, however, has not been followed by the Courts and in consequence the Mitàksharà women's heritable right has been curtailed in a way most unjust to them, which is explained later on

Husband's right over wife's property.—In the text of Yàjnavalkya (z) it is stated that the husband may take and use, without liability to make good, his wife's property in a famine, or for the performance of duty, or during illness or while under restraint But the wife will still remain the

(z) Text No 19 *ante* p 713

owner of the property that has not been used for such circumestanses.(a)

Sub-Sec iii—HER RIGHTS UNDER COMMENTARIES

Woman's property and heritable rights under Commentaries.—A great deal of injustice has been done to women by not keeping in view the great distinction between the early law contained in the Codes, and its later development by Commentators, with respect to their disabilities and rights. There cannot be any doubt the women were originally disqualified for owning and holding property and that under the Codes that disability continued as a general rule, but certain exceptions to it were introduced, and women were declared competent to hold as owner only certain specified descriptions of property, the peculiar character of which was expressed by the technical term *Stridhana* or woman's property. On a consideration of the enumeration of *Stridhana* given by the different Codes, a development of law in favour of women is found ; for, while the earlier Codes lay a stress on the number six in enumerating *Stridhana*, the later ones either add fresh items, or describe woman's property in a mode indicating the enumeration to be only illustrative and not exhaustive , and the impression left on the mind of the reader on a persual of the passage of the Code is that *Stridhana* or woman's property had but a technical and limited meaning.

Disability under ealier codes,

later codes more liberal,

But in the Commentaries, higher rights are conferred on women who are placed almost on a par with men, as regards the capacity to hold property. *Stridhana* or woman's property ceases to have any technical meaning, and it is explained to mean property "belonging to a woman" , accordingly women may acquire property in the same modes as men may do, subject to one or two exception. The general rule and the exceptions are now reversed , for, under the Commentaries, as a general rule, all kinds of property may be *Stridhana*, while the exceptions relate to a

comentaries gave higher rights

(a) Nammalwar v Perundevi, 50 M 941 1927 M 1031

few items that do not come under that category, what is said by the leading Commentaries on the present subject is examined below.

The Mitakshara—which is, a work of paramount authority, and universally respected, says while commenting on the Text No 7 of Yâjnavalkya,—that the term *Stridhana* as used in that text, bears no technical meaning, but it signifies "woman's property" or property belonging to a woman, which is its etymological meaning, (*b*) that the term "or the like" in that text, includes property that a woman may acquire "by inheritance, purchase, partition, seizure or finding," *i e*, by the same modes in which a man may acquire property and which are set forth in Ch 1, Sec 1, paras. 8 and 13, and that Manu and other sages also intended to lay down the same rule, the enumeration by them of six-fold *Stridhanam* being illustrative and not intended to be restrictive (*c*)

and woman can own property

Here the Commentator changes the law by the fiction of interpretation. He ignores the existence of any disability or incapacity in woman with respect to the ownership of property, such as may appear from a perusal of the texts of the Codes What Manu and Yâjnavalkya really intended to ordain is of no concern, what has to be seen is, what construction has been put on them by the commentators respected by the different schools (*d*) The Mitâksharâ is clear and unambiguous that *Stridhana* has no technical meaning, and women may hold property like men and that property inherited by a woman is her *Stridhanam*, and according to the Privy Council (*e*) the European Judges are bound to follow and act upon it without stooping to enquire whether this doctrine is fairly deducible from the earliest authorities But on the present question, their Lordships have themselves acted contrary to their own direction and advice to the lower Courts, as is presently seen

Katyayan's text on Stridhana,

Katyayana's text and Mithila School—The Vivâda Ratnâkara and Vivâda Chintamani are the principle commentaries of the Mithila sub-division of the Mitâksharâ school They do not enter into any discussion as to the term *stridhana* being technical or limited in its meaning, but they seem to accept the view propounded by the Mitâkshara, while they go on citing and explaining the diverse texts of the Codes on the subject of *Stridhana*

as interpreted by Vivada-Ratnakara

The Vivâda Ratnákara while dealing with *Stridhana* cites the texts of Nârada (*f*) recognising the full power of a wife over the husband's gifts excepting immoveable property, it then cites the three slokas of Katyayana set forth above (*g*) and further making a few comments on them concludes by saying that it is established on the authority of all the texts cited, that women are independent in dealing with property inclusive of immoveables given by the affectionate relations, excepting, however, immoveable property given by the husband, it then cites the two slokas of Kâtyâyana's Text (*h*)

(*b*) Mit 2, 11, 8
(*c*) Mit 2, 11, 2 and 4
(*d*) *See ante, pp* 35-37 and 56-58
(*e*) *Ante, pp* 25
(*f*) Text No 15
(*g*) Text No 14
(*h*) Text No 16

which have a very important bearing on women's right in property given by, or inherited from, their husbands According to the explanation given in the two commentaries of the Mithilà School, the English translation of the 1st sloka (*i*) is slightly different from what is given above, and should be as follows —

Correct translation

(*a*) "The husband's *daya* gift (or heritage), a woman may deal with according to her pleasure when the husband is dead, but when he is alive, she shall carefully preserve it, otherwise (*i. e* when she has no property) she should remain with his family" The second sloka may also be given here for the sake of convenience in understanding the explanation

(*b*) "A sonless (widow) keeping unsullied the bed of her lord, and abiding by her venarable protector, shall, being moderate enjoy until death, afterwards the heirs shall take"

Text refers to husband's gifts

Both the commentators of the Mithila School admit, that having regard to the context, both these texts relate to the husband's *gifts* to the wife, and that they lay down that woman is perfectly independent after the husband's death in dealing with moveables *given* by the husband, and as regards immoveable property *given* by the husband, she shall enjoy it during her life, and afterwards the husband's heir shall take the same

is well to his property

But they maintain that these two slokas must apply also to the moveables and immoveables *inherited* by a widow from her husband, because the term *daya* in these texts may mean either heritage or gift, and those two meanings are eqully capable of being construed with the other words of text and there is no texts opposed to such a construction, and that hence although the context shows that these slokas relate to gifts yet by reason of the twofold meaning of the term *daya* a rule if furnished that it may be applied to the husband's heritage as well

The result is, that according to the Mithilà School, the wife's right to the moveable and immoveable properties *inherited* from the husband is similar to her right to similar properties *given* by the husband, that is to say, the wife's right to moveables *inherited* from the husband is absolute *i. e*, they become her *Stridhan* in the technical sense, but her right to immoveables is limited, and she must have in all cases what is technically called a life-interest in such property which will, after her death, pass to her husband's heir

tamoni applies the texts to son's property

The Vivàda-Chintàmani, however goes further and says that these texts apply also to the husband's immoveable property which the wife *inherits* not directly from the husband but mediately *through her son* who had inherited it, and then died leaving his mother as his heir,—in the following pasasage,—

एवञ्च मृतस्य पत्युः स्थावरे भार्य्यासंक्रान्तेऽपि न तस्या दानादौ स्वातन्त्र्य भाकाङ्क्षा तीवरात्। अन्यथा तत्र कीदृशी व्यवस्था स्यात् इत्याकाङ्क्षा अपूर्वेण निर्देत्। अतएवास्य वचनस्य सौदायिक प्रकरणाम्नान-विरोधोऽपि अपास्त. प्रकरणा-

(*i*) Text No 16.

पेक्षया आकाङ्क्षायाः बलवत्त्वात्। यथा पतिदत्ते स्थावरे वचनात् दानादौ स्त्रीणाम् अनधिकारः तथा पत्युः स्थावरेऽपि स्त्रीसंक्रान्ते। एवमेव प्रकाश-रत्नाकरौ। एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि (पत्युः) स्थावरे। अत्रापि आकाङ्क्षासत्त्वात् साक्षाद् वचनस्य चाश्रुतेः।

The following is a literal translation of this passage —

"And thus also in the deceased husband's immoveable property devolved by inheritance on the wife, her independence does not exist in making gift and the like, by reason of the Equality of Expectancy Other wise, the Expectancy as to what is the rule about it, would remain unsatisfied Hence also the inconsistancy of the recital of this texts in the chapter on Saudayika (*Stridhan*) or *Gifts from the affectionate kinded'* with its application (to) property *inherited* from the husband) is removed Because Expectancy is greater force than the Context Just as in immoveable property *given* by the husband, there is incompetancy of women in making gift and the like by reason of this text, so also in the husband's immoveable property *devolved by inheritance* on the wife The (authors of the) Prakasa and the (Vivada) Ratnakara are of the same opinion Thus also in the (husband's) immoveable property *devolved by inheritance* on the wife *through the son*. Herein also, the Expectancy exists,and there is not found any express text, on the subject "

In some manuscript copies of the original Sanskrit Vivada-Chintamani there is the word पत्युः before the word स्थावरे thus,—एवं पुत्र-द्वारास्त्रीसंक्रान्तेऽपि पत्युः स्थावरे,—Thus also in the *husband's* immoveable property devolved on the wife by inheritance *through the son*" The meaning however, is the same, whether there be that word or not, since the other words suggest the word by neceassary implication even if that word be omitted

Meaning of Expectancy used by it

The term Expectancy आकाङ्क्षा is a technical word meaning one of the three conditions required to be fulfilled by a collection of words for constituting a Sentence In the Sahitya-Darpana a well-known treatise on Sanskrit Rhetoric, a Sentence is thus difiened —

वाक्यं स्याद् योग्यताकाङ्क्षासत्तियुक्तः पदोच्चयः।

Meaning of sentence

which means,—"Sentence is a collection of words possessing Compatibility Expectancy, and Proximity," and the following is the literal translation of the explanation of this distinction given by the author himself,—

Compatibility

"*Compatibility* means absence of unreasonableness in mutual relation of the meanings of the words if a collection of words could be a Sentence without this (Compatibility), then even the words—'He irrigates with fire'—would be a Sentence

Expectancy,

"*Expectancy* (= interdependence of words) means absence of completion of sense (without construing one word with others) and this (absence of complete sense) *consists in the listener's (or reader's) desire (on hearing or reading a word)* to know (something conveyed by the other words of the collection, if the same is a sentence) If a collection of words without Expectancy could have been a Sentence, then a collection, of words, such

as—A cow, a horse, a man, an elephant would have become a Sentence

Proximity

"*Proximity* is absence of interruption in the knowledge (of the words) If there could be a Sentence even when there is interruption in knowledge then there would be a coalescence (into one Sentence) of the word 'Devadutta' pronounced just now, with the word 'goes' pronounced the day after

"Since Expectancy and Compatibility are properties, the one of the mind of the reader, and the other of things (signified by the words), it is by a figure of speech, that they are here represented as properties of words"

What the word *Daya* suggests

One is now in a position to understand the meaning of the technical term "Expectancy" and "Equality of Expectancy" The word *daya* in the above text snggests to the mind of the reader or listener of that text, both its meanings, namely 'gift', and "heritage," and his Expectancy or desire to know the connection of the other words of the text with the word *daya*, is equal as regards both its meanings being equally compatible with either

The fact that these two slokas are found in that part of Katyayana's Code where *saudayika stridhan* is dealt with, does not prevent their application to the husband's heritage, for according to a well-known rule of interpretation the *expectancy* of the force of words prevails over the context, or in other words, the context cannot control or restrict the meaning conveyed by the words of the slokas, in the absence of any text expressing a contrary meaning (*j*)

Vivada-Chintamani on the texts

The Vivàda-Chintàmani maintains that on same principle, these text, apply also to immoveable property which had been husbands' heritage though the same comes to the wife by inheritance from her sons on whom it had devolved directly from the husband

Rules deduced therefrom,

Hence by reason of the application of these slokas to the husband's immoveable property inherited by a woman from her son, the two rules therein laid down must apply, namely, (1) her power of alienation is restricted, (and (2) her husband's heirs inherit the same after her death)

This peculiar doctrine arising fromt he construction of these slokas of Kàtyàyana by the author of the Vivada Chintàmani which is respected as a work of pramount authority in Mithilà was brougbt to the notice of the Sudder Dewany Court of the North-West Provinces in the fifties by the Pundit who was the Hindu law officer of that Court and judgment was delivered by that Court according to the Pundit's opinion in which a person's sister's son was held heir on the death of his mother, to the estate which had devolved on that person from his father, and which on his death went to his mother as his heiress, the person's sister's son as *his heir* could not be preferred to, his agnates, but as *heir of his father* could be so preferred according to the said construction of that text of Kàtyayana (*k*)

were followed by Sudder Court,

When this case was heard on appeal by the Privy Council, the English translation by P C. Tagore, of the Vivàda-Chintàmani had been published but as the above passage was mistranslated the Pundit's opinion seemed to

but not so in appeal to P C.

(*j*) *See* Jaimini's Mimansa on the Topic called वाक्यस्य प्रकरणादपेक्षया प्राबल्याधिकरणं or the superiority of a Sentence over the context &c,

(*k*) Thakoorani Sahiba *v* Mohun, Lall, 11 M.I.A 386.

be contrary to it, and it was not explained to their Lordships how the Pundit arrived at that conclusion, it was therefore rejected by the Judicial Committee, who held that the sister's son was not and heir at all,—a proposition which cannot now be held correct

The attention of the author was drawn to this passage of the Vivâda-Chintâmani in 1893, by his cleint in the case of *Mohan Persad* v *Kishen Kishore (l)* who had consulted a Benares Pundit and brought an original Sanskrit copy of that work to him, but it was not necessary to refer to it in that case, in which the *Stridhana* property only was in dispute

Woman's right in inherited property

It should be observed that according to the Mithilâ school, a women's right is restricted only in the husband's immoveable property inherited by her whether from him, or from his and her son But as regards moveable property and the son's self-required property inherited by her, the same must become her *stridhana* Subject to the above exception, a woman's right in inherited property must be absolute, in the same way as the right of a male heir

Accordingly in the first edition of his translation of the Vivâda-Chintâmani, the rule XIII of the Table of succession given by Babu P C Tagore was as follows - "If the mother die after inheriting her son's property such property become her *Stridhan* Hence the heirs of her peculiar property get it" But this was contrary to his mistranslation of the above passage "एवं पुत्रद्वारा स्त्रीसंक्रान्तेऽपि (पत्यु) स्थावरे" into—"if the *mother* on the death of her son, get *his* immoveable property she cannot make a gift of it or dispose of it,"—the correct translation being, —"Thus also in the(husband's) immoveable property *devolved by inheritance* on the *wife through the son*"

P C. Tagore on the Text.

Owing to the said inconsistency, the Calcutta High Court rejected the said rule XIII and held that immoveable property inherited by a mother from her son goes on her death to the son's heir not to her heirs *(m)* This view is supported by the said mistranslation And it is curious that Babu P C Tagore in the second Edition of his translation changed the rule XIII so as to make it quite contrary to what it was in the first Edition Had he been a genuine Sanskrit scholar, he would have acknowledged the mistranslation and corrected it and also maintained the accuracy of the said original rule XIII

Correct Mithila law.

But according to the correct doctrine of the Mithilâ school if the immoveable property was the son's self-acquired property the same was to decend to the mother's heirs, and if the same was inherited from the father, then it was to descend to the son's heirs But uufortunately the Vivâda-Ratnakara was not then translated, and the error in the rendering of the above passage was not pointed out to the Court

1st object

It should specially be noticed that the effect of the correct doctrine is to bring in two near and dear relations, namely, the son's sister and her son who are the original proprietor's daughter and daughter's son, in preference to the comparatively more distant agnates And this is but the ordinary course

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(l) 21 C 344

(m) Punchanund v Lalshan, 3 W R. 140; this is the view in the C.P., Tortan v Ballavhji, 48 I.C 956 (N)

of development of law according to natural justice, in every system of Jurisprudence.

Katyayana's text and the Dayabhaga—It should be borne in mind that according to the Mitàksharà school the widow is entitled to inherit only in the exceptional circumstance on the husband being separate *i e*, when he was neither joint nor re-united with any co-heir The widow's succession therefore must be rare, having regard to the fact that the joint family system is the normal condition of Hindu society, and it takes place when there is no other dear and near relation who may be the object of the deceased proprietor's affection along with his wife Hence there is no reason why the widow who has been the partner of the deceased during his life, and who is believed to become his partner in the next world, should not be absolutely entitled to his estate, when the most distant male heir, whose very existence might not be known to him, would take an unlimited and absolute interest

In Mithila widow's inherit[illegible] is contingent on partition

The author of the Dàyabhàga introduced a complete change in the law by recognising the heritable right of the widow in default of male issue, in all cases, *i e*, even when the husband was joint or re-united with his co-parceners, that is to say, in preference to, and to the exclusion of, his father mother brother, and the like near and dear relations with whom he was associated from birth, and lived in hermony during his whole life

In Bengal she inherits in default of sons,

Such a radical change in the law of succession could not be acceptable to the pepole unless the widow's rights were curtailed and limited in the manner adopted by the Dàyàbhaga.

The acute founder of the Bengal school conferred higher rights on females in one respect, by curtailing their rights in other respects, and thus he improved the condition of women in the principle of give-and-take, in such a manner as to secure the approbation of the pepole of Bengal for the change in law which was suited to their feeling, and so became adopted by them

but her right is curtailed

It is now to be seen how the author of the Dàyabhàga shows that his foregone conclusion is supported by the earliest authorities

He cities the five slokas of Katyayana in different parts of his works the there slokas (*n*) are cited in paragraph 21, and the sloka (*o*) in paragraph 8 of Section 1 of Chapter iv, in which *stridhana* is explained , but the slokas (*p*) is cited in paragraph 56 Section 1, Chapter xi, where the widow's succession is discussed, for supporting his position with respect to she restriction on the widow's power of alienation

Daya cites Katyayana,

He maintains that the widow inheriting her husband's estate is entitled only to enjoy it with moderation, but not to alienate the same by gift, sale or mortgage, &c , and in support of this position he cites Kàtyàyana s text (*q*) as if it related to property inherited by a woman from her husband, without any allusion to its meaning according to the context, and without feeling any hesitation or difficulty in relying on a text the primary meaning of which is not what he puts upon it

in support of its conclusion

One is in a position now to appreciate the great importance of the remark

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(*n*) No 14 (*o*) No 16*a* (*p*) No 16*b*. (*q*) Sloka No 16*b*

Importance of remark of Privy Council

made by the Privy Council, namely, that the Courts of Justice must not trouble themselves with the question whether a doctrine maintained by a school is fairly deducible from the earliest authorities

Katyayana's text

The language of this text of Kàtyàyana applies to the widow only. But the change of the law of inheritance, introduced by the author of the Dàyabhaga was also in favour of the daughter and the daughter's son, as well as of the mother and the paternal grandmother And it was feft by the author to be necessary to curtail their rights also

So he at first extends the operation of his interpretation of Kàtyàyana's text to the daughter *(r)* and then to the daughter and to the daughter's son, upon the ground that they being inferior to the widow with respect to inheritance, the restrictions imposed by that text on the widow's estate should *a fortiori* apply to them also *(s)*

And lastly he puts it artfully as an alternative, that the text must be understood as applicable to female heirs only, the term widow being merely illustrative , and he thereby implies that it is does not apply to the daughter's son *(t)* And this alternative is, now accepted as the doctrine of the Bengal school For, of two alternative interpretations put by the author in two passages one following the other, the latter is taken to prevail as being intended to be the preferable one

On what extension is based.

Here the extension of meaning is based on the gender of the words , hence the meaning must be that the *female* heirs of a *male*, take a limited interest, having regard to the context of the Chapter which deals with succession to the property of a *male* that is to say, it can by no means apply to a female heir of a *females stridhana*

Woman's estate in Daya

Woman's estate in property inherited from males under Dayabhaga,—

1 She has merely the right of enjoyment with moderation *(u)* So she has not even a life-interest

2 If the estate falls short of what is sufficient for her legal enjoyment, she may alienate a part or even the whole of it, if necessary *(v)*

3. Save as aforesaid, her rights in both moveable and immoveable property are limited, and she cannot alienate them *(w)*

4 Her management of the estate is subject to the control of her husband's kinsmen who are her legal guardians , in other words, subject to the control of the reversioners *(x)*

5 She may dispose of the property with the consent of the reversioners *(y)*

6 She is enjoined to maintain, and to make gifts to, poor relations of the husband's *(z)*

7 The reversioners are entitled to the residue of the estate and of its accretions, left after her lawful enjoyment *(a)*

(r) D B xi, 1, 65 *(s)* D B xi, 11, 30.
(t) D B xi, 1, 31 *(u)* D B 11, 1, 56 and 61 *(v)* D B 11, 1, 62
(w) D B 11, 1, 56 *(x)* D B 11, 1, 64 *(y)* D B 11, 1, 64,
(z) D B 11, 1, 63 *(a)* D B 11, 1, 69

Stridhana according to Dayabhaga—The Dàyabhàga appears to follow the Mitàkshara, and to hold that *stridhana* or woman's property has no technical meaning. After citing many texts describing different kinds of woman's property, the author observes that the texts do not intend to exhaustively enumarate woman's property, but they intend to explain by illustrations the nature of woman's property, and then concludes by saying, "That alone is a woman's property which she has power to give, sell or use indepen dently of husband's control" *(b)*

Stridhana according to Daya

And he then goes on to show that the husband's control is confined to the wife's earnings by the practice of mechanical arts and to presents made by strangers To this two must be added the gifts by the husband, especially immoveable properry *(c)*

It follows, therefore, by necessary implication that the author adopts the view propounded in the Mitàkshàra, of the nature of *stridhana*, namely, that it has no technical meaning her capacity to hold property is not restricted, save and except the said three kinds of property, with respect to which she is subject to the husband's control, all other properties vesting in a woman in the modes in which a man would become owner, are her *Stridhana*

Daya adopts Mit view,

Viramitrodaya and Smriti-Chandrika on Katyayana's text.—The Viramitrodaya repeats the view propounded by the Mitàkshara, with respect to *Stridhana*

Viramitrodaya on Katyayana's text

This work is regarded by the Privy Council to be a treatise of high authority at Benares and to be properly receivable as an exposition of what may have been left doubtful by the Mitàkshàra, and to be declaratory of the law of the Benares school *(d)*

The author of this work notices the text of Kàtyàyana (Sloka No 16 *b*), and maintainst hat it refers to the property assigned to the widow of a deceased undivided co-parcener, for maintaining herself from its profits *(e)*

He then notices the construction put on it in the Dayabhaga and disapproves of the same He maintains that the widow as heir must necessarily be absolute master of the inherited property, and text like this must be taken to be of moral obligation only, such as those with respect to which the doctrine of *factum valet* is propounded by the author of the Dàyabhàga And he concludes by saying that the utmost that can be said is, that gift and the like alienation made by a widow for immoral purposes or without any necessity, may be held improper: otherwise, she has full power to dispose of property for religious and other lawful purposes *(f)*

The Smriti-Chandrikà notices the text of Kàtyàyana, and explains it to refer to the widow of a member of a joint undivided family, who has received from her husband's surviving co-parceners an assignment of landed property for getting her maintenance from the income thereof In fact, the Viramitrodaya has borrowed the explanation of Kàtyayana's text from this work

Smriti-Chandrika on Katyayana's text

(b) D B iv, 1, 18 *(c)* D B iv, 1, 19-23
(d) Giridhari Lal Roy *v* Bengal Government, 12 M I A 448 10 W. R 31
(e) Vir p 136
(f) Vir pp 137-141

which is frequently cited and referred to by it and other commentaries under the name of "Chandrika"

Privy Council on Katyayana's text

Judicial Committee on Katyayana's text.—It should be observed that *heritage means property in which the heir acquires ownership* by reason of relationship to the late owner, therefore, when a woman becomes the heir she must acquire an absolute right to the inherited property in the sense that *all the rights in the property constituting the deceased proprietor's estate* or heritage must pass as well to a *female* as to a male *heir* as such; unless there be an inherent disability on her part, or there be an express text curtailing her rights.

There would have been an inherent disability if *Stridhana* had still been held to have a technical meaning, or if the original incapacity of women to hold property had been admitted even now to continue, or in other words, *if women could not have absolute right in any kind of property, which is not expressly* enumerated as *Stridhana*. But the paramount authorities of both the schools hold that women do not, as a general rule, labour under any such disability or incapacity, whatever might have been their condition in early law.

No disability of woman unless curtailed,

by express texts

Therefore their rights in inherited property cannot be curtailed, unless there be an express provisson of law to that effect. And Kàtyàyana's text *(g)* is the only passage of Smriti or law by which women's rights in *heritage* are curtailed according to the Dàyabhàga and to the commentaries of the Mithilà School. It should be observed that the term *daya* (heritage) is used in this text, hence the commentators curtailing the widow's or female heir's rights in inherited property rely on this text, and not on a few others prohibiting alienation by a widow, in which the term *ansa* (share) is used which may be, and has been, explained away to refer to a portion of the husband's property, assigned to a widow for maintenance from its usufruct.

Katyayana curtails woman's rights

Katyayana's text and Mithila

Katyayana's complete Code is not extant. It is, however, admitted by the writers of the Mithila School, that this text of Katyayana relates actually to the immoveable property *given* by the husband.

No authority against Mit. view

So there is really no authority in Hindu law, against the doctrine maintained by the Mitakshara, that property inherited by a woman becomes her *Stridhana*.

Why Privy Council held Mit wrong

But the Privy Council held this doctrine to be erroneous by reason of its being in conflict with the text of Katyayana who is recognised by the Mitakshara as a law giver, *(h)* though the text is not cited in the Mitakshara. *(i)* Their Lordships of the Judicial Committee were betrayed into this position by assuming the interpretation put on it by the Dayabhaga to be its only real meaning. And herein their Lordships departed from their own view of the duty of an European judge in dealing with Hindu Law *(j)*. By rejecting the interpretation put by the Mitakshara on Yajnavalkya's text on

(g) No 16 *(h)* *Supra p* 4

(i) Bhagwandeen *v* Myna Bai, 11 M I A 488 9 W R P C 23

(j) *Supra p* 25

Stridhana, their Lordships did what their Lordships held in the *Unchastity case*, the Court is not justified in doing (*k*)

What really happened was that the Dayabhaga rule had been erroneously applied to some cases governed by the Benares school, in which the property in dispute was small, and when at last the question arose in a big case going up to the Privy Council, the view already acted on in the previous cases and seeming to be sanctioned by usage, was maintained intact, as the materials necessary for arriving at the correct view of the law were not placed before their Lordships.

Daya view applied in Benares,

And their Lordships have proceeded further: not only the rule extracted by the author of the Dayabhaga from his peculiar interpretation of Katyayana's text, but also his extension of that rule to cases not covered by the language of that text, have been applied by the Privy Council to cases governed by the Benares school Accordingly the daughter has been held to take the widow's estate in her father's property (*l*) and the same rule has been applied by the Calcutta High Court to the mother's inheritance (*m*)

also to cases other than widow's

Thus women governed by the Benares school have been subjected to the restrictions and limitations of the Bengal school, while the privilage enjoyed by the Bengal women of inheriting from their male relations even when these were joint or re-united, could not be granted to them, they have thus been deprived of their snbstantial rights without any compensation whatever.

Position of women under Benares school

It should be remarked here that the text of Katyayana lays down two continuing conditions for the enjoyment by the widow, of her husband's estate, namely, (1) chastity and (2) residence with the husband's relations It has, however, been held that these are not to be taken as conditions subsequent, inasmuch as the author of the Dayabhaga has not himself drawn any such conclusion from that text and as the Courts themselves would not be justified in drawing any such conclusions from the Smriti texts cited in the commentaries Hence it has been held in *Cossinauth Bysack's* case that the widow inheriting her husband's estate is not bound to live with her husband's kinsmen, and in the *Unchastity case* that subsequent unchastity will not divest

Sec. 3—STRIDHANA

Sub Sec. i—CASE LAW ON STRIDHANA

Privy Council on Stridhana—In the case of *Brij Indar Bahadur Sing* v. *Ranee Janki Koer* (*n*) the Judicial Committee, took into their consideration all the passages of the Mitàkshara and the Dàyabhàga, in which the character of *Strìdhana* is discussed, and came to the only conclusion that may properly be deduced from them, namely, that *Stridhana* has no technical or restricted meaning; and their Lordships laid special strees on

Privy Council on Stridhana *Brij Indar v Ranee Jan'i*

(*k*) *Supra p* 618
(*l*) Chotay Lal *v* Chunnoo Lal, 6 I A. 15 4 C. 744, Roy Radha *v* Nauratan, 6 C L J 490, see *supra pp* 562 and 612
(*m*) Jullesur *v.* Uggur, 9 C. 725, see *supra p* 563
(*n*) 5 I A 1

the conclusion arrived at by Jimùtavàhana, namely, "That alone is (*Strìdhana*) her peculiar property, which she has power to give, sell, or use, independently of her husband's control." The words "her peculiar property" in this passage are misleading, the correct rendering should be, "That alone is *woman's property*, which &c." so there is no peculiarity about woman's property. Their Lordships also relied on the explanation of *Strìdhana* given in the Mitàksharà, (*o*) in which it is laid down that property which she may have acquired by inheritance, purchase, partition, seizure, or finding are denominated "woman's property", and that the term *Strìdhana* or 'woman's property' conforms in its import with its etymology, and is not technical.

Facts of the case.

The facts of this case were as follows :—A *Taluk* in Oudh, in possession of a Hindu widow to whom it had descended as the heir of her husband, was confiscated by the Government, and was subsequently granted to her by a *Sunnud*, with right of alienation, and with right of succession to her heirs

Taluk granted by *sanad* is her Stridhana,

The *Taluk* was held by the Privy Council to have become the *Strìdhana* of the widow, by the grant to her and to pass on her death, to her heirs and not to her husband's heirs The grant was made by a stranger, to a Hindu lady, and therefore if made during her husband's lifetime, it is doubtful whether it could become her *Strìdhana* But as it was made to a widow, there was nothing to prevent it from being her *Strìdhana*. If *Strìdhana* had been technical and restricted in its meaning, and if nothing could have been *Strìdhana* unless expressly ordained to be so, then it could not have been held that the *Taluk* had become the grantees' *Stridhana*. (*p*).

Correct view expressed in *Brij Indar*

The principle enunciated in this case represents the true view of Hindu law, though it is in conflict with the opinion expressed by the Privy Council in some earlier cases (*q*) and is overlooked in some later cases.

(*o*) Mit 2, 11, 2 and 3 (*p*) See Bachha *v* Jugmohan, 12 C 348

(*q*) Mt Thakur Deyhee *v* Rai Baluk Ram, 11 M L A., 139 10 W R, P C, 3.

According to this principle it has been held in the case of *Sham Koer* v *Dah Koer*, (r) that when a widow of a member of Mitâksharâ jointly family, who would not be entitled to anything more than maintenance out of his estate, obtained possession of three villages appertaining to his estate, not as the result of an arrangement with the husband's heirs, her possession was adverse to them, and their rights were barred at the expiration of twelve years from the date of the husband's death So she acquired title by adverse possession, and the property became her *Stridhanam*, and devolved as such after her death on her heirs (s) It cannot be presumed that the possession of a female member, who is not entitled to take as heir, is the possession of limited owner. (t) Where a reversioner sued for possession of properties of which a widow acquired title by adverse possession, the burden is on the reversioner to show that the widow had only a limited interest in them. (u)

Sham Koer v *Dah Koer*

Adverse possession by women

Case-law on Stridhana and property inherited from male.—

Case-law.

According to the Bengal school a woman inheriting the estate of a male, has a limited interest or what is called the *widow's estate* in both moveable and immoveable property.

Bengal school

This Bengal doctrine has been (though improperly) extended to cases governed by the Benares school. (v) It has been held by the Allahabad High Court that in the absence of any explanation or evidence to the contrary the presumption is that a widow succeed to her husband's property as a *Hindu widow* and holds possession as such. (w)

Benares school

According to the Mithilâ school the widow inheriting her husband's estate, either directly from him, or mediately

Mithila school,

(r) 29 I A, 132

(s) Mohim v Kashi, 2 C W N, 161; Kanhai v Mt Amri, 32 A, 189 7 A L J 153 5 I C 207

(t) Kuppusawmy v Srinivasa, 9 M L T 445 10 I C, 63.

(u) Vengidusawmy v Narayanasawmy, 24 I C., 880 (M)

(v) Rupa v Chaudhari, 1928 N 93

(w) Ram Saran v Chhota 1928 A 668

through her son, takes an absolute estate in the moveables, (*x*) and a life interest in the immoveables in all cases ; for her interest in such property is the same as in property given by the husband.

moveables,

She is therefore competent in Mithilà, to alienate the moveables according to her pleasure. (*y*)

The moveable property becomes her *Stridhan*, and must therefore pass to her heirs on her death.

proceeds of immoveables

The widow is likewise absolutely entitled to the proceeds of the immoveables ; for, her interest therein is the same as in immoveable property given by the husband.

savings,

Hence the savings of the income of the inherited immoveable property, as well as any immoveable property purchased therewith, must be her *Stridhana*, and pass on her death to her heirs, and not so her husband's heirs This great distinction between the Bengal school and the Mithilà school should be kept in view.

The question of succession to the moveables and the savings, &c, under the Mithilà law, is an open one, and has not yet been decided. (*z*)

daughter's and mother's right in inherited property

It should be observed that the daughter takes an absolute estate in property inherited from her father, according to the Mithilà school , and so also the mother as regards the son's self-acquired property. But owing to the mistranslation of the exposition of Katyàyana's text, as given in the Vivàda-Chintàmani, the Mithilà law has been misunderstood, and the Bengal doctrine applied to Mithilà cases (*a*)

Bombay school,

In Bombay the Mithilà rule seems to be followed to some extent, subject, however, to an extension in consequence of all the *sapinda* females being recognised as heirs.

(*x*) Chowdhury Sureshwar Misser *v* Maheraini, 48 C 100 47 I B 233 41 C L J, 433 25 C W N, 194 18 A L J, 1069 39 M L J, 161 57 I C, 325; *see post*, Ch XVI, Sec 2, Sub-Sec. 11, "Alienation of moveables "

(*y*) Doorgo *v* Pooran, 5 W R, 141 , Birajun *v* Luchmi, 10 C, 392 , Bhugwandeen *v* Myna Baee, 11 M I A, 487 9 W.R P C 23, *see post*, Ch XVI, Sec 2, Sub-Sec 11, "Alienation of moveables "

(*z*) Rajunder *v* Bijai, 2 M I A, 181 (251).

(*a*) Punchanund *v* Lalshan, 3 W R, 140.

widow, mother and *gotraja sapindas*,

There the widow, the mother and the like relations, becoming members of the family by marriage, are held to take a limited interest. (*b*) But a recent decision of the Bombay High Court (*c*) relying on the observation of the previous Full Bench (*d*) of the same Court, has held that a widow, inheriting as a *gotraja sapinda* from a *female*, takes an absolute estate.

daughter, sister, brother's daughter

While the daughter, (*e*) the sister, (*f*) the brother's daughter (*g*) and the like, who are born in the family, are held to take the estate absolutely.

Right over moveables of widow.

In Bombay the widow and the like appear to have an absolute power of disposal over the moveables, but yet it has been held that the moveables must pass, on the widow's death, to her husband's heirs. (*h*)

Madras school

In Madras also it has been held that the widow's power over the moveables is not larger than over immoveables. (*i*)

Bengal doctrine extended to Mitakshara

The *conclusion* on perusal of most of the Mitàksharà cases is that the Bengal doctrine has been permitted to make considerable inroad on the Mitàksharà school; the attention of the judges was not attracted by the great distinction between the two schools as regards the inheritance of women. And the learned Judges appear to labour under the misconception that *Stridhana* is even now technical and limited in meaning.

According to the Mitàksharà school there is no distinction between *Stridhana* and "property that a widow can deal with at her pleasure". (*j*)

Trust property

A woman cannot acquire *Stridhana* interest *in a trust* property. (*k*)

(*b*) Dhondi *v* Radhabai, 36 B 549 14 Bom L R 569 9 Bom L R 1187 16 I C 343, Vrijbbkanda *v* Bai Parvati, 32 B 26, *See* Mukund *v* Laxman, 5 I C 752 6 N L C 46
(*c*) Norayan *v* Waman, 46 B 17
(*d*) Gandhi *v* Bai Judab, 24 B 192 (F B) 1 Bom L R 574
(*e*) Gulappa *v* Tayawa 31 B 453 9 Bom L R 834, Vithappa *v* Savitri, 34 B 510, 12 Bom L R 487 7 I C 445 Laxman *v* Bhau, 48 I C 116
(*f*) Vinayak *v*. Luxmeebai, 1 Bom H C R 117 affirmed on appeal 9 M I A 516
(*g*) Madhevram *v* Dave, 21 B, 739
(*h*) Harilal *v*. Pranvalay, 16 B 229 and Bai Jumna *v* Bhai Sankar, 16 B 233.
(*i*) Narasimha *v* Venkatadri, 8 M 290, Buchi *v* Jugapathi, 8 M 304
(*j*) Hukum *v*. Sital, 50 A 232 1928 A. 52.
(*k*) Pratapa *v* Siniji, 1927 M 50

Sub-Sec. II—STRIDHANA INHERITED BY WOMAN.

Stridhana inherited by women not Stridhana,

Stridhana inherited by woman—The Bengal High Court has gone further and held that even *Stridhana*, inherited by female heirs, does not become the latter's *Stridhana* (*l*) And this view has been adopted by the Madras High Court. (*m*) The Privy Council on appeal from the Allahabad High Court holds the same view(*n*).

Calcutta and Madras,

held on authority of Srikrishna

The only authority on which this view is based, is the opinion expressed by Srikrishna in his Dayakrama Sangraha, namely, that inherited property does not become *Stridhana* There is no authority in support of this broad proposition, and there is no reason why the writer should be raised to the position of a law-giver The writer was neither a judge nor a lawyer but a mere Sanskritist without law, who appears to have lived in the beginning of the seventeenth century. He is not regarded by the people of Bengal as any authority He has, however, been thurst into prominence by the adventitious circumstance of his work being translated into English at an early time.

Dayabhaga authority in Bengal

If any Bengali be asked as to the law by which he is governed, the answer will be invariably received that he is governed by the Dayabhaga, no body will name either Srikrishna or Dayakrama Sangraha

Dayabhaga holds con-

Now, not only there is nothing in the Dayabhaga in suport of the above view, on the contrary, a perusal of the Chapter IV of the Dayabhaga wherein *Stridhana* and its devolution are discussed, will convince the reader that the daughters take the same interest in their mother's *Stridhana* as sons

Reasons why Srikrishna unacceptable

Because it is a peculiar doctrine of the founder of the Bengal school, that sons and daughters *equally* inherit their mother's non-*Jautaka Stridhana* and in arguing out this position, he refers to the well-known maxim that "Equality is the rule where no distinction is expressed" (*o*) It is difficult to understand, how in the face of what the founder maintains, namely, that the heritable right of the son and the daughter is equal, can it be contended that they take different estates This would be over-ruling Jimutavahana by Srikrishna

Besides in nine hundred and ninety-nine cases out of every thousand, *Stridhana* consists of moveables only, and the heir male or female takes it absolutely according to the popular belief and usage That the female heir takes only a limited interest, and is not absolutely entitled, is an idea which is not known to the people, nor even to the persons likely to become reversioners If that were the law, how is it that there is no provision made by Hindu law for the protection of the future interest of reversioners?

(*l*) Sheo Sankar *v* Debi, 25 A 468 30 I A 202 9 C W N 831, 838, Jogendra *v* Phani, 43 C 64, Madhumala *v* Lakshan, 20 C W N 627 22 I C 518, Prankissen *v* Noyanmoney, 5 C 222, Hari *v* Grish, 17 C 911

(*m*) Janki Setty *v* Miriyala, 32 M 521 19 M L J 384 3 I C. 281, Venkata *v* Bhujanga 10 M 107 6 M L J 16 and Virasangappa *v* Rudrappa, 19 M 110 6 M L J 4

(*n*) Sheo Shankar *v*. Debi, 25 A, 468. *See* also Ram Kali *v* Gopal, 1925 A, 557.

(*o*) D B iv 1, 3

In the case of property inherited from males there is such a provision, for, the widow is directed to reside with the persons likely to be reversioners, and to manage the estate subject to their control (*p*)

It should be noticed in this connection, that there is no commentator of the Mitakshara school maintaining the view propounded by Srikrishna Hence that doctrine cannot properly be extended to cases governed by the Mitakshara Accordingly the Allahabad and the Bombay High Courts held that a woman's *Stridhana* inherited by a woman becomes the latter's *Stridhana* (*q*)

Allahabad & Bombay held right view

The Privy Council (*r*) has held that *stridhna* inherited by a womam does not become the latter's *stridhana* and reversed the above decision of the Allahabad High Court.

Allahabad view set aside by Privy Council

The learned Judges of the Allahabad High Court thought themselves free to follow the law laid down in the Mitakshara and the Viramitrodaya respected as paramount authority in the Benares school The learned Judges of the Allahabad High Court were aware that the Mitakshara doctrine of inherited property being *stridhana,* was held inapplicable to property inherited by a woman from a male relation, but they were also aware that that view was the result of there having been many decisions of the Bengal Courts in which the Bengal law had been applied to Mitakshara cases, without however any notice of the law laid down in the Mitakshara itself, to which the attention of the Courts was not drawn at all by "lawyers without Sanskrit" who appear to have been familiar with the Bengal law but completely ignorant of the different doctrine of the Benares school on the subject Their Lordships were, therefore, of opinion that the said fact could not justify the total rejection of that doctrine of the Mitakshara law, which therefore was held by them to be applicable to the property inherited by women from women, there being no decided case of the Benares school to the contrary But the Judicial Committee says that as the language of the Mitakshara does not allow any distinction to be drawn between the heritage of males and that of females, with respect to the rights of female heirs, and as the doctrine has not been followed in the Mitakshara cases of inheritance from males, and in Bengal and Madras also in the cases of inheritance from females, and as Macnaghten in his Hindu Law (*s*) applies the rule that what has once passed by inheritance as *Stridhana* does not so pass a second time, to the Mitakshara law as well as to that of Bengal, therefore their Lordships are unable to agree with the High Court of Allahabad In their Lordships' opinion Macnaghten's work is of higher authority as valuable evidence of the law as it was actually understood, than the Mitakshara itself But their Lordships forget that the Hindus of Benares school who are governed by the Mitakshara law, believe their law to be of divine origin, and feel the highest respect for the Mitakshara as

Privy Council view, contrary to Mit

(*p*) D B 11, 1, 56-64

(*q*) Debi Sahai *v* Sheo Shankar, 22 A 353 20 A W N 100 and Gandhi *v* Bai Jadab, 24 B 192 1 Bom L R 574, Naryan *v* Waman, 46 B 17

(*r*) Sheo Sankar *v* Debi Sahai, 25 A 468 30 I A, 202, Sheo Pertab *v* Allahabad Bank, 25 A 476 30 I A 209. This now followed Sham *v* Kam, 45 A 715 1924 A. 15, Ram Kali *v* Gopal, 1926 A 557

(*s*) Vol 1, p 38

being a commentary on their divine law, composed by the highly venerated ascetic Vijnana Bhikshu or Yogin, and that they cannot have any respect for a view of their law contrary to what is expressly stated in that treatise Whatever the text-writers and judges may say and hold, it cannot but be admitted that in this respect the law of the Courts has been thus made different from the law of the people in all places it has already been observed that, as a general rule, *stridhana* consists of moveables only, and the actual usage with respect to them is that female heirs take the same absolutely, and the law could not be otherwise, there having been no means for preserving future interests in such property, which would be absolutely necessary if the law were such is is now enunciated by the Highest Court to be It is unfortunate that the attention of a Judge of Sir Arthur Wilson's pre-eminence and Indian experience was not directed to the question whether the maxim of *Stare decisis* is properly applicable to all cases of Hindu law, having regard to the facts that the Hindus are a conservative and religious people tenaciously adhering to their customary law believed by them to have emanated from the Deity, that the Judges having no access to the original treatises, and being ignorant of the actual usages, cannot be held to be repositories of Hindu law in the same manner as the English Judges in England are of English law, and that the decisions being not reported in the languages of the people, they cannot be presumed to be accepted by the Hindus as the basis of their transactions, specially when they are inaccurate expositions of their law nor to the question whether on these grounds the view taken by the Allahabad High Court should not be upheld as the proper one by reason of its conformity to the original commentaries on Hindu law

Bombay follows earlier view

The Bombay High Court inspite of the above Privy Council decision has adhered to the dicision held by it before, namely, a woman inheriting a *stridhana* takes it as her *stridhana* (t)

Lahore follows P C

But the Lahore High Court has followed the above Privy Council decision and held that she does not take it as her *stridhana* but take it as a *woman's estate.* (u)

Sub-Sec iii—PROPERTY RECEIVED ON PARTITION

On partition mother is entitled to a share,

Mother's share *—It has already been shown that the mother is entitled to a share on partition And it has been held that a purchaser from a son takes, subject to the mother's right, and stands in his vendor's shoes, at a partition by him the mother is entitled to a share. (v) It has also been held

(t) Narayan v Waman, 46 B 17 Earlier decision, Gandhi v Bai Jadab 24 B 192. 1 Bom L R 574.

(u) Dhanna v Parmeshari 1928 L 9

* *See ante pp* 521-524 and 605-605

(v) Amrita v Manick, 27 C 551 4 C W N, 764, see Jogobondhu v Rajendra, 34 C I J, 29 66 I C, 121

that she has an inchoate or *quasi* contingent right to a share, on a suit for partition being instituted by a son and a purchaser after the suit is affected by *lis pendens* (*w*)

The share to which the mother in both the schools, and the stepmother under the Mitakshara, are entitled to get on a partition of the property by the sons, is intended to become their *Stridhanam* or absolute property. That it is *Stridhana* according to the Mitakshara is beyond all doubt Because the Mitakshara says that on the mother's death, this share devolves on her daughters, and in default of the daughters, on her sons

which is Stridhanam according to commentaries,

Besides there are two strong reasons for considering this share to be the recipient's *Stridhana* (1) if the mother has got *Stridhana* from the husband or the father-in-law, then so much only is to be allotted to her, as together with what has been so received, would be equal to the share of a son, hence, when a share is so constituted, her right to its different component parts ought to be the same, (2) when on a partition shares are allotted to different persons, the right of each to his or her share must *prima facie* be of the same character, in the absence of any express distinction, hence, the right of the mother to her share must be of the same character as that of a son to his share, since no distinction is anywhere expressed These arguments apply to the Bengal school as well

and should be so,

As a great deal of misconception prevails about the character of *Stridhana,* it has been held that this does not become *Stridhana* acording to the Bengal school (*x*) and there is an *obiter dictum* to the same effect, with respect to cases governed by the Mitàksharà school (*y*) But the correct view was adopted by the Allahabad High Court. (*z*) The Privy Council has held that under the Mitàksharà law, in the absence of any express contract to the contrary, the share obtained by a mother on a partition of ancestral property amongst her sons, does not become her Stridhana property (*a*)

but courts hold otherwise

P C view

It is taken for granted that this share is given for the purpose of maintenance only, if that were the object, why should a share be given at all, when the property is very large, and how again can the share be sufficient for maintenance, when the property is very small? Hence, the assumption is groundless and unsupported by authority or reason

Reason assigned for share is groundless

(*w*) Jogendra *v* Fulkumari, 27 C, 77
(*x*) *Ante p.* 606-607 Poorendra *v* Hemangini, 36 C, 75 12 C W N 1002, 1 I C 523,
(*y*) *Ante, p* 522-523
(*z*) Chiddu *v* Naubat, 24 A. 67 21 A W N 171, Sripal *v* Suraj, 24 A
(*a*) Debi Mangal Prasad *v* Mahadeo, 39 I A 121 34 A 234 16 C W N 409 14 I C 1000 15 C L J 344 14 Bom L R 220 22 M L J 462 9 A L J 263, see Munni Lal *v* Phula, 50 A 22 1927 A 679, Krishna *v* Nandeshwar, 4 Pat L J 38 44 I C 146

Real reasons. Contemplate the condition of a Hindu mother when her sons separate from each other during her life, and there is a general disruption of the family How is she to live, if all the sons separate from her? Is the Pardanashin lady to live alone under the Zenana system in solitary confinement? That might have been her lot, but for the share allotted to her by the Hindu law, and intended by it to be her absolute property If not for her sake, at least for the sake of her property, some one of her sons or some other relation of hers, would consent to live with her And this is the real reason why a share is assigned to her, instead of maintenance only• It is also intended to act as a deterrent on sons, for dissuading them from violating the religious injunction which requires brothers to live together so long as the parents are alive

Courts deprived women of many rights. Thus the Hindu women have been deprived of many rights, by reason of the materials in their favour not being properly placed before the Courts The Pardanashin ladies could not personally look after their own causes, and thus they were in a disadvantageous position in the unequal contests with their male adversaries, and so there is no wonder that they have been improperly cast even in British Indian Courts, the Judges whereof cannot but be naturally disposed to protect their rights, but appear to have been misled by the analogy of the disabilities of women in England

Gifts to women—For *husband's gift, Husband's gift to wife* and *Husband's gift of immoveable property*, *see*, Ch, XIII, for *father's gift Father's gifts other than nuptial presents*, *see*, Ch XIII, for general discussion *see*, Ch XVI *gifts to women.*

The widow's estate and its incidents should be discussed now.

Sec 4—WIDOW'S ESTATE

Sub-Sec i—NATURE OF WIDOW'S ESTATE

Law changed in widow's favour. **Anomalous.—The nature of the widow's estate under the Dàyabhàga has already been maintioned. (*b*) But the Courts of Justice felt considerable difficulty in giving full effect to all its incidents, and so the law on the subject has been altered to some extent in favour of the widow.**

Widow need not be moderate. **(1) The widow is required to enjoy with moderation: she is enjoined to lead a life of austerity, and is forbidden to wear delicate apparel or to eat rich food Compliance with this requirement was considered difficult to enforce, and so this restriction has been dispensed with, and it has been held that the widow may, if she chooses, spend the whole income**

(*b*) *Supra p* 728

arising out of her husband's estate, and she is not bound to save a single farthing.

(2) **But if she does not spend the whole income, but saves and accumulates any portion, and invests these in the purchase of immoveable property, and dies without making a valid disposition, the same shall pass to her husband's heirs who are entitled to every thing that has not actually been enjoyed or consumed by her** (*c*)

Widow's saving added to the estate

(3) **A widow in possession of her husband's estate is not a tenant for life, but is the owner of her husband's property subject to certain restriction on alienation and subject to its devolving upon her husband's heirs upon her death.** (*d*)

(4) **Although the widow has not even a life-interest when the property is large,** still as a corollary of the position that she is not bound to be moderate as regards the expenditure of the income, it has been held that even without any necessity the widow may sell her husband's estate so as to pass to the vendee an interest in it for her life.

Right to transfer

(5) The restriction imposed on the widow that in her management of the estate, she shall be subject to the control and guidance of her husband's kinsmen, has been set aside, perhaps on the ground of its being a moral injunction only, the estate being completely vested in her, and no part of it being vested in the husband's next heir during her life. But it has been overlooked that this was intended for the protection of their future interest. She is thus entitled to do ordinary acts of management (*e*) and whether an act was in the ordinary course of business or not depends on the circumstances of each case.(*f*)

Power of management unrestricted.

(6) A partial effect has been given to the said restriction by holding that the widow can, with the consent of the husband's next male heir for the time being, transfer any property appertaining to her husband's estate. It gives rise to a presumption as to the existence of legal

Alienation with reversioner's consent

(*c*) For discussion *see post below* Section 6 " *Accumulation and acquisitions* "
(*d*) *See* Bijoy Gopal *v* Krishna, 34 C 329, 333 : 34 I A 87 : 11 C W N 424.
(*e*) *See*, Sumitrabai *v*. Hirbaji, 1927 N 25.
(*f*) Ram Singh *v*. Brij, 1927 A 283.

necessity for the transfer in favour of the transferee even against the actual reversioner who may be a different person. (*g*)

Her right varies.

(7) When the property is small, and not sufficient for her lawful expenses, she may sell the whole of it, so that the widow's interest varies from an absolute estate when it is small, to less than a life-interest when it is very large, although she is permitted, if she chooses, to convert it into a life-interest in the latter case.

Interest of husband's heirs how safeguarded

(8) Although the widow's estate in both *moveable* and *immoveable* property, is a limited one, yet the only mode of preserving the future interest of the husband's heirs, provided by Hindu law, namely, the control of the husband's kinsmen over her management of the estate, is not ordinarily given effect to. (*h*)

Anomalous character of widow's estate,

(9) The result is that the widow is, subject to the restrictions relating to alienation, entitled to exercise the most absolute power of enjoyment over the estate which is entirely vested in her, and she represents the estate fully as if the husband is alive in her, and no one else can have any vested interest in the succession so long as she is alive unless she is guilty of wilful waste, she is not accountable to any one, (*i*) and she cannot be deemed to hold the estate in trust for reversioners in any sense, and can deal with the property in such manner as is most beneficial to her self, irrespective of the question whether the same is prejudicial to the interests of the reversioners. (*j*)

Thus the Hindu widow's estate has become an anomalous and peculiar one It is thus described by the Privy Council in the Unchastity case (*k*)

as described by Privy Council

"According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether

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(*g*) For discussion *see post*, Sec 9 Sub-Sec "Alienation with reversion's consent" under heading *Reversioner*

(*h*) *See post* Sec 7 "*Waste*"

(*i*) Renka *v* Bhola, 37 A. 177 : 28 I C 895

(*j*) Singam *v* Draupadi, 31 M 153 18 M L J 11

(*k*) Moniram Kolita *v* Keri, 5 C 776 7 I A 115 affirming 19 W R 367 13 B L R 1.

she succeeds by inheritance or survivorship—as to which see the *Shivaganga* case—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. (*l*) Her estate is an anomalous one and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of the estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death."

The Privy Council in a subsequent case observed that a *widow's estate* "is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in Western notions of what a holder of one or other of these estates might do." (*m*)

Mit view is different from Bengal.

This anomalous *widow's estate* is what is taken by the female heirs in the estate of males according to the Bengal School. But that is not the view of the Mitâksharâ School, although the Bengal doctrine has improperly been extended to cases governed by the Benares School, and also by the Southern Schools to some extent.

Heirs to Stridhan under Mit.

It may be noticed in this connection, that according to the Mitâksharâ, the heirs to the *stridhana* of a woman married in the approved forms, and dying without leaving any heir of her body, are the same persons who are her husband's heirs and they take in the same order. So the succession of the husband's heirs to his estate inherited by his widow after her death might have contributed to the false idea that

(*l*) This view approved again in Ramsumran *v* Shyam, 49 I A 342 27 C W N 269, 273 P C 1 Pat 741 37 C L J 356 21 A L J 18 25 Bom L R 634 44 M L J 751 69 I C 71 1922 P C 356

(*m*) Rangasami *v* Nachiappa, 42 M 523 · 46 I A 72 23 C W N 777 29 C L J 539 36 M L J 493 17 A L J 536 21 Bom L R 640 50 I C 498

such property is not her *stridhana*, although they succeed as *her* and not as the *husband's* heirs.

Mithila view

As regards the Mithilâ School, its peculiar doctrines have not been overlooked, and accordingly the widow's estate there, is such as has already been pointed out, (n) and differs materially from what is technically called the *widow's estate*.

The Madras High Court has observed that *widow's estate* cannot be created by a will or a grant, nor can it be acquired by prescription. (o)

Sub-Sec ii—COMPROMISE AND SETTLEMENT *

Brij Indar Bahadur's case.

Property received by widow by settlement or compromise.—In the case of *Brij Indar Bahadur* already noticed, it was held by the Judicial Committee that a Hindu widow acquired an absolute title to a Taluk in Oudh, which had been confiscated and was afterwards settled with her by Government under the Oudh Estates Act, although the widow had been in possession of the Taluk as her husband's heir at the time of confiscation The view taken by their Lordships appears to have been based on the express provisions of that Act. Accordingly, when a widow of an under-proprietor called *Mukaddam* inherited the under-tenure, and the Government while making a settlement with the *Mukaddams* excluding the superior proprietors by giving them an allowance by way of *Malikana*, settled the under-tenure with the widow in possession,—it has been held that the widow became entitled only to a widow's estate in the enlarged estate, inasmuch as the action of the Government in making the settlement with her cannot be held to have the effect of constituting her a zemindar having a title independent of that inherited from her husband. (p)

Nature of property received by compromise depends on

When a widow inheriting her husband's estate enters into a compromise with her husband's co-parceners, according to the terms of which some property is assigned to her, in lieu of her husband's undivided share, then a question arises

(n) See p 722 supra
(o) Kolhapur, Maharaja of, v Sundaram, 48 M 1 1925 M 497.
* In this connection see ante p 479
(p) Kashi v Inda, 30 A 490 5 A L J 590, Vangala v Vangala, 28 M 13,

whether she acquires an absolute title to the same or only a Hindu widow's estate therein, the solution of which depends upon the intention of the parties to be gathered from the words of the document, looked at with reference to the parties who use them, and the quantity of the property assigned The property given to her may represent either her life-interest received in her personal character, or the husband's estate received in her representative character for enjoyment as a Hindu widow for life only In the former case the property would become the widow's *stridhana*, the other party to the compromise being her husband's separated co-parceners and reversioners; while in the latter, she would have only the widow's limited estate (*q*) Where an agreement was entered into by the widow and the reversioner by which the latter declared her to be absolute owner, the reversioner is estopped subesquently from denying the purchaser's title acquired from her. (*r*)

I—intetion of parties

II—quantity of property;

But a family arrangement (*s*) to which a widow was a consenting party whereby the disputes between the members of the family were settled, and whereby the widow obtained one-fourth of the joint property instead of one-third which was her husband's share therein—is held to be not binding on the reversionary heir who was not a party to the arrangement (*t*) But the same High Court, in a case of a similar nature, has held a contrary opinion basing its judgment on the principle that the compromise of a disputed litigation is binding on the reversioner, the dispute was a suit for recovery of possession of the estate brought by the widow against the mother of the deceased owner. (*u*)

Family arrangement

when got less share,

A declaration in a *farkhat* by a brother of a widow's husband after the death of the latter, with respect to the

Re husband's self acquisitions,

(*q*) Sambasiva *v* Venkata, 31 M 179—on appeal from 30 M 356, Rabutty *v* Sibchander, 6 M I A 1, Bal Krishna *v* Paij, 52 A 705, Karim *v* Gobind, 31 A 497 36 I A 138 13 C W N 1117 10 C L J 243 6 A L J 837 11 Bom L R 911 3 I C 795

(*r*) Sat Narain *v* Bindesri, 87 I C 787 1925 A 453, Annu *v* Spripati, 1930 B 373, *see post* Sec 9 *Sub-sec* iv "Estoppel by conduct of Reversioner"

(*s*) For definit on of *family arrangment see p* 479-480 and *p* 257

(*t*) Asharam *v* Chandi, 13 C W N 147 2 I C 549

(*u*) Upendra *v* Gurupada, 34 C W.N 404 1930 C 508

self-acquired property of the deceased, to the effect that it shall be her absolute property and she shall be entitled to deal with it according to her pleasure, cannot be regarded as a family settlement, for he had no interest in the property which he could transfer by way of gift or otherwise in favour of the widow and hence, after her death it will revert to her husband's heir. (v)

Settlement before birth of plaintiff,

In a case in which a step-grandmother of the plaintiff, alienated for alleged legal necessity, the share of property which she received without power of alienation in a settlement of family disputes, with the consent and acquiescence of the managing member of the family, the father of the plaintiff when he was not born, the Privy Council has held that the plaintiff cannot question it, for at the time when it was executed the plaintiff had no interest. (w)

Property got by settlement with daughter-in-law,

In a dispute between the widow and her mother-in-law regarding a property left by the widow's husband, the mother-in-law was given certain share as a result of an award of an arbitrator, in this share she had only a limited interest. (x)

Joint family dispute nor doutful claims necessary,

The existence of family dispute is not essential for the validity of a family arrangement, nor is it a compromise of doubtful rights or claims (y) In this case a widow of a deceased holder of the estate came to a sort of partition of the estate with her four daughters retaining a share for herself. After the death of the widow two surviving daughters challenged the validity of the partition which the Court has interpreted as a family settlement and validated the arrangement, applying too broad a meaning on what is called *family settlement* and forgetting the elements of a valid surrender. Partitioning of the *widow's estate* by the widow with her daughters cannot be a valid *surrender* as the widow did not surrender the entire *widow's estate*, nor can it be called a family settlement as there can possibly be

(v) Vatsalabai v Vasudev, 1929 B 348
(w) Bhagwan v Ujagar, 32 C W N 538, 543 47 C L J 189 1928 P.C. 2
(x) Gouri Sankar v Gurupada, 35 C W N 66
(y) Pokhar v. Dulari, 52 A 716.

no dispute between the widow and her daughters regarding her husband's estate in her possession. Such arrangements, if allowed, may, lend to abuse of widow's powers in dealing with husband's estate and the widow may in collusion with reversioner thus create an absolute estate.

Sub-sec. iii—TERMINATION OF WIDOW'S ESTATE

Forfeiture of widow's estate

Lapse or forfeiture on re-marriage*—It should be observed that the widow inherits her husband's estate, in the character of being the surviving half of the husband, all wives are not entitled to inherit, (z) those only who are *patnis*, *i. e.*, who are lawfully wedded wives, and with whom the connection is religious and permanent so as to subsist even in the next world, are recognised as heirs When therefore the widow gives up this character and connection by re-marriage, her right to the deceased husband's estate ceases. (*a*) There cannot be any difference between a re-marriage under the Act and a remarriage under custom or one otherwise contracted, as regards its legal incident of divesting the widow of her deceased husband's estate (*b*)

Transfer before re-marriage.

So unless a transfer by a widow before her re-marriage was for legal necessity, it cannot bind reversionary heir, who will be entitled to take the property from the purchaser after she had forfeited her estate by re-marriage. (*c*)

All on re-marriage when valid by custom does not operate forfeiture

But it has been held by the Allahabad High Court that a widow belonging to the sweeper caste among whom the custom of re-marriage of widows prevails, and to whom therefore the Hindu Widow's Re-marriage Act does not apply, does not forfeit by re-marriage her right to her deceased husband's estate inherited by her, nor her right to maintenance under a decree against her husband in his life-time, declaring the same to be a charge on his property

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* *See ante pp* 181-182, 561, 661, 669, 693

(z) D B 11, 1, 48

(*a*) Matungini *v* Ram, 19 C 289, Act XV of 1856, Section 2, *see supra* p 661; Basorey *v* Ballavhdas, 8 I C, 1146 6 N L R 171, Muthu *v* Srinivassa, 8 I C, 269 9 M.L T 99, Ganpat *v* Narayan, 1930 N 204, *see* Kundan *v* Secretary, 7 L 543

(*b*) Murugayi *v* Viramakali, 1 M, 226, Rasul *v* Ram, 22 C, 589, Gouri *v*. Sita, 14 C W N, 346 5 I C 510.

(*c*) Nitya *v* Srinath, 8 C I J 542

in possession of his vendees and donees. (*d*) The view of the Allahabad High Court has been followed by the Chief Court of Oudh. (*e*) This view appears to be founded on the assumption that Section 2 of that Act laid down a new rule, whereas it did only embody the rule of Hindu law according to which the widow has the right to enjoy her husband's estate or to receive maintenance, in her capacity of being the surviving half of her deceased husband, which right must necessarily be extinguished by the determination of that capacity on re-marriage. Among castes which allow *Karao* marriages by which a widow can re-marry the husband's brother, the widow inherits the properties of both the brothers married by her. (*f*) So also a widow who is permitted to re-marry prior to 1856 does not forfeit all her rights and interest in her deceased husband's property under Section 2 of Hindu Widow's Re-marriage Act (Act XV of 1856). (*g*)

So also Oudh

Cal differ from All re re-marriage ;

But the Calcutta High Court differs from the Allahabad view and holds that by re-marriage the widow loses her rights to her husband's estate (*h*) But mere unchastity of a widow who has not renounced that capacity by re-marriage, has not the effect of putting an end to the connection with her deceased husband

but subsequent unchastity does not ,

Bom view same as Cal

The Bombay High Court also holds that a widow even when re-marriage is allowed by the caste to which she belongs, forfeits her rights to her former husband's estate by re-marriage under the provisions of the Widow Re-marriage Act (*i*)

Mad agrees with Cal and Bom

The Madras High Court entertains the same view as that of the Calcutta and Bombay High Court. (*j*)

(*d*) Hari *v* Nandi, 11 A 330, Gajadhar *v* Kounsilla, 31 A 161 6 A. L J 107 1 I C 761, Mula *v* Partab, 32 A 489 7 A L J 417 6 I C 116; *see* Sohan *v* Durga, 24 I C 691 (A), Balkrishan *v.* Paij, 52 A. 705; *see ante* *pp* 181 183, 561

(*e*) Ram Lal *v* Jwala, 3 Luc 610

(*f*) Nagar *v* Khase, 85 I C 893 1925 A. 440

(*g*) Mangat *v* Bharto, 1927 A 523

(*h*) Santali *v* Badiswari, 50 C 727 27 C W N 669

(*i*) Vithu *v* Gobind, 22 B 321 F B, *see ante p* 181-183

(*j*) Gajapathi *v* Jeevammal, 1929 M 705, Murugayi *v* Veerama Kali, I M 225.

A widow does not acquire an absolute interest in the property inherited by her from her husband in enlargement of widow's estate, simply because she remained in possession of the estate without objection by the reversioners notwithstanding the forfeiture of the estate on account of her re-marriage. (*k*)

Possession after for future if adverse

By adoption.—When a widow adopts a son in the exercise of a power of adoption which may be deemed constructive pregnancy for the purpose of accounting for some of the legal consequences of adoption, then also her interest in her husband's estate ceases, and so does the interest of a transferree from her without legal necessity. (*l*)

Adoption by widow operates forfeiture,

By surrender.—The widow's estate is also put an end to by surrender which is dealt with later on in Sec 9. Sub-sec. ii

so by surrender

Sub sec iv—CO-SHARERS OF WIDOWS

Two or more widows or other female heirs—There seems to be some misconception about the nature of this estate taken by two or more female heirs in the property jointly inherited by them.

According to the Bengal School, two or more persons succeeding together take as tenants-in-common, and not as joint-tenants in any case

According to the Mitakshara school also, two or more persons jointly inheriting property by the rules of inheritence, and not by birth, take it as tenants-in-common, to which survivorship does not apply (*m*) But to this rule an exception has been introduced by the Judicial Committee with respect to succession by two joint undivided brothers to their maternal grandfather's estate (*n*)

The Mitâkshara has expressly laid down that two or more co widows jointly inheriting their husband's estate shall take the same by *dividing* it, in the following passage accidentally omitted by Colebrooke in his translation .—

Co widow's can divide estate according to Mit,

एक वचनञ्च जायत्यभिप्रायेण, अतश्चबह्व्यश्चेत् सजातीया विजातीयाश्च, यथांश विभज्य धनं गृह्णन्ति ।

(*k*) Tarif *v* Phool 1927 A 274.

(*l*) *Ante p* 275, Rama Krishna *v.* Tripura Bai 33 B 88 : 10 Bom L R 1029

(*m*) *See supra pp* 320; 553-554

(*n*) Chelikani *v* Chelikani, 25 M 678 29 I A 156 7 C W N 1. 12 M L J. 299 4 Bom. L R 657, *see supra p* 321.

which means,—"The singular number (of the term lawfully wedded wife) in the text of Yajnavalkya on Succession, (o) has been used to imply the class, hence if there be more wives than one, whether of the same caste or of different castes, they shall take the property dividing the same according to their shares"

Inherited property is Stridhana according to Mit,

Partition is an incident to the joint heritage, in fact *partition of heritage* is the name given by Hindu lawyers, to the law of inheritance

The misconception has to some extent been removed in the following way.—

Partition,

Partition by two or more joint female heirs is expressly laid down by the commentators

It is no doubt true, that when the female heirs take the Hindu widow's estate, the share which may, on partition, be allotted to any one of them, will, on her death, during the lifetime of the others, pass to the latter as being the then next taker or reversionary heir of the last male owner.

Survivorship between co-heirs under Dayabhaga

But this devolution is mistaken for passing by *survivorship*, and consequently the tenancy of the female heirs is deemed to be an inseparable joint-tenancy in those cases in which they take the *widow's estate* according to the Dàya-bhàga. So it is held that there cannot be joint family consisting of two women. (*p*)

They are joint-tenants

The general law is now well settled that if a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. (*q*)

Partition can be effected for convenience of enjoyment,

And as a consequence of this doctrine, an opinion has been expressed that although the joint female heirs may come to an arrangement whereby they may separately hold and possess portions of the property in proportion to their shares, for convenience of enjoyment, yet there cannot be between them a legal partition or division of title, so as to defeat their survivorship, (*r*) or give an absolute estate in the share they obtain, (*s*) so as to enable one to alienate without the consent

(*o*) Text No 1 *supra*, *p* 552 (*p*) Khushwagt *v* Jagannath, 1930 O 184.
(*q*) Gauri Nath *v* Gaya, 33 C W N 39, 42 48 C L J 405 1928 P C 251 22 N L R 169
(*r*) Bhugwandeen *v* Myna, 11 M L A 487 : 9 W R P C 23, Durga *v* Gita, 33 A. 443 9 I C 498 8 A L J 220, Dilipat *v* Kashi, 24 I C 542 17 O C. 108; Nandi *v* Sarup, 39 A 463, Hari *v* Vitai, 31 B 560, Ammani *v* Periasami, 74 I C 58 45 M L J 1 1924 M 75, Gaya *v* Gouri, 1926 O 401
(*s*) Diltor *v* Harkhu, 2 Pat L J 578 1917 Pat 225 41 I C 631

of the other. (t) But by agreement they can divide the estate to defeat the right of survivorship *inter se* ; (u) and the intention of the parties to such an agreement is to be gathered from the surrounding circumstances,(v) or on the construction of the partition deed. (w) Hence, although there cannot be an absolute partition, yet an order for separate possession may be made, when that is the only likely means to secure peaceful enjoyment. (x) But a co-widow has not an unqualified right to claim separate possession. It is discretionary with the Court which may allow it only in those cases where in the circumstances, separate possession appears necessary for securing equal enjoyment. (y) But such partition for the convenience of enjoyment cannot in any way affect the reversionary rights. (z)

but cannot be claimed as a matter of right

The Privy Council has clearly laid down that co-widows are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life interest, but she cannot alienate any part of the corpus of the estate by gift or Will so as to prejudice the rights of the survivor or a future reversioner. (a)

P C on partition between co-widows

In the case of *Amritalal* v. *Rajani Kanta,* (b) the same principles have been applied though it was a case governed by the Dàyabhàga, one of the fundamental doctrines of which is, that co-heirs cannot but take as tenants-in-common.

Amritalal v *Rajani,*

The facts of this case were as follows :—Two married daughters jointly inherited their father's property, then one of them became widowed and she was also sonless, subse-

facts of the case ,

(t) Gajapati v Pasupati, 16 M 1 19 I A 184.
(u) Subbammal v Krishna, 26 M L J 479 22 I C 399, Sudalai v Gomathi, 23 M L J 355 16 I C 428, Balu v Tanu, 24 I C. 808 10 N L R 51, Alamelu v Balu, 43 M 849, 854, Ramakkal v Ramasami, 22 M 522, Latchamma v Subharagudhu, 1925 M 343
(v) Kaliani v Thirumalayappa, 1927 M 115, *See* : Minakshi v. Subramanian, 1930 M
(w) Pirmanayagam v Arumughan, 1929 M 710
(x) Gajapathi v Gajapathi, I M 290, 4 I A. 212, Chhittar v Gaura, 34 A 189
(y) Dal Koer v Panbas, 8 C W N 658
(z) Lorandi v Nehal, 6 L 124 26 Punj L R 759 : 1925 L 403
(a) Gauri Nath v Gaya, 33 C W N 39, 42 48 C L J 405 . 1928 P.C 251 : 22 N L R 169
(b) 2 I A 113 23 W R 214

quently the other died. The question is whether the surviving daughter who was a childless widow, could take her deceased sister's share in the father's estate. It was held that she could. And this conclusion was based on the principle of joint-tenancy and survivorship. (c).

conclusion based on survivorship,

conclusion might be justified on other grounds,

But the conclusion may, without involving the above principle, be justified on the ground that the question whether the surviving daughter was competent to become the heir to her father was determined when the succession opened to her at first, and the character of heirship having been once impressed on her, it could not be taken away by any subsequent event, and therefore she as her father's heir could not be prevented from taking her sister's share any more than be divested of her own share

survivorship not equitable in all cases

Nor does the principle of survivorship seem to be equitable in all cases Take for instance a case in which a man dies leaving two maiden daughters and one married daughter having sons, the maiden daughters inherit to the exclusion of the married one, then one of them is married and subsequently becomes a widow without sons, and afterwards the maiden daughter dies leaving the two sisters, one of whom is a childless widow, and the other having sons According to survivorship the former alone would take the deceased sister's share, but according to the rule of inheritance both would take it and the latter alternative appears to be acceptable for several good reasons

Another conclusion

Another consequence which is sought to be deduced from the doctrine of co-widow's inseparable joint tenancy, is the incapacity of either to alienate her share without the consent of the other. (d) So one cannot without the concurrence of the other, alienate any property even for legal necessity. (e) A compulsory sale in execution of a decree personally against one of the co-widows, of her share, however, has been held valid during her life. (f)

In the Punjab two co-widows succeed as co-heirs to the estate of their deceased husband as joint-tenants with rights of survivorship and of equal beneficial enjoyment, and an alienation made by one of such co-widows has no legal effect after her death (g)

In Bombay daughter's inheritance is Stridhana

In the Presidency of Bombay, the property inherited by daughters from their father becomes their *Stridhana.* The

(c) Sachindra v Rajani, 18 C W N 974 27 I C. 250
(d) Kathaperumal v Venkabai, 2 M 194
(e) Nabin v Shona, 35 C W N 279
(f) Ariyaputri v Alamelu, 11 M 304
(g) Bal Kaur v Har, 1928 L 242

property thus inherited is held by them as tenants-in-common and not as joint-tenants and there is no survivorship amongst them. (*h*)

Alienee from co-widow can enforce partition

A co-widow's power of alienation over her undivided interest in a particular property appertaining to her husband's estate, came to be considered by a Full Bench of the Calcutta High Court in the case of *Janokinath Mukhopadhaya* v. *Mathuranath Mukhopadhaya*, (*i*) and it has been held that the purchaser is entitled to enforce a partition as against the other widow, which should be carried out in such a way as not to be detrimental to the future interests of the reversioners. The tenure of co-heirship was held to be the same between the female co-heirs as between male herls.

Mortgage of a part by one of two co-widows

In the case of *Sri Gajapathi* v. *Pusapathi*, (*j*) governed by the Mitàksharà, it has been held by the Privy Council that a mortgage by one of two co-widows, of part of the husband's estate jointly inherited by them, is not binding on the estate in the possession of the surviving widow after the death of the mortgagor, inasmuch as the mortgage was not so framed as to bind the same. And an opinion is also expressed that such a mortgage even for legal necessity, will not be binding on the estate so as to affect the interest of the surviving widow.

When one of two co-widows in separate possession of their husband's property by an agreement between them sold some property for paying off costs of litigation relating to property in her possession, the sale was held to be valid and binding on the co-widow whose implied authority was presumed. (*k*) An alienation by one of two co-widows for paying off a money decree binding on the estate is not *ipso facto* invalid with reference to the interest of the other widow or of the reversioner. (*l*)

Sale by one of two co-widows in separate possession

(*h*) Vithappa *v* Savitri 34 B 510 12 Bom L R 487 7 I C 445
(*i*) 9 C 580 (*j*) 16 M. 1 19 I A 184
(*k*) Mahadevappa *v* Basagawda, 29 B 346 7 Bom L R 258
(*l*) Subbammal *v* Avudaiyammal, 30 M 3, *see* Valluru *v* Kannamma, 49 M.L J 479 22 L W 287 90 I C 881 1926 M 6

When binding according to P C

The Privy Council in the case of *Gouri Nath Kakaji* v. *Gaya Kuar* (m) has explained its own decision made in the above case of *Sri Gajapathi* v. *Pasupathi* (n) in connection with the question, whether a transfer for legal necessity by one of two co-widows in separate possession of the estate left by their husband, is binding on the other widow and held that when concurrence of the co-widow was not even applied for, the alienation is not binding on the estate. An opinion, though it did not arise in that case, has, however, been expressed that "when the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate". Their Lordships have overruled the decisions in *Kalliyansundaram* v. *Suba* (o) and *Jai Narain* v. *Munna* (p).

Right of female co-heir

Equity appears to require that a female co-heir should be held to have same right over her share, as if she had been the sole heir, and her share, the only property, of the last full owner, and that the succession of the surviving co-heir to her share does not differ in any respect from the succession of a remoter female heir such as that of the daughter or the mother, after the widow and the like

Sec. 5—LIABILITY AND ALIENATION *

Sub Sec 1—CHARGES ON WIDOW'S ESTATE

Charges on inheritance—There are certain charges on the inheritance, namely, the debts due by the deceased, the maintenance of certain persons already mentioned, the marriage of the unmarried daughter and sister, and the like. When the widow or any other woman becomes heir having a limited interest, the question arises whether she is bound to meet the charges for which the estate is liable, from the income, or is entitled to throw the burden on the corpus. It has been held that a widow is not bound to pay off the debts and the costs of marriage of maiden daughters from the

Limited owner's liability to meet them

whether from income,

(m) 33 C W N 39, 43 48 C L J 405 1928 P C 251 22 N L R 169
(n) 16 M I 19 I A 184
(o) 14 M L J 139
(p) 50 A. 489 26 A L J 268 1928 A 92
* For further discussion on *Alienation* See Ch XVI Sec 2, Sub-Sec 11

income. (q) The question however, is not free from difficulty having regard to the rule prescribing moderate enjoyment by the widow. For, although the rule has not been strictly enforced, owing to the difficulty in determining what enjoyment would be moderate or otherwise, yet it indicates the nature of the widow's right to the income, and has given rise to the restriction on the widow's power of disposal over accumulations and acquisitions by means, of her savings. (q1)

What to be paid out of income

On income—The widow's liability for rent, Road-cess or the like ought to be regarded as her personal liability and ought not to be held as attaching to the reversion, unless the tenure itself was sold under the special provisions of the Rent Law or the like. (r) The Calcutta High Court has held that a decree for arrears of rent obtained against a widow when put into execution after her death against the property held by her as widow's estate, does not affect the reversioner's interest. (s) But the same High Court holds a contray view in a later decision. (t) And the Patna High Court also observes that by a sale in execution of a decree for arrear of rent against the holder of a widow's estate, not only the widow's estate but absolute estate will pass to the landlord-purchaser. (u)

Widow's liability for husband's debt

Liability how to be met.—It should, however, be observed that assuming that the widow is not bound to liquidate the husband's debts from the income, yet she as heiress is entitled only to the residue left after payment of the debts. If she does not liquidate the debts by the sale of a portion of the corpus, she must pay the interest accruing due after the the husband's death, from the income, (v) inasmuch as the

Interest,

(q) Debi v. Bhau, 31 C 433 8 C W N 408 (q1) *Infra p* 774

(r) Jiban v Brojo, 30 I A 81 30 C 550 7 C W N 425 5 Bom L R 428 on appeal from 26 C 285, Srimohan v Brijbehari, 36 C 753, 757 21 C 152, Mahomed Sadat v Hara, 16 C W N 1070 15 I C 351, Bireshur v Kamal, 17 C W N 337, Nafar v Kamini, 18 C W N 542 (tortious act of daughter does not bind reversioner) Jag Sahu v. Rai Radha, 56 I C 867 5 Pat L J 287 (road-cess) (1920) Pat 211 1 P L T. 209, on appeal to P C Rai Radha v Jag Sahu, 29 C W N 293 · Ram Asra v Ambica, 1929 P 216 (rent)

(s) Kristo v Hem, 16 C 511

(t) Ashutosh v Akhoy, 34 I C 581

(u) Indrasan v Kabutra, 1929 P 237

(v) Jagadham v Vighnesworudu, 55 M, 216

balance left after the payment of interest represents the true income, to which she is legitimately entitled. She cannot throw the entire burden on the reversion by renewing the bond for the debt from time to time by adding interest to the principal, and so keep alive the debt. Suppose the husband mortgaged his properties . the widow as heiress is entitled to the properties subject to the mortgage whereby the mortgagee acquires an interest in the properties, and the mortgagee's interest being predominant the income accruing out of the properties should properly be applied to pay the interest on the mortgage, and the balance only, if any, may be appropriated by the widow who cannot claim to have the whole income by virtue of her right as heiress, although she realises the same, and although the whole estate is vested in her, still it is subject to the right of the mortgagee who also has an interest in the property pledged. Besides, her right of alienation and also her right of enjoyment being restricted, her interest is practically like that of a life-interest.

When property large liability to be met out of income

So it is held that when a woman inherits considerable property as a limited owner she is not entitled to charge the reversion with debts contracted by her when she could have met these debts from the income of the property. (*w*)

Sub-Sec ii—POWER OF ALIENATION OF WIDOW'S ESTATE

Her power of alienation, similar to infant's manager,

The entire estate being vested in the widow, she is competent to deal with the same as a prudent owner would do. (*x*) As regards the management of the estate inherited by a widow or other female heir, her power has been held by the Privy Council to be similar to that of the manager of an infant's estate, by applying the principles of *Hunooman Parsaud Panday's* (*y*) case to alienation made by her. (*z*) And anything which is for the benefit of a reversionary heir may properly be regarded as necessity. (*a*)

(*w*) Rajagopalachariar *v* Sami, 1925 M 517, *but see foot note* (*v*) above,
(*x*) Jaganadham *v* Vighneswarudu, 55 M 216
(*y*) 6 M I A 393
(*z*) Kameswar *v* Run Bahadoor, 6 C 843 8, I A. 8 ; Ragho *v* Zaga, 5 B 419, 422 1929 B 251, see Rameswar *v* Provabati, 19 C. W. N 313, 20 C L J 23 25 I C 84
(*a*) Sadhu *v* Chimma, 1929 L. 397

pressure on estate,

Necessity, for which the holder of a woman's estate can alienate immovable property, does not mean actual compulsion, but the kind of pressure which the law recognizes as serious and sufficient. (*b*)

absence of heirs does not give her absolute estate

Her power to deal with the property absolutely, in the absence of legal necessity, does not arise by reason of the want of blood relations. (*c*)

Lease—The Calcutta High Court has held that a widow can, for her own maintenance or to meet the expenses of religious ceremonies for the salvation of her husband's soul, alienate the property left by her husband but she cannot alienate property in anticipation of her wants. (*d*) Purporting to follow the decision in *Kamaswar* v. *Run*, (*d1*) it has been held that a permanent lease at a fixed rent granted by a widow, and found by the lower Appellate Court to be for the benefit to the estate, is valid and cannot be set aside by the reversioner. (*e*) So also a permanent lease in consideration of the lessee looking after her in her old age is binding on the reversioner. (*f*)

Permanent lease at fixed rent.

It is, however, doubtful whether a widow is competent under the aforesaid decision of the Judicial Committee to grant a permanent lease, especially one at a fixed and invariable rent, without legal necessity, and whether such a lease is or is not for the benefit of the estate, is a pure question of fact. An alienation by a widow can be justified only by legal necessity which involves the idea of some pressure from without and not merely a desire to better or develop the estate, which implies very large powers that may lead to speculative ventures. It has accordingly been held that a widow can alienate immoveable property in order to preserve the estate, but not merely to improve it.(g) And a lease for

(*b*) Ramsumran, *v* shyam, 1 P 741 49 I A 342 21 A L J 18 27 C W N 269 : 37 C. L J 356 25 Bom L R. 634 · 44 M. L J 751 : 69 I C 71 1922 P C 356, Upendra *v*. Bindessi, 20 C W N 210 · 22 C L. J. 452 32 I C 468, yashoda *v* Shamji, 1930 N 218

(*c*) Balak *v* Nanu, 11 L. 503 1930 L 579

(*d*) Santosh *v* Ganesh, 31 C W N. 65 1927 C. 160 ; *see post p* 764.

(*d1*) 6 C 843 *above*

(*e*) Dayamani *v* Srinibash, 33 C. 842 (*f*) Rajendra *v* Peyari, 1926 C 854,

(*g*) Ganap *v* Subbi, 32 B 577 10 Bom L R 927, Abhiram *v* Shyama, 36 C. 1003 36 I A 148 14 C W N I 10 C. L J 284 . 6 A L.J 857 . 11 Bom L R, 234 . 19 M. L. J. 530 . I C. 449.

60 years granted by a widow in due course of management is held valid, in the circumstances, the arrangement being accepted by the family. In the absence of legal necessity a permanent lease by a widow is not binding on the reversioner, (h) even if the rent reserved and the premium obtained were at the market value. (i) The reversioners cannot ratify a lease granted by a widow, but they may elect to affirm it, or treat it as nullity, and the institution of a suit would show election to treat it so. (j) A lease granted by her is not *ipso facto* void but only voidable (k)

Working mine.—She may work mines and quarries and fell timber, (k1) unless her acts amount to destruction of property. (l)

Transfer of life-interest

Transfer of life interest—A widow may sell her life-interest without any legal necessity, (m) and even for legal necessity life-interest only may be sold. (n)

Recitals in deed where necessary

The recitals in a deed of transfer—to the effect, (i) that the husband did not leave property the produce of which was sufficient to meet her necessary expenses, (ii) that she had been obliged to borrow money to provide necessaries of life, (iii) that there were unpaid ancestral debts and the creditors were pressing for payment, and (iv) that the only way to discharge them was to sell a portion of the property of her deceased husband, were necessary if the widow was

(h) Anandi v Ambika, 47 C L J 569 1928 C 412

(i) Nabakishore v Upendra, 26 C W N 322 P C 35 C L J 116 · 20 A L J 22 24 Bom L R 346 42 M L J 253 3 P L. T 311 65 I C. 305 ; 1922 P C 34 on appeal from 23 C. W N 64

(j) Sulin v Rajkrishna, 33 C L J 193 25 C W N 420 60 I C 826, Nachiappa v Raugasami, 28 M L J 1, 15 F B 26 I C 757 on appeal to P C 42 M 523 46 I A 72 : 23 C W. N 777 29 C L J 539 : 17 A L J 536 21 Bom L R 640 50 I C 498, Bijoy v Krishna, 34 C 329 34 I A 87 11 C. W N 424 5 C L J 334 : 4 A L J 329 9 Bom L R 602 17 M L J 154, Sankar v Bejoy, 13 C W N 201 8 C L J 458

(k) *See foot note (k) post p* 773, Dattaji v Kalba 21 B 749, *see* Indra v Sarbasova, 41 C L J 341 87 I C 930 1925 C 743 ; Upendra v Shibadasi, 88 I C 898 1925 C 1053 (k1) Rajindra v Malhoo, 1929 O 93

(l) Subba v Chengalamma 22 M 126 9 M L J 19, *but see* Mahalakshmamma v Ramasamy, 1926 M 641

(m) Durga v Matu, 35 A 311 (F B) 19 I C 138 11 A. L J 317 ; Chidambaramma v Hussaiamma, 39 M 565 30 I C 101 29 M L J 546 ; (1915) M W N 577

(n) Prosonno Kumar v Umedur, 13 C W N 353 : 9 C L J 88 ; 3 I. C. 692.

disposing of the absolute interest ; but they serve no purpose if the object was to convey merely her limited interest. (*o*) What was intended to be transferred is to be gathered from the statement in the deed or from the surrounding circumstances. (*p*)

What transferred ?

Sub-Sec iii—LEGAL NECESSITY*

The widow alone is also competent to absolutely alienate the property for certain religious purposes and for necessity. (*q*) *These are as follows* :—

When limited owner can alienate —

Moveables and immoveables —The difference in her power of alienation regarding these has been discussed in pages 733-734 and in Ch. XVI, Sec. 2, Sub-Sec. ii—"Alienation of moveables."

1. Payment of the husband's debts —It being conducive to his spiritual benefit, she is justified in alienating for the purpose of paying off even debts barred by limitation. (*r*) She cannot, however, alienate husband's property to pay off husband's debts which had been repudiated by him ; (*s*) nor can she sell the property for less than its value to pay off a few debts in order to get money into her hands , (*t*) nor in the absence of any proof of necessity to borrow at a high rate of interest, can she borrow at such rate of interest. (*u*) An alienation of husband's estate for the payment of husband's debts will not be binding on the estate unless it could not have been paid out of the current income. (*v*) Conversion of

1 Husband's debts

(*o*) Vasonji *v* Chanda, 37 A 369 P C 22 C L J 180 19 C W N 873 17 Bom, L R 556 29 M L J 130 29 I C 781

(*p*) Rameswar *v*. Provabati, 19 C W N 313 . 20 C L J 23 25 I C 84

* *See ante pp* 385

(*q*) Rameswar *v* Provabati, 19 C W N 313 20 C L J 23 25 I C 84, Hari Kishen *v* Kashi, 42 C 876 19 C W N 370 21 C L J 225 42 I A 64 28 M L J 665 13 A L J 223 27 I C 674 Khub *v* Ajodhya, 43 C 574 22 C L J 345 31 I C 433 , Upendra *v* Bindesri, 20 C W N 210 22 C L J 452 32 I C 468

(*r*) Ashutosh *v* Chidam, 34 C W N 153 1930 C 351 Bhawat *v* Nivratti, 39 B 113 16 Bom L R 738 27 I C 356 Kandasami *v* Raja Gopalsami 5 I C 382 , Khojendra *v* Santo, 22 I C 669 (C) , Uday *v* Ashu, 29 C 190 , Sunder *v* Jiwan, 1930 L 249 (not barred).

(*s*) Bhagwat *v* Nivratti, *supra*

(*t*) Muddusiami *v* Bhaskara, 29 M L J 357 30 I.C 853

(*u*) Harmanoje *v* Ram, 6 C L J 462, Bhagwant *v* Daulat, 21 I C 157 16 O C 272

(*v*) Sakhireddy *v* Sakhireddy, 24 I C. 534 (1914) M W N 488,

a charge on the income to a charge on the *corpus* is improper act on the part of a widow. (*w*) But payment of her husband's debts during his lifetime by a wife with her own money is deemed to be a voluntary payment in the absence of evidence to the contary, and will not support an alienation by her after his death. (*x*) The Privy Council, on appeal from the above mentioned case dismissed it because the alienee failed to prove that there was any obligation on the part of her husband or his estate to pay the money which was paid by his wife. (*y*)

The Patna High Court has held that a widow has no right to jeopardize the reversioners, right to redeem a usufructuary mortgage in the absence of proof that there was no property other than the mortgaged property available to raise money to meet the legal necessity. (*z*) But the same High Court has held that a widow can sell a portion of the estate to discharge a debt created by the husband by a *zerpeshgi* mortgage under the terms of which the mortgagee is precluded from bringing a suit to recover his debt. (*a*)

A mother who succeeds to her son's estate as such cannot validly pay off time-barred debts of her husband not charged on the property. (*b*)

Debts in business incurred by her

A limited owner can alienate immoveable property in her hands to pay off debts incurred by her in carrying on a business which formed part of the estate. (*c*)

ii Exequial rites

2. **Husband's exequial rites.**—The performance of her husband's exequial rite as well as that of his mother and the like are justifying causes for alienation. (*d*)

(*w*) Bhuvaragha *v* Natesa, 37 I C 768 (1917) M W N 40.

(*x*) Himmat *v* Bhawani, 30 A 352

(*y*) Bhawani *v* Himmat, 33 A 342 15 C W N 466 13 C L J 441 : 21 M L J 641 10 I C 274

(*z*) Dasrath *v* Damri, 1927 P 219

(*a*) Kam Asri *v* Ambika, 1929 P 216.

(*b*) Sheo Ram *v* Sheo Ratan, 43 A 604 19 A L J 613 63 I C 279

(*c*) Jagarnath *v* Jaikishen, 1 Pat L J 16 3 Pat L R 164 34 I C 375, *see* Subramanya *v* Ramkrishnamma, 84 I C 868. 1925 M 403

(*d*) Sadashiv *v* Dhakubai, 5 B 450, Ratanchand *v* Javherchand, 22 B 818, Vrijbpukandas *v* Bai Parvati, 32 B 26. 9 Bom L R 1187,

A daughter inheriting her father's property may alienate a portion of the property for defraying the expenses of her mother's *Sràddha*, (e) or that of her father. (f) Similarly she can alienate the property inherited from her mother for the latter's first annual death ceremony. (g)

iii Religious or Charitable purposes for her husband.

3. Spiritual benefit of husband —Religious or Charitable purposes or purposes which are supposed to conduce to the spiritual welfare of the deceased husband, give a widow larger power of disposition than for worldly purposes, over the husband's estate. (h) Religious purposes, however, cannot be exhaustively enumerated (i)

pilgrimage to Gaya, feasting Brahamanas,

A pilgrimage to Gaya for performing the deceased husband's *sràddha* (j) or feasting Brahamanas in connection with such pilgrimage according to the Calcutta High Court, (k) but not, according to the Allahabad High Court, (l) is a religious purpose. A subsequent decision of the Allahabad High Court, however, has held that the gift of a portion of her husband's estate by the widow to his priest (*purohit*) on her return from a pilgrimage to Gaya is valid, (m) and the validity is to be tested with reference to what portion it bears to the whole estate. (n) The excavation of a tank (o) and well (p) and construction of a temple and bathing *ghats*(q)

excavation of tank,

(e) Nabin v Shona, 35 C W N 279, Srimohan v Brijbehari, 36 C 753 2 I C 152, Rajchunder v Sheeshoo, 7 W R 146, head-note of this case is wrong owing to mistakes in the judgment as reported
(f) Tatayya v Ramkrishnamma, 34 M 288 20 M L J. 798 6 I C 240
(g) Mugbul v Brijdeo, 1930 A 529
(h) Collector of Masulipatam v Cavaly, 8 M I A 529, 551 2 W R P C 61, Khub v Ajodhya, 43 C 574 22 C L J 345 31 I C 433
(i) Khub v Ajodhya, 43 C 574, 584, Sardar v Kunj, 44 A 503, 512 P C 37 C L J 383 : 27 C W N 653 44 M L J 766 25 Bom L R 648 1922 P C 261 : 69 I C 36, on appeal from Kunj v Laltu, 41 A 130, Cossinaut v Hurrosundry, 2 Morley's Digest 198 note
(j) Muteeram v Gopal, 20 W R 187, Bishandayal v Jaiseri, (1918) Pat 323 48 I C 746.
(k) Dinanath v Hrishikesh, 20 C L J 285 18 C W N 1303 24 I C 670, *See* Samrath v Ram, 1928 O 353
(l) Makhan v Gayan, 33 A 255 8 A L J 13 9 I C 199
(m) Gobind v Lakhrani, 43 A 515 19 A L J 499 63 I C 221
(n) Ishwari v Babu, 47 A 563 88 I C 193 1925 A 495, Bai Chanchal v Chimanlal, 1928 B 238, (alienation of the whole estate invalid) Sunder v Gurdwara, 1929 L 440
(o) Ram v Hitanandan, 10 P 744
(p) Khub v Ajodhya, *supra*, (*well* where necessary for the benefit of the estate), Makhan v Gayan, *supra*, but *see* contra Ranjit v Mahomed, 21 W R 49, (Tank) Fattesing v Sarna, 1930 N 198
(q) Bisheshar v Jang, 1930 O 225

made for the performance of a work of recognised religious merit comes under the class of religious purposes. The Privy Council has laid down that an alienation by a widow of a small portion of her deceased husband's estate, for a continuous spiritual benefit of the husband though not for an observance essential to his salvation according to Hindu religious law, is binding on the estate even when she had sufficient income for carrying out the object. (r) So also can she make a gift of a small portion of the estate to family deity. (s)

P C on spiritual benefit

for her own self:

A small portion of the property may be alienated for a pious purpose of her own, (t) but the Allahabad High Court holds a contrary view, (u) and this view has been adopted by the Chief Court of Oudh. (v) The Patna High Court holds, the act conducive to the spiritual benefit of the widow is not necessarily an act conducive to that of her husband. (w)

Allahabad, Oudh, Patna

Where alienation for religious purposes invalid

A pilgrimage to Benares, (x) or to Mathra, Brindaban, Rishikesh or Badrinarain, (y) or the gift even of a amall portion of the estate, such as a house at Benares, for the purpose of a *Dharamsala* (free pilgrim house), (z) unless it is for the benefit of her husband's soul, (a) or the installation of an idol or creation of an endowment, (b) is not a religious purpose.

Alienation must be reasonable

The widow has no doubt got powers to alienate the husband's estate for purposes conducive to her husband's soul, but it must be within proper and reasonable limits. (c) In determining the amount, the question in every case must

(r) Sardar v Kunj, 44 A 503 37 C L J 383 27 C W N 653 44 M L J 766 25 Bom L R 648 1922 P C 261 69 I C 36, on appeal from Kunj v Laltu, 41 A 130, Madan v Rakhal, 33 C W N 1042

(s) Madan v Rakhal, 57 C 570 33 C W N 1043 1930 C 173, Thakar Singh v Uttam, 10 L 613, 644 1929 L 295, 305

(t) Ram Kawal v Ram Kishore, 22 C 506

(u) Umadal v Bhagwan, 5 I C 283 (A), Puran v Jai, 4 A 482 2 A W N 115

(v) Har Mitra v Raghubar, 3 Luc 645

(w) Thakur v Dipa, 10 P 352

(x) Hari v Rajrang, 13 C W N 544 9 C L J 453, Darbari v Gobind 46 A 822 1924 A 902

(y) Ahmad Din v Tulsa, 1928 L 875

(z) Sham v Birbhadra, 43 A 463 19 A L J 312 62 I C 432

(a) Gopalji v Manbirti, 52 I C 996 (1919) Pat 396, Kunj v Laltu, 41 A 130: 16 A L J 995 48 I C 847, see Tehlkuar v Amar, 1925 L 2

(b) Harmanage v Ram, 17 C W N 782, Sohan v Hiran, 10 I C 230 (A).

(c) Panachand v Monohar, 42 B 136, 154 20 Bom L R 1, 43 I C 729.

be whether it was for the spiritual benefit of her husband in the performance of her duty to his soul, and whether the expenses incurred are reasonable or were made honestly having regard to the estate, the status of the family and other consideration. (*d*)

iv Maintenance

4. Maintenance charges—Maintenance for herself (*e*) and of those who are entitled to it out of the estate, such as his mother, paternal grand-mother, maiden sister, daughter, and the like (*f*) are legal necessity But she cannot alienate for putting the family in comfortable circumstances (*g*)

Generally a holder of widow's estate cannot alienate for future maintenance, but when the only property capable of any income yields no appreciable income, the holder can alienate for future maintenance (*h*)

v (*a*) Marriage expense

5. Marriage expense.—Marriage of deceased's maiden sister,(*h*1) daughter,(*i*) son's daughter, grandson's daughter or of relations such as these, is conducive to the husband's spiritual benefit. (*j*) The Calcutta High Court (*k*) has held that the amount of expenditure to be incurred at a daughter's marriage must be reasonable and not a fourth part of the estate, the texts of Manu and Dayabhaga on the subject are only directory. Gift to a son-in-law on the occasion of the daughter's marriage, of a portion of the property reasonable in extent, is held valid. (*l*) Gift of an immoveable property by the widow to her daughter at her *Gowna* ceremony is valid. (*m*)

its proportion

(*b*) Gift to son-in-law

(*c*) Gift at *Gowna*

Daughter's daughter's marriage

A daughter inheriting her father's estate is competent to alienate the same for the purpose of raising money to meet

(*d*) Gunpat v Tulsiram, 36 B. 88, 13 Bom L R 860 12 I C 271
(*e*) Satosh v Ganesh 31 C W N 65 1927 C 160, *see ante p* 759
(*f*) "Who entitled to maintenance" *see ante* Ch XI *pp* 684-700
(*g*) Srinivasa v Alamelu, 1927 M 715
(*h*) Kuthalinga v Shammuga, 1926 M 464, Beli Ram v Daya, 1929 L 678 In connection read the topic on "Maintenance" *see* Ch XI *above*, and *ante p* 370
(*h*1) *See ante p* 697
(*i*) Gunpat v Tulsiram, *above*, Makhan v Gayan, 33 A 255 8 A.L J 13 : 9 I C 199, Madho v Dhanraj, 1926 O 425, *see ante pp* 695-696
(*j*) *See* texts Nos 12 and 14, 16 in Chapter on Marriage, *pp* 1189 and Ramcoomar v Ichamoyi, 6 C 36, Lalla Gunpat v Mt Toorun 16 W R 52
(*k*) Sailabala v. Baikuntha, 1926 C 486
(*l*) Ramasami v Vengidusami, 22 M 113, Wazir v Jiwan, 1928 L 58
(*m*) Churaman v Gopi, 37 C I 13 C W N 994 10 C L J 545 1 I C 945

the expenses of her daughter's marriage, when her husband is not possessed of sufficient means to do so. (*n*) She cannot burden the estate with debt to meet the expenses of her son's marriage (*o*) But it has been held that it is not a legal necessity to mortgage for meeting the expenses of a daughter's marriage until the marriage has been finally settled.(*p*)

Debt to be after settling marriage

The marriage of a daughter is a legal necessity but her divorce is not a legal necessity (*q*)

vi Govt Revenue and the like

6. Preservation of the estate—(*r*) by payment of Government Revenue and the like justify an alienation, (*s*) but a decree for rent which has accrued due after the husband's death is *prima facie* a personal decree against the widow. (*t*) She can pledge property for completing a house left unfinished by her husband, (*u*) but not for building a house for the purposes of education of children. (*v*) So also a widow cannot sell any property for the payment of rent for ex-proprietary tenancy which came into existence by operation of law when the widow sold a portion of the Zamindary property. (*w*) A sale of the *corpus* for payment of rent is not binding on the estate, unless it can be shown that there was no other ostensible means of satisfying it (*x*) And

vii Costs of litigation.

7. Costs of litigation,—but not frivolous litigation (*y*) respecting the estate such as are incurred for defending her title to it, (*z*) or defending herself in a criminal case with respect to a Kabuliyat taken from a tenant in the course of

(*n*) Rustam *v* Moti, 18 A 474 16 A W. N 155, *see* observation in next case in 1926 M 517 and Kamala *v* Lalji, 9 P 721 35 C W. N xxiii

(*o*) Rajagopalachariar *v* Sami, 1926 M 517 50 M L J 221, *see* Anaudaras *v* Venkatarubjea, 1930 M 287

(*p*) Kamyad *v* Rambchara, 4 Pat L J 734

(*q*) Langeva *v* Govindappa, 1928 B 495

(*r*) Karimuddin *v* Gobind, 31 A, 497 36 I A 138 10 C.L J 243 13 C W N 1117 36 A L J 87 11 Bom L R 911 19 M L J 687 3 I C 795.

(*s*) *See* Ganesh *v* Khetramohan, 5 P 585 31 C.W N 25 P C

(*t*) *See ante p* 755 *foot note* (*r*) Rameswar *v* Provabati, 19 C W N 313 20 C.L. J 23 25 I C 84, Jagannth *v* Gurcharan, 1929 O 422

(*u*) Subramanya *v* Ramkrishnmma, 84 I C 868 1925 M 403,

(*v*) Jogesh *v* Chapala 1926 C 383

(*w*) Ishwari *v* Babunandan, 47 A 563

(*x*) Dhania *v* Hakayat, 52 I C 316 (Pat)

(*y*) Ram Asre *v* Ambika, 1929 p 216, Raghubir *v*. Ram, 1928 A 651

(*z*) Stevens *v* Janki, 19 C W N 80 22 I C 304, Sudarshan *v* Sarjug, 60 I.C 486 (Pat), Amjad *v* Moniram, 12 C 52, Karimuddin *v* Govind, 31 A 497 10 C L J 243 *see above*, Brojo *v* Joges, 9 C L J 346, Upendra *v* Kiran, 43 C L J 562 1925 C 1046, Jagadat *v* Kanhaiya, 1929 O 364.

management of the estate by herself and co-sharers, but charged by the tenant to be a forgery, is a legal necessity. (*a*) Where a widow in good faith and for the benefit of her husband's estate took possession of property from which she was subsequently evicted, the estate is liable for the mesne profits. (*b*) But if she wrongfully commits an act of trespass, the estate will not be liable, (*c*) nor has she got un-limited power of borrowing to carry on litigation (*d*)

trespass

Alienation proportionate with necessity—There is a distinction between a mortgage and a sale, for while the exact amount actually necessary may be borrowed, there may not be any property the value of which is equal to the amount necessary to be raised, so that a sale often covers property of larger value, and is valid if the difference be not disproportionate. (*e*)

Advantage of mortgage over sale

The reversioner cannot recover the property sold for legal necessity, even by offering to pay to the purchaser the amount raised. (*f*) But in a case of excessive sale, he is competent to have it set aside by paying the amount which the widow was entitled to raise, and he must offer to pay the same, otherwise his suit would fail (*g*) The "criterion for deciding whether the sale should be upheld or set aside, is whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account." (*h*)

Reversioner's remedy in case of excessive sale

criterion

(*a*) Nobin *v.* Kherode, 6 C W N, 648.
(*b*) Lalji *v.* Kurki, 14 C.L J 90 15 C W N 859.
(*c*) Sadasi *v.* Ram, 15 C.W N 857 14 C L J 91 11 I C 90, see Nafar *v* Kamini, 18 C W N 542, Bhuvaragha *v* Natesa, 37 I C 768 (1917) M W N 40 (*d*) Roy Radha *v* Nauratan, 6 C L J 490
(*e*) Luleet *v* Sreedhur, 13 W R 457, Kannu *v* Amrithammal, 26 I C 418, Felaram *v* Bagalanand, 14 C W N 895 6 I C 207, in this connection see Medai *v.* Natnar, 27 C W N. 365 P C, Bharath *v* Munnu, 7 O L J 151 56 I C 291, Anandrao *v* Saraswati, 6 N L J 115 71 I C 532 1923 N 175
(*f*) Sugeeram *v* Juddoobuns, 9 W R 284, Shaik *v.* Notobar, 4 C W N cciv
(*g*) Phoolchund *v* Rughoobuns, 9 W R 108, Muteeram *v* Gopal, 20 W R 187, Shumsool *v* Shewukram, 2 I A 7 22 W R 409, Pramatha *v* Bhuban, 49 C 45 : 33 C L J 421 25 C.W N 585 64 I C 980 1922 C 221, Sadashiv *v.* Dhakubai, 5 B 450, Debi Doyol *v* Thakurai, 8 C W N 408, Deputy Com *v* Khanjan, 29 A 331 34 I A 72 11 C W N 474 5 C L J 344 4 A.L J 232. 9 Bom L R 591 17 M L J 233 Singam *v* Draupadi, 31 M 152 18 M L J 11
(*h*) Medai *v* Narain, (1922) M W N 804 P C., Daulat *v* Sankatha, 47 A 355, Jainarain *v.* Bhagwan, 44 A 683, Sanmukh *v* Jagarnath, 46 A 531, Govinda *v* Krishaji, 1926 N 341, Krishnayya *v* Kottaya, 1929 M 449

But a recent decision of the Privy Council has laid down that a sale should not be set aside merely because a portion of the proceeds was not proved to have been applied for necessity, holding that the real question is whether the sale itself was justified by necessity, and if the purchaser acted honestly and made due inquiry as to the existence of necessity, he is under no obligation to see to the application of any surplus and hence, a decree confirming the sale conditionally upon repayment by the purchaser to the plaintiff of the sum not applied for necessity, is bad in law (i) This has again been approved by the same Board. (j) The fact that the defendant has failed to prove after a long interval of time (14 years) how a part of the consideration was applied for necessity, is alone not sufficient ground for setting aside the sale. (k) But when the sale has been set aside, the Court is justified in making such equitable order in the decree, in favour of the purchaser, when part of the consideration money has been found to have been applied for legal necessity. (l)

Sale proportionate to debt

The principle that the sale should be commensurate with the debt as far as possible, has no application in the case of a house which is an indivisible parcel of property and cannot be sold piecemeal (m)

Sub-Sec iv—TRANSFEREE'S DUTY

Duties of purchaser

Duties of creditors and purchasers *—A lender or a purchaser dealing with a Hindu widow, is like one dealing with a manager bound to enquire into the necessities for the

(i) Sri Krishan v Nathu, 49 A 149 : 54 I A 79 1927 P C 37 . 31 C W N 462 45 C L J 386, *See* Jaganadham v Vighneswarudu, 55 M 216, *See* also p 395-396

(j) Naimat v Din, 8 L 597 54 I A 211 45 C L J 548 1927 P C 121 ; Suraj Bhan v Sah, 32 C W N 117 46 C L J 291 , Gouri v Jiwan 32 C W N 257 47 C L J 7 1927 P C 121 , Ram Sunder v Lachhmi, 51 A 430 P C (case of a minor) 33 C W N 699

(k) Ram Sunder v Lachhmi, *supra*

(l) *See* Deputy Com v Khanjan, 29 A 331 34 I A 72 11 C W N 474 5 C L J 344 4 A L J 232 9 Bom L R 591 17 M L J 233 and in this connection *see foot note (g)* p 765 The observation which though did not arise for the decision of the case, made at the concluding portion of the judgment in Kisan v Tukaram, 1929 N 180, 185 seems to be doubtful.

(m) Bal Krishna v Hira, 17 A L J 239 50 I C 74

* In this connection *see* Ch V, S 6, *ss* iv *ante p* 392.

loan or the sale. (*n*) But the creditor who has not shown tohave made *bona fide* enquiry must prove in order to protect himself, that there was an actual pressure on the estate, such as an outstanding decree, or an impending sale which the widow had no funds capable of meeting (*o*) An enquiry from the reversioner is a sign of *bona fide* enquiry. (*p*) He is not bound by the previous acts of mismanagements so long he is satisfied that, there was pressing necessity (*q*)

and creditor from limited owner

The onus lies on him, who wants to take benefits under a transaction to prove justifying necessity. (*r*) The enquiry must be from the creditor to be paid off and not from the widow. (*s*) But a mortgagee (*t*) or a purchaser (*u*) is not bound to enquire into or prove legal necessity, if the widow obtained leave of the Court which granted Letters of Administration or Probate. A statement made by the father of the reversioner as to the existence of legal necessity will not be sufficient proof. (*v*)

Onus

Interest—Even if necessity has been proved, the creditor is bound to show that there was such a necessity as to borrow

(*n*) *Ante p* 392; Taraprosad *v* Madhu, 42 C L J 259 30 C W N 204 · 1926 C 283, Rur *v* Nazar, 1925 L 208, Ahmad Din *v* Tulsa, 1928 L 875

(*o*) Rameswar *v* Provabati, 19 C W N 313 · 20 C. L J 23; 25 I C 84, Ray Radha *v* Nauratan, 6 C L J 490, Dhunmun *v* Nirsu, 50 I C 104 (Pat).

(*p*) Santosh *v* Ganesh, 31 C W N 65, 74 1927 C 160, see also Mankarnikabai *v* Nandalal, 1930 N 220

(*q*) Sailabala *v* Baikuntha, 1926 C. 486, Amhad Din *v* Tulsa, 1928 L. 875

(*r*) Kameswar *v.* Run Bahadoor, 8 I A 8 6 C 843, Banga Chandra *v.* Jagat, 44 C 186 : 43 I A 249 21 C W N 225 24 C L J 487 14 A L J 1103 · 18 Bom L R 868 : 31 M L J 563 Pat L· W 1 36 I C 420, Anant *v* Collector 40 A 171 22 C W N 484 27 C. L J 363 34 M L J 291 20 Bom L R 524, 4 Pat L W 226 44 I C 290, Brij Lal *v* Inda, 36 A 187 12 A L J 495 18 C W N 649 19 C L J 469 16 Bom L R 352 26 M L J 442 23 I C 715, Rangasami *v* Nachiappa, 42 M 523 23 C W N. 777 46 I A 72 36 M L J 493 29 C L J 539, 17 A L J 536, 21 Bom. L R 640, 50 I C 498, Bhawani *v* Himmat, 33 A 342, 15 C W N 466 13 C L J 441 21 M L J 641, 10 I C 274, Gur *v* Sheolal, 26 C 566, 578, 23 C W N 521, 36 M L J 68, Mohan Singh *v* Dalpat Singh, 46 B 753, 24 Bom L R 289, 67 I C 235, 1922 B 51, Tirupatiraju *v* Venkayya, 45 M 504 F B, 67 I C 479, 42 M L J 392, 1922 M 131, Bhola *v* Harimani, 30 C L J 6

(*s*) Janhabi *v* Bulbhadra, 15 C W N 793, 10 I C 350

(*t*) Annada *v* Atul, 31 C L J 3, *see* Chuni *v* Makshada, 23 C W N 652 31 C. L J 379, 52 I C 309

(*u*) Chuni *v* Mokhada, 31 C. L J 379, 23 C W N 652, 52 I C 309

(*v*) *See* Manokarani *v* Haripada, 18 C W N 718 P C 24 I C. 311, Govinda *v* Thayammal, 28 M. 57 14 M L J 209

Onus as to high rate of interest

at a high rate of interest,(w) otherwise it will be reduced ; (x) but the onus is shifted if money could not have been raised at less interest. (y) In Berar a widow is not entitled to alienate her husband's property for payment of interest in excess of what is recoverable under the principle of *Damdupat.* (z)

Application of money

But a purchaser or a creditor is not bound to see to the application of the money raised by the widow. (a) The mere fact that money advanced to a widow for one legal necessity is used for some other valid purpose, is not sufficient to invalidate the transaction. (b)

Widow's and manager's powers

The widow's case differs from that of the manager or the head of an undivided family who manages an ancestral trade and has a certain power to pledge for the requirements of the business. restriction on her power of alienation is not relaxed on account of the trade ; the validity of the charge must be proved. Absence of necessity need not even be pleaded by the reversioner. (c)

Old transaction

Pesumption of necessity.—The Privy Council has adopted the principle of law that in cases of very old transactions by widows, "presumptions are permissible to fill in the details which have been obliterated by time". (d) But lapse of time does not affect the question of *onus*, (e) though strict proof of legal necessity may not be required in such cases. (f)

(w) Harmonoje v Ram, 6 C L J 462, Stevens v. Janki, 19 C W N 80, 22 I C 304, Dwarka v Prithipal, 47 I C 106, 5 O L J 271, Baij v Sheoraj, 6 O L J 469, 22 O C 260, 53 I C. 761.

(x) Hurronath v Rundhir, 18 I A 1, 18 C 311.

(y) Radha v Jag, 4 p 19, 51 I. A 278, 26 Bom L R 732, 47 M L J 329 ; 2 Pat L R 259 80 I C 791 29 C W N 293, 1924 P. C 184, appeal from 5 Pat L J 287, 56 I C 867, *see ante p* 461

(z) Rajaram v Ramchandra, 1926 N 33, *see p* 462 *ante*

(a) Medai v Nainar, 27 C W N 365, 74 I C 604, 1922 P C 307 ; Taraprosad v Madhu, 42 C L J 269, 1926 C 283

(b) Jagadishwor v Sheo, 51 I C 856 (A)

(c) Sham v Achhan, 25 I A 183, 21 A 71

(d) Venkata Reddi v Rani 43 M 541 47 I A 6 : 38 M L J 393 ; 22 Bom L R 541, 18 A L J 367 55 I C 538

(e) Ravaneshwar v Chandi, 38 C 721, 12 I C 931 affirmed by P C 43 C 417 36 I C 499, see Banga v Jagat, 44 C 186, 43 I A 249 ; 24 C L J 487 21 C W N 225, 14 A L J 1103, 18 Bom L R 838, 31 M L J 563 1 Pat L W 1, 36 I C 420

(f) Kanthu v Dasi, 25 I C 376, 378 (M), Bhuvaragha v Natesa, 37 I. C. 768. (1917) M W N 40

Value of recitals in deeds,

As regards the evidentiary value of recitals in old deeds of transfer the Privy Council has ruled that recitals cannot be lightly set aside when independent evidence cannot be procured on account of lapse of time ; (g) but under ordinary circumstances the recitals cannot be relied upon, (h) where, however, evidence is available, the principle laid down by the Privy Council in cases of old transactions is not applicable even when the deed was forty years old. (i) Inspite of recitals in a deed which is not old, the passing of the consideration is to be established by the person seeking to recover money under the deed from the reversioner, (j) as recitals in a deed of recent date is no evidence of facts recited. (k)

evidence of representation

"The recital in the document is clear evidence of a representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then, when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed ; *Banga Chandra* v. *Jagat.*" (l)

The recitals in a deed dated 1877 about the existence of necessity coupled with the fact that the parties to the

(g) *See pp* 484-485 *ante*, Banga Chandra v Jagat, 44 C 185 43 I A 249 21 C. W N 225 24 C L J 487 31 M L J 563 18 Bom L R 868 14 A L J 1103 1 Pat L W 1 36 I C 420 *see* Qamar v Banshidhar, 72 I. C 1046 (O), Chandar v Upendra, 37 C L J. 319 74 I. C 612 1923 C 563, Sanyasi v Ramchandra, 1926 M 692, Abdul v Bishari, 1930 A 9

(h) *See p* 483 , *ante* Banga Chandra v Jagat, *Supra* Brij Lal v Indra, 36 A 187 P C , 12 A L J 495 18 C W N 649 19 C L J 469 16 Bom. L R 352 25 M L J 442 23 I C 715 , Ajudhia v Ram, 31 A. 454 : 6 A. L J 557 2 I C 376 , Sarjuprasad v Shakur, 66 I. C 564 (A) , Anappindi v Venkayya, 48 M L J 224 , 22 L W. 81 . 85 I C. 483 1925 M 673

(i) Upendra v Nobo, 23 C W N 64, on appeal to P C, Nabakishore v Upendra, 26 C W N 322 35 C L J. 116 , Gopal v Brojo, 34 C W N. 944

(j) Jagannath v. Gurcharan, 1929 O 422

(k) Gaje Singh v Uchhaba, 1929 A 223

(l) Ram Narain v Nandrani, 50 A 823, 825 : 1929 A 128

transaction are dead, raises a presumption of legal necessity. (*m*)

Independent advice when to be proved

When the existence of the necessity for the loan and *bona fide* enquiry have been proved by the creditor, he need not show that the woman, in entering into the transaction, had independent advice. (*n*)

Sub-Sec v—PURDANASHIN LADY

Who is?

A Purdanashin lady has been defined long ago by the Privy Council (*o*) in a case in which the parties were Muhammadans, as a woman of rank, alike Hindu woman of similar position, who lives in seclusion shut in the *zenana* having no communication except from behind the *purda* or screen with any male persons save a few privileged relations or dependants. This view has been upheld now by the Lahore High Court (*p*).

Women who observe *Purda*

But this description of *purdanashin* lady is too narrow in comparison with what is actually known to exist in India. *Purda* is not only observed by ladies of 'rank' only, but is generally observed, with the exception of some labouring classes, by Hindu women of Bengal, Bihar and Orissa, and the North Western Provinces. But *purda* is generaly observed among the Muhammadans by almost all classes of women in perhaps whole of India

W[illegible] who ke[illegible] *hamam* if *purdanashin*

The Lahore High Court in the above-mentioned case, therefore, has held that a Muhammadan woman who belongs to a family of barbars, whose females do not live in a state of seclusion and who keeps a *hamam*, does not come within the definition of *purdanashin* lady so as to get the usual protection from Court in her transanction with men. (*q*) But the Calcutta High Court has extended the Court's protection which a purdanashin lady is entitled to, to poor and ignorant woman though she may not be strictly Purdanashin. (*r*)

(*m*) Upendra *v* Gurupada, 34 C W N 404, 408 1930 C 508

(*n*) Radha *v* Jag, *see foot note (y) ante p* 768

(*o*) Bazloor *v* Shumsoonnessa, 11 M I A 551, 586

(*p*) Fayyaz-ud-din *v* Kutab-ud-din, 10 L 761, 766 (references to the Allahabad and Calcutta cases are misplaced in the report).

(*q*) *Ibid*

(*r*) Chinta *v* Bhalku, 51 C L J. 465

The same High Court has applied the provisions of section 132 of the Civil Procedure Code even in a case in which the lady in question was highly educated and at times went out for marketing and exempted her from personal attendance in Court. (s) But a recent decision of the same Court holds that section 132 (1) of the Civil Procedure Code does not apply to examinations under section 36 (1) of the Presidency Towns Insolvency Act and that the Court in a suitable case may summon before it a *purdanashin* lady who is known or suspected to have in her possession any property belonging to the Insolvent (t),

Their attendance in Court

A person dealing with a Purdanashin lady—must take care to see that the transaction is honest and *bona fide*, that the deed, and the power (should there be any), were read over and fully *explained* to, (u) and *understood* by. (v) her before execution, and that she had *disinterested* and *independent advice*, and was *free from undue influence*. (w) But *independent advice* is not absolutely necessary (x) It is not enough that the deed was read out to the lady, but it should also be proved that it had been explained to her, and that she had understood it. (y) It rests upon those founding

What a person dealing with them to prove

(s) Solomon v Jyotsna, 45 C 492, *see* also Balakeshwari v Jnananda, 45 C 697.

(t) *Re* Bilasroy Serowgee, 56 C 865 33 C W N. 681, for comment *see* 33 C W N cxv and cxix

(u) Indubala v Manmotho, 41 C L J 258, (not in every case, parties Mahomedans Sadi v Masihan 9 P 417 1930 P 452)

(v) *See* Thakurain Tara v Chandra, 11 P. 227

(w) Tacoordeen v Nawab Ali, 1 I A 192 21 W R 340, Sudisht v Sheobart, 7 C 245, 8 I A 39, Wajid v Ewaz, 18 I A 144 18 C 545, Annada v Bhuban, 28 C 546; 28 I A 71 5 C W N 489 followed in Tarubala v Surendra, 41 C L J 213, P C Appeal in 57 C 1311 51 C L J 309 1930 P C. 158, Ganesh v Khetramohan, 31 C W N 25 in this connection *see* Shyampeary v. The Eastern, 22 C W N. 225, 234 40 I C 855

(x) Kali v. Ram, *see below*, Faridunnessa v Mukhtar, 47 A 703, 52 I A. 342, 1925 P C 204, Paras v Mewa, 1930 A 561

(y) Kali v Ram, 36 A 81 41 I A 23. 19 C L J 172, 176 26 M L J 121 12 A L J 115 16 Bom L R 147 21 I C 985, Shambati v Jago, 29 I. A 127; Bhagwat v Debi, 36 C 420 35 I A 48: 12 C W. N 393 7 C.L.J. 335: 5 A.L J 184; 10 Bom L.R 230. 18 M.L J. 100. 14 Bur. L R 49

upon the document executed by a *Purdanashin* lady to establish that she understood its effect and that the deed was intelligently and properly executed by her, (z) and that the intention was really her own voluntary act, (a) particularly when the relation of the parties to the transaction is of confidentiality and when the transaction is clearly harsh and unconscionable. (b) "It is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should with a fair understanding of the whole matter, advise the lady that the deed should be executed." (c) Independent legal advice is not essential. (d) The mere declaration by the lady, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive, it is sufficient if the person enforcing the deed establish that the deed executed was the free and intelligent act of the lady. (e)

Patna

The Patna High Court (f) has held that a document executed by a *Purdanashin* lady is not invalid unless it is shown that independent advice would have affected the execution of the document by the executant.

P C view

The Judicial Committee has given much stress on the dictum relating to transaction by *Purdanashin* ladies as laid down previously by the same Board in the following words. "while it is important to maintain the principles of law laid down for the protection of *Purdanashin* ladies, it is also

(z) Valluri v Marina, 35 C W N 633 P C, Ruhulla v Hussanali, 32 C W N 929 P C, Chinta v Bhalku, 51 C L J 465, Sajad v Wazir, 34 A 455 39 I A 156 16 C L J 613, 617 16 C W N 889 14 Bom L R 1055 23 M L J 210 16 I C 197 (Mahomedan), Keshub v Radha, 17 C W N 991; 20 I C 717

(a) Valluri v Marina, 35 C W N 633 P C, Kamini v Krishna, 39 C 933 16 C W N 649 16 I C. 110

(b) Thakurji v Ram, 51 C L J 414 P C

(c) Sunitibala v Dhara, 47 C 175, 180 46 I A 272 24 C W N 297 37 M L J 483 : 22 Bom L R 1 53 I C 131, see Surur Jigur v Barada, 11 C L J 563, 37 C 526 (Mahomedan Woman)

(d) Valluri v Marina, 35 C W N 633 P C

(e) Farid-un-nisa v Makhtar, 30 C W N 337 P C (Mahomedan lady)

(f) Ram Sumran v Gobind, 5 P 646, in this connection see Thakurian Tara v. Chandra, 11 P. 227.

important as expressed in the judgment of this Board in *Kali Bakhsh Singh* v. *Ram Gopal Singh* (g), not to 'transmute such a legal protection into a legal disability'." (h)

Their agent to prove authority to compromise

In case of a compromise entered into by a person as agent of a *Purdanashin* lady, the existence of authority to compromise must be proved. (i) So also a person seeking to bind a *Purdanashin* lady by the act of her agent must give strict proof of agency. (j)

Sub-Sec VI—ALIENATION WITHOUT NECESSITY

Alienation by widow void or voidable,

Alienation without necessity whether void after her death.—An alienation by a widow is not to be deemed to become void on her death though legal necessity be not established, so as to entitle a party other than the reversioner to deny the purchaser's title on that ground. (k) The reversioner only can question the validity of alienation made by the holder of a limited estate. But a legatee under a Will does not acquire any interest whatever, not even a voidable interest as it takes effect only after the death of the widow when she ceases to have any interest in the property which then devolves on the reversioner. (l)

So a covenant by a widow to take effect after her death is not binding on the reversioner in any circumstances. (m)

P C holds it voidable.

His Lordship Lord Sinha (of Raipur, Bengal, India) in his judgment in the Privy Council case of *Ramgowda Annagowda Patil*, (n) has explained the law thus : "It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the

(g) 36 A 81 41 I A 31 18 C W N 282

(h) Ruhulla v Hassanali, 32 C W N 929

(i) Taru Bala v Surendra, 29 C W N 597 41 C L J 213, *see* P C Appeal Surendra v Tarubala, 57 C 1311 51 C L J 309 1930 P C. 158

(j) *Ibid*, Azeezoonnissa v Bagar, 17 W R 393 (P C) 10 B L R 205

(k) *See foot note* (j) *p* 758 *ante* Madhu v Rooke, 25 C 1; Bijoy v Krishna, 34 C 329, 333 34 I A 87, Kishori v Sheikh Bhusai, 14 C W. N 106, Jabedali v Prasanna, 27 C W N 433 Jagat v Biswambhar, 55 I C 743 (C), Rangasami v. Nachiappa, 42 M 523, 538 46 I A 72, Dhanna v Parmeshari, 1928 L 9, Piari v Kishori, 1930 L 223

(l) Jagdeo v Raja, 6 P 788 1927 P. 262

(m) Mahendra v Kailash, 32 C W N 439, 447 47 C L J 376, 385. 1929 C 50

(n) 52 B 1, 7 54 I A 396 32 C.W N 88, 92 1927 P C 227, (Amritha-linga, *In the matter of*, 1928 M 986 thus overruled).

reversioners who may either singly or as a body be precluded from exercising their right to avoid by express ratification or by acts which treat it as valid or binding."

Reversioner's intention to avoid alienation how expressed

The intention of the reversioner to avoid an alienation made by a widow can be expressed not only by filing a suit but also by a demand of the property as also by an attempt to take forcible possession of it. (o).

Absence of heirs does not give widow absolute estate

The widow does not get an absolute estate merely because of the absence of any reversioner or because other persons or the Crown who are entitled to the estate on the widow's death do not claim it (p)

Alienation in excess of necessity —Ch V, Sec. 6, Sub-Sec. iv, *pp*. 395-396 above, specially *foot note* (j) in page 396 and *pp* 755-756, 765-766 above (q)

Sub-sec vii—COURT'S SANCTION FOR ALIENATION

Alienation b widow as administratrix

Alienation with sanction of Court.—An alienation cannot be challenged on the ground of want of legal necessity, if it was made by a widow who obtained Letters of Administration to the estate of the deceased male owner and if it was effected with the previous sanction of the Court, (r) such alienation cannot be questioned on any ground which cannot be assailed against any other Administrator. (s)

Sec 6—ACCUMULATIONS AND ACQUISITIONS

Widow's standard of life

Widow's standard of living —According to the Dayabhaga, the widow is to live a life of austerity, she must not partake of rich food or wear delicate apparel, and enjoy with moderation the husband's estate inherited by her, it follows, therefore, by necessary implication that she must accumulate the surplus income for the benefit of the husband's next heirs. But the Courts felt a difficulty in determining what is intended by moderate enjoyment as there is no restriction on her liberty to expend for religious and charitable purposes the whole of the balance of the income left after

Court's inability to enforce it

(o) Sitaram v Maroti, 1927 N 305

(p) Janardan v Anu, 10 I C 51(C)

(q) Jaganadhan v Vighnesuradu, 55 M 216

(r) Kamikhya v Hari, 25 C 607, Chuni v Mokshada, 23 C W N 652, 52 I C 309, Annada v Atul, 23 C. W N 1045 54 I C 197.

(s) Rakhal v Prosad, 90 I. C. 229 (C)

her moderate *personal* enjoyment. So they left it to the discretion of the widow herself, and accordingly it was held that when the estate is large and the income thereof is more than sufficient for meeting all the legal expenses, the widow is at perfect liberty to dispose of the surplus income in any way she pleases; she is not bound to save. But if she saves and makes no attempt to dispose of the savings or accumulations in her life-time, they will follow the corpus of the estate and go to her husband's heirs after her death, and not to her own heirs.

How can she dispose accumulations.—As regards her competency during her life to deal with accumulations, a difficulty has arisen in consequence of the conflict between the original view of the widow's restricted right of enjoyment, according to which she was considered incompetent to alienate without legal necessity what had already been accumulated by her moderate enjoyment of the income, and the modern view of the widow's power of alienating even the whole of the husband's estate, such alienation being valid and operative during her life, even when made without any legal necessity Hence has arisen a distinction between an accumulation amounting to an accretion to the estate, and an accumulation being simply income held in suspense for expenditure. (*t*) It is difficult to fix the line which distinguishes accretions to the husband's estate from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it.

Accumulations if accretion or income in suspense

There is no presumption that a property acquired by a widow possessing her husband's estate as his heir, forms part of that estate, (*u*) nor is there any presumption that the money has come from the savings of her husband's estate. (*v*) There is no presumption that property in possession of the widow had belonged to her husband. (*w*)

Presumption as to acquired property

(*t*) Puddo Monee *v* Dwarka, 25 W R 335

(*u*) Dakhina *v* Jagadis, 2 C W. N 197, *see ante p* 550

(*v*) Baikunth *v* Jai, 51 A 341 1929 A 449

(*w*) Diwan *v* Indrapal, 26 C 871 26 I A 226 4 C W N 1 2 Bom. L.R I, Sombhai *v* Jagjiban, 1928 B 380, *see ante p* 550

P. C on acquisitions

In the case of *Isri Dut Koer* (*x*) and *Sheolochan Singh* (*y*) the rule laid down by the Privy Council is, that when a widow not spending the income of her husband's estate, acquires immoveable property with her savings, and makes no distinction between the original estate and the after-purchases, the *prima facie* presumption is that it has been her intention to keep the estate one and entire, and that the after-purchases are an increment to the original estate. In both these cases the widow attempted to alienate both descriptions of property by one transaction and had not previously dealt with the after-purchases in any way.

So the original view is now confined to the acquisition of immoveable property when there is nothing to show her intention to keep it separate.

Madras,

Allahabad,

Lahore,

The Madras High Court has held that there is no presumption that the property acquired by a widow out of the surplus income of the husband's estate is an accretion to the estate. (*z*) The Allahabad High Court seems to entertain the same view. (*a*) But the Lahore High Court holds that in the absence of evidence to the contrary, a purchase from the income of the estate by a widow becomes accretion to the estate. (*b*)

P.C, if accretion depends on her intention

The Judicial Committee assumed as correct the above Madras view in the case of *Raja of Ramnad* (*c*) But in a recent decision, the Privy Council has expressed that it would be possible for the widow to so deal with the after-purchases that it would remain her own, yet it must be treated and shown to have been so dealt with (*d*)

(*x*) 10 C. 324 10 I A 150

(*y*) 14 C 387 14 I A 63

(*z*) Ramkrishna *v* Naraina, 62 I C. 215 11 L W 112, Subramanian *v* Arunachelam, 28 M 1 Akkanna *v* Venkayya, 25 M 351 12 M L J 5

(*a*) Wahid *v* Tori, 35 A 551, 11 A L J 856 21 I C 91 *See also* Lal Bahadur *v* Sheo, 22 I C 702 16 O C 359 *see* Malan *v* Kishore, 71 I C 833 1923 L 17, (mother)

(*b*) Tepal *v* Amar, 1925 L 2, *see* Ram *v* Lal, 1926 O 277

(*c*) 42 M 581 46 I A 64 29 C L. J 551, 563 36 M L J 164 23 C W N 549 17 A L J 153 21 Bom L. R 885 49 I C. 704, affirming 27 M L J 694 27 I C 283

(*d*) Nabakishore *v* Upendra, 26 C W N 322, 325 35 C. L J 116 20 A L J 122 34 Bom L R 346 42 M L J 253 3 P L T 311 65 I C 305 1922 P C. 39, on appeal from Upendra *v* Nobo, 23 C W N 64.

So if the widow acquires immoveable property with the savings of the surplus income, she may deal with it as a full owner, (e) yet it must be traced and shown to have been so dealt with. (f) The Court cannot presume that it was so done. (g) If she makes in no way any distinction between the original estate and the acquisitions, and treats such after-purchases as accretions to the original estate, she will be afterwards precluded from alienating the acquisitions except for legal necessity. The true test is the *intention* , (h) whether she treated the acquisitions as her own or as a part of the estate depends on the circumstances of each case. (i)

Whether acquisition is accretion

depends on intention,

A decree for mesne profits in respect of property inherited by a daughter from her father is to be considered as part of the estate in the absence of any intention to keep the decretal amount separate from the parental estate. (j)

The property thus acquired and made a gift of to her brother by the widow shows her intention that she treated it as her own (k) A *benami* purchase shows her intention to keep the acquisition her own (l).

gift or *benami* purchase a sign of intention

The sum of money, in the hands of the agent of the widow, representing rents realised during her life, goes to the legal representatives , (m) but rents unrealised for the period of the widow's life passes with the estate (n) A tenancy pur-

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(e) Nabakishore v Upendra, 26 C W N 322, 325 , 35 C L J 116 20 A L J 22 42 M L J 253 24 Bom L R 346 3 P L T 311 65 I C 395 1922 P C 39 on appeal from Upendra v Naba, 23 C W N 64 , Kula v Bama, 41 C 870 seems to have been overruled ; Sridhar v Kalipada, 16 C W. N 106 15 C L J 12 11 I C 971 Ayiswaryanandaji v Sivaji, 49 M. 116, 49 M L J 568 1926 M 84 , see Yeshwant v Daulat, 1926 N 129 89 I C 663 , Girja v Babulal, M L J 1926 N 342

(f) Nabakishore v Upendra, *Supra*

(g) Srinivasa v Alamelu, 1927 M 715

(h) Bhagabati v Sahudra, 16 C W N 834 13 I C 691 , Chela Ram v Ishar 32 I C 831 , 41 P W R 1916 Venkata v Surenani, 31 M 321 , Wahid v Tori, 35 A 551 11 A L J 856 21 I C 9 , Charusila v Mrinalini 64 I C 531 (C) , Narayanan v Ruppiah, 43 M 629 38 M L J 437 *see* Nabakishore v Upendra, *Supra* , Deo Dutt v Raj, 1928 O 411

(i) Keshav v Maruti 46 B 37 . 23 Bom L R 803 62 I C 954 1922 B 144 , Chhanun v Raj , 67 I C 16 9 C L J 24

(j) Bharateswari v Bhagaban, 33 C W N 193 , 1928 C 759

(k) Keshav v Maruti, 46 B, 37 23 Bom L R 803 62 I C 954 1922 B 144

(l) Nirmala v Deva, 55 C 269 : 1927 C 868

(m) Rivett v Jivibai, 10 B 478, in this connection *see* Sridhar v Kali, 16 C W N 106 15 C L J 12 11 I C 971

(n) Bhagabati v Sahudra, 16 C W N 834 13 I C 691

chased by a widow, in execution of a decree for rent, against a tenant of a land forming her husband's estate, does not lose the character of the parent estate. (o)

Calcutta view.

Mr. Justice Page of the Calcutta High Court has, in a very learned and able judgment, investigated the present law on the widow's rights of enjoyment and disposal of moveable and immoveable properties which she has inherited from her husband, as also of the income thereof and has come to the following conclusion "so long as she remains in enjoyment of the estate she may spend or accumulate, or otherwise dispose of, the income that accrues therefrom as she chooses. *Prima facie* any income that she has not spent, will pass on her death to her husband's heirs. But if during her lifetime she has so dealt with the unexpended income that the reasonable inference to be drawn from her acts is that she has disposed of it in a way that is inconsistent with an intention on her part to treat it as part of her husband's estate, such a disposition will be valid and binding upon the reversionary heirs of her husband. On the other hand, if at her death, or when her widow's estate otherwise is validly determined, it appears that she had not already disposed of the income current or accumulated which she was entitled to enjoy while she was alive, such income 'will follow the estate from which it arose,' and will pass to the heirs of her husband. In other words, her capacity to dispose of such income is commensurate with her capacity to enjoy it. It follows that she is impotent to dispose of such income by Will, for her Will speaks from the time of her death, and when she purports by her Will to dispose of the income the widow no longer is able to enjoy the property which passed to her for her maintenance as the 'other half of her husband', and she is then incapable of enjoying the income, whether she had received it in her lifetime, or whether, as in the present case, she never had it in her possession while she was alive. By merely making her Will it is obvious that she did not dispose

(o) Gangadayal v Chhakina, 1927 C. 806

of the property *inter vivos* or during her lifetime, for she may revoke her Will before her death, and it is in this sense, I think, that Sir A. Hobhouse referred to the income of her widow's estate 'as a kind of property the nature of which must remain undecided till her disposal of it or her death" (*p*)

His Lordship has very lucidly enunciated that *so long as she remains in enjoyment of the estate she may spend or accumulate or otherwise dispose of, the income that accrues therefrom as she chooses*, and thus lays down that she has got absolute power of disposal over the income during her lifetime But his Lordship's observation, namely, *in other words, her capacity to dispose of such income is commensurate with her capacity to enjoy it*, is much narrower than the proposition above expressed and does not follow from the preceeding sentences, and it seems that the report of the judgment as printed is inaccurate This latter dictum was no doubt what the Dàyabhàga has laid down, (*q*) but so far as the income and accumulations arising out of it are concerned, the case-law is that she can absolutely alienate it.

In none of the cases decided before, it has been ruled that a widow cannot dispose of by Will the income derived from the estate inherited by the widow. Disposal of property by Will was unknown to Hindu law and hence the power of a widow to dispose of the income by Will is to be determined by the present state of law. There seems to be that some lacunœ is absent from the judgment as reported, inasmuch as his Lordship's reasoning in support of the proposition that the widow cannot dispose of the income by Will, cannot be supported. A Will, no doubt speaks from the time of the death of the testator be he or she a full owner or a holder of a widow's estate and either of them can revoke the Will before death. If a Hindu widow cannot make a valid disposition by Will because the Will speaks from the time of her death when the estate vests in the reversioner, a full owner will be equally incompetent to dispose of by Will any property as the estate

(*p*) Sarat Chandra Mitra *v.* Charusila, 55 C 918, 933-934 1928 C 794
(*q*) *See ante p* 728

passes to the heir-at-law when the Will speaks. So the distinction based on the above reasoning, between the capacity of a Hindu widow's testamentary power over the income of the estate in her hands and that of a full owner, is a distinction without difference. Unless one begs the question or unless some links in the judgment as reported, are missing one cannot limit the powers of a Hindu widow to dispose of by Will the income derived from her husband's estate in her possession on the reasonings set forth in his Lordship's judgment

When her heirs get

A decree obtained by a daughter for advances made out of the income of her father's estate in her hands is executable by her representative after her death and not by the person entitled to the estate after her. (*r*)

Moveables

The Bengal doctrine is not applicable to cases under the Mithilà School, where the widow is entitled to the moveables absolutely, and not to the entire income of the immoveable property.

When from part of estate.

When a mother purchases moveable property out of the income of the estate inherited from her son, with a view to its becoming part of the main estate, it passes to the son's heir after her death. (*s*)

Sec 7—WASTE

Waste may be restrained

If the widow commits any waste in respect of her husband's estate, she may be restrained by the presumptive reversionary heir by a suit. But the principles which are applied in Courts of Equity in England for securing in the public funds any property to which one person is entitled in possession, and another is entitled in remainder, are not applicable to the property in possession of a Hindu widow.

What is waste

It is necessary to show that there is danger to the property from the mode in which the widow is dealing with it or apprehension of waste, (*t*) or real jeopardy to the assets exist. (*u*)

(*r*) Sita v Dulam, 41 A 350 (*s*) Tortan v Ballabhji, 48 I C 956 (N)
(*t*) Hurrydoss v. Uppoornah, 6 M I A 433, Durga v Chintamoni, 31 C. 214 8 C W N 11, Iajo v Allah Din, 35 I C 229 (P)
(*u*) Shankarbhai v Bai Shib, 54 B 837,847

In that case the reversioner may sue for an injunction to restrain her, (*v*) or for the appointment of a Receiver (*w*)

Widow as administrator

A widow, however, obtaining Letters of Administration to her husband's estate incurs the same degree of liability as any other person and is liable to be removed from the management of the estate if her conduct and management is such as to endanger the estate. (*x*)

When reversioner can interfere

When a widow alienates any property belonging to her husband in excess of her power, the then next heir of the husband may during her life bring a suit for a declaration that the alienation, either in whole or in part, is invalid after her life, but unauthorized alienation is not waste

Protection of reversioner's interest

Thus the reversioner's interest is not so fully protected, as it is under the provisions made by the Dàyabhàga for the control by the husband's kinsmen over the widow's management.

In case of moveable

When cash, or moveable property easily convertible into cash, appertaining to the husband's estate comes to the widow's hands, it would be almost impossible for the reversioner to get any remedy in most cases, if the Court would not interfere unless he could prove danger to the property from the *mode* of her *dealing* with it, for she may secretly deal with such property so as to deprive the reversioner entirely. The danger apprehended is the gift to the widow's own relations, of which no trace can be found by the reversioner. So it is open to the reversioner to file a suit praying that moveables be placed in the hands of a Receiver appointed in the suit. (*y*) It seems reasonable to presume danger without waiting for the mode of dealing, and to apply those equitable principles, and to allow the widow permission to negotiate for the purpose of more profitable investment when the same is available, with the sanction of the Court.

Appointment of Receiver

(*v*) Section 54, illustration (*m*) of Specific Relief Act, (Act I of 1887)

(*w*) Rupa v. Chandhari, 1928 N 93

(*x*) Raghava v Thoyammal, 9 M L T 296 10 I C, 670

(*y*) Venkanna Narasimham v Gogula, 44 M 984 41 M L J 279 66 I C 10, Janaki v Narayanasami, 43 I A 207 39 M 634 20 C W N 1323 24 C L J 309 31 M L J 225 11 A L J 997 37 I C 161

Widow represents whole estate

When widow represents whole estate in suit.—It has already been said that the widow represents the whole estate of her husband, which is entirely vested in her, no one else having any present interest in the estate before the termination of her interest. It is only after the termination of her estate that the actual reversioner or the next heir can be ascertained. To a suit respecting the husband's estate she alone is entitled to be a party as representing the estate, and a decree fairly and properly obtained against her will bind the reversioners. The following observations of the Privy Council in the *Shivaganga* case lays down the rule on the subject —"The same principle which has prevailed in the Courts of this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow" In the case of *Pertabnarain Sing* (z) following the above principle, the Privy Council has held that a decree properly obtained against the widow who represented the estate, operates as *res judicata* against the reversioners. (a) But unless the decision could have been impeached on some special ground, it would be binding on the reversioner. (b) In each case it is to be considered whether the estate was properly represented by her. But a suit by a widow for the recovery of possession being dismissed on the ground of limitation, does not operate as *res judi-*

Rule in *Shivaganga* case

Case of *Pertabnarain Singh*

* In this connection *see post pp* 809 *etc*

(z) 11 C 186, 11 I A 197

(a) Risal *v* Balwant, 45 I A 168, 40 A 593, 48 I C 553, 28 C L J 519; 23 C W N 326 36 M L J 597, (1919) M W N 155, overruling Darbari *v* Gobind, 43 A 1558, *see* Bireshur *v* Kamal, 17 C W N 337, Ganga *v* Indra, 22 C W N 350, 25 C L J 391, 35 I C 49, Gobinda *v* Mohini, 23 I C 931 (C), Soshi *v* Chandra, 35 C L J 348 (observation at *p* 349) 68 I C 322, 1923 C 204, Pramatha *v* Bhuban, 49 C 45 33 C L J 421, 25 C W N 585, 64 I C 980, 1922 C 321, Ghelabhai v Bai Javer, 37 B 172, 14 Bom L R 1142; 17 I C 856, Mohendra *v* Shamsunnessa, 19 C W N 1280, 21 C L J 157, 27 I C. 954, Shiva *v* Kali, 1929 P 392, Nagayya *v* Karuppayyee, 1930M 344

(b) Risal *v* Balwant, *supra*, Bai Kanku v Bai Jadav, 43 B 869, 21 Bom L R 837 53 I C 164, Amrit *v* Gaya, 45 C 590, 45 I A 35, 27 C L J 295 22 C W N 409 16 A L J 265, 20 Bom L R. 546, 34 M L J 298, 44 I C 408.

cata in a suit brought by the reversioner after her death. (*c*) In an appeal to the Privy Council from the above mentioned case, (*d*) it is observed that in a suit by or against a widow for possession of the estate or part thereof, she and the reversioners are equally bound by any final decree which a Court makes in such a suit, provided that the suit was fought out according to law and was not collusive or fraudulent. (*e*)

Res judicata against reversioner, when

In order that a decree against the widow may be binding on the reversioner, it is necessary that it should be passed after a fair trial, after full contest in a *bona fide* litigation, but not one based on a compromise. (*f*)

When decree binds reversioners.

Compromise by widow when binds reversioner.—But in order that a compromise made by a widow may be binding on the reversioner, it must be a settlement fairly and *bona fide* arrived at of disputed claims (*g*) as prudent compromise (*h*) or made *bona fide* for the estate, (*i*) with due care and

Compromise

(*c*) Ramchandra *v* Audemma, 32 M. L J 627, Somasundaram *v* Vathilinga, 40 M. 846, 860, 44 I C 546.

(*d*) 40 M 846

(*e*) Vaithalinga *v* Srirangathami, 48 M 883 · 52 I A. 322 49 M L J 769 42 C L J 563 1925 P C 249 : 30 C W N 313, *this is explained again in* Giggo Bai *v* Utsava, 33 C W N 809 50 C L J 52 P C, *again followed* Munni *v*. Trilaki, 58 I A 158 35 C W N 552, 560 P.C

(*f*) Katama Nachiar *v* Raja of Shivaganga, 9 M I A 539 2 W R P C 31, Madan *v* Akbaryar, 28 A 241, Harinath *v* Mothur, 21 C 8, Mahadie *v* Buldeo, 30 A 75, Gibind *v* Khunni, 29 A, 487 *see* P C in *foot note* (*g*) below, 7 C L R 76, 81, *see* Rajlakshmi *v* Katyayani, 38 C 639 12 I C. 464

(*g*) Khunni *v* Govind, 38 I A 87, 33 A 356, 15 C W N 545, 13 C L J 575, 21 M L J 645, 10 I C 477, on appeal from Gobind *v* Khuuni 29 A. 487, Himmat *v*, Dhanpat, 38 A 335, 35 I C 148, 14 A L J 340, Kanhaiya *v* Kishori, 38 A 679, 35 I C 683, 14 A L J 881, Upendra *v* Bindesri, 20 C W N 210, 22 C L J 452, 32 I C 468, Hiran *v* Sohan, 18 C W N 929 24 I C 309 27 M L J 149, Kambinayni *v* Kambinayani 33 M 473 20 M L J 204 5 I C 640, Rama *v* Daji, 43 B 249, Basawan *v* Natha 1925 O 30, *see* Sureshwar *v* Mahesrani, 47 I A 233, 48 C 100 25 C W.N 194, 41 C L J 433, 57 I C 325; 39 M L J 161, 18 A L J 1059

(*h*) Raoji *v* Kunjalal, 54 B 455 34 C W N 627 51 C L J 434 1930 P C 163

(*i*) Ramsumran *v* Shyam, 1 P 741, 27 C W N 269 37 C L J 356 21 A L J 18 25 Bom L R 634 44 M L J 751 69 I C 71 1922 P C 356, Srinath *v* Nibarun, 53 I C 945 Kadakkarai *v* Nadakkannu, (1921) M W N 342 62 I C 752, Kamarasami *v* Subramania, 31 M L J 87 33 I C 687 Bagawati *v* Jagdam, 2 Pat L J 471 : 62 I C 933 Mohendra *v* Shamsannessa, 19 C W N 1280 21 C L J 157 27 I C 954 Rama Aiyar *v* Narayanasami 1926 M 609, Ravji *v* Rama, 1928 B 14 Shanmuga *v* Kaveri, 1928 M 708 Thakur *v* Dipa, 10 P 352

caution, (*j*) by the widow representing the estate, and not one designed to secure a personal benefit for herself which will be no better than any other contract or alienation made by the widow (*k*) The widow is not bound at her peril to pursue a litigation to the ultimate Court of Appeal. (*l*)

When not binding on reversioner

A compromise entered into in which the claimant was given larger interest than he was entitled to, is not binding on the reversioner. (*m*) So also a compromise is not binding on the reversioner if the disputant had no *bona fide* claim, (*n*) or it was not *bona fide* but the result of collusion, (*o*) or when the widow by compromise says her husband was a joint member of a Mitakshara family and thus disclaims all title to represent her husband's estate. (*p*)

Uncontested decree

But when the claim is binding on the estate then the decree on it without contest by the widow is binding on the reversioner, the widow representing the estate was not bound to raise any defence when the debt was really due. (*q*)

Presumption.

Presumption.—There is, however, no presumption that a property found to be in possession of a Hindu widow who inherited considerable property left by her husband belonged to him (*r*)

The question of acquisition of property in the name of a woman and the presumption arising therefrom has already been dealt with (*s*) A deed purporting to convey full proprietary rights will be construed to convey such rights unless the contrary appears in the context or from the

(*j*) Gangamirtham *v* Rajamanikka, 53 I C 555, 556 (M)

(*k*) Rama *v* Daji, 43 B 249 See Srinivasa *v* Thiravengada, 55 I C 588. 26 M L J 350 10 L W 594 Janak *v* Debi, 2 Pat L J 370

(*l*) Upendra *v* Bindesri, *Supra*

(*m*) Bhogaraju *v* Addepalli, 35 M 560 12 I C 123, but in this connection *see* Upendra *v* Gurupada, 34 C W N 404 1930 C 508 and *see p* 745.

(*n*) *See* Obala Kondama *v* Kandasamy, 28 C W N 1050 P C Anup *v* Mahabir, 3 Pat L J 83 in this connection *s e p* 745,

(*o*) Nagappa *v* Naranappa, 48 M L J 461 87 I C 667 1925 M 731

(*p*) Nirman *v* Fateh, 52 A 178 1929 A 9

(*q*) Subbammal *v* Avudaiyammal, 30 M 3

(*r*) Diwan *v* Indarpal, 26 C 871 26 I A 226 Venkataramayya *v* Venkatappayya, 1930 M 337, *see ante p.* 550

(*s*) *See ante pp* 550-551

surrounding circumstances. (*t*) Under the Mithila law a simple and pure gift by the husband to the wife does not convey to her absolute ownership; she only takes it for her life without any right of alienation unless power of alienation is expressly conferred on her (*u*) Where express intention of transferring full rights of ownership appears in the context, the other principles of interpretation relied on are of minor importance and should not be allowed to restrict the natural meaning of the words. (*v*)

In Mithila wife does not get absolute interest in simple gift,

If absolute right intended it should be so

Acknowledgment of debt by widow when binds reversioner—An acknowledgment made by the widow of a mortgage while she was in possession as mortgagee, is not an acknowledgment within the meaning of Section 19 of the Limitation Act so as to give a new period of limitation in a redemption suit, as against the reversioners, inasmuch as she is not the person through whom the reversioners derive title or liability. (*w*) But she can keep alive a debt by making payments under Section 20. (*x*) But by amending the Limitation Act, it has been settled that an acknowledgment signed or payment made by any widow or limited owner shall be valid against the reversioner. (*y*)

Aknowledgment

Sec 19,

Sec 20 of Limit Act.

Adverse possession against a widow—An adverse possession against a widow is not adverse against the reversioner and the latter is entitled to twelve years from the death of the widow to enforce his rights against the trespasser in respect to immoveale property (*z*) and to six years in respect

Adverse possession against widow how far against reversioner.

(*t*) Jaikaram *v* Umrao, 2 O W N 751 90 I C 674 1925 O 749

(*u*) Hitendra *v* Sir Rameshwar, 7 P 500 32 C W N 762 · 48 C L J 83 · 1928 P C 112 (*v*) *Ibid*

(*w*) Soni *v* Kanhaiya, 35 A 227 40 I A 74 17 C W N. 605 11 A L J 389 15 Bom L R 489 25 M L J 131 19 I C 291, *see* Mohini *v* Sarat, 86 I C 353

(*x*) Chegamull *v* Govindaswamy, 1928 M 972

(*y*) *See* Act I of 1927, amending Act I of 1908 (Limitation Act) Sec 21, Sub-sec (3), (*a*)

(*z*) Limitation Act, Art 141, Jaggo Bai *v* Utsava, 51 A 439: 33 C W N 809, 821-22 50 C. L J 52 P C, Runchordas *v* Parbatibai, 23 B 725 26 I A 71, 82: 3 C W N 691 on appeal from Vandravandas *v* Carsondas, 21 B. 646; Srinath *v* Prosunna, 9 C 934 F B., Bankey *v* Raghunath, 51 A 188 F B, 26 A L J 1049 1928 A 561, Roy Radha *v* Nauratan, 6 C L J 490, Siva Prosad *v* Bhadramani, 1929 C 93, *see* Lajpt *v* Sohna, 1929 L 432; Ayyaswani *v* Mahadeva, 1929 M 421, Deoram *v* Biju, 1927 N 226, Phul *v*. Gobardhan, 1929 A 739.

to moveable property. (*a*) But a remote reversioner cannot, therefore, claim twelve years commencing to run after the expiry of twelve years from the death of the widow. (*b*)

Res Judicata

But in a suit by or against a widow for possession of the estate or part thereof, she and the reversioner are equally bound by the principles of *res judicata* and the reversioner does not get the benefit of Art. 141. of the Limitation Act. (*c*) The Privy Council has thus explained that there is no conflict between the Board's decision in the cases of *Runchordas* and *Vaithialinga* It has been so explained by the Full Bench of the Allahabad High Court, (*d*) and Mr. Justice Dwarka Nath Mitter of the Calcutta High Court (*e*) sitting with Mr. Justice Jack. The decision of Mr. Justice Page of the Calcutta High Court (*f*) to the effect that there is no difference in principle between the loss of the reversioner's rights by an adverse decree against the widow and the loss of such rights by adverse possession against her without there being any decree, is thus overruled.

Privy Council,

Allahabad

Calcutta

Art 141

But Article 141 applies only when the last full owner was in possession of the property at the time of his death, (*g*) or when the widow was in actual possession and dispossessed. (*h*)

Adverse possession by widow, its effect

Adverse possession by widow.—In a claim by one alleging himself to be the heir of another person, on whose death his mother and after her, his step-mothers were in adverse possession of the disputed properties for more than 12 years against the above claimants, the Privy Council laid down the following principle —"The Hindu widow, as often pointed out, is not a tenant for life but has a widow's estate—that is to say, a widow's estate in her deceased husband's estate If possessing as widow she possesses adversely to

Explained by P C, not stridhana

(*a*) Limit Act, Art 120, Jiggo Bai v Utsava, Runchordas v Parbatibai, *see above* (*b*) Amar v Ralli, 1930 L 211

(*c*) Gaggo Bai v Utsava, *see above*, Hurrinath v Mathoor, 21 C 8 20 I A 183, Vaithialinga v Srirangathami, 48 M 882 52 I A 322. 49 M L J 769 42 C L J 563 30 C W N 313 1925 P C 249

(*d*) Bankey v Raghunath, 51 A. 188 26 A L J 1049 1928 A 561, *see* Lachmin v Ishuri, 1929 O 153, *see* Kali v Amla, 1930 A 307

(*e*) Abinash v Narhari, 57 C 289 50 C L J 250

(*f*) Aurabindoo v Manorama, 55 C 903 32 C W N 913 1928 C 670; Radha v Nil, 51 C L J 23 (Page and Mallick, J J)

(*g*) Mohendra v Shamsunnessa, 19 C W N 1280 21 C L J 157 27 I C 254, *See* Jaideo v Dhoom, 1929 A 419, (*h*) Lachmin v. Ishuri, 1929 O. 153

anyone as to certain parcels, she does not acquire the parcels as *Stridhan* but she makes them good to her husband's estate." (*i*) A widow, who came into possession of her deceased husband's estate on husband's death and who subsequently re-married but remained in possession of the same for more than 12 years, without knowing that her right to the estate forfeited on re-marriage and without any opposition from the real owners who were entitled to the estate on her re-marriage, merely acquired the right for her first husband by such adverse possession, (*j*) but under similar circumstances she acquires an absolute title to the property acquired out of the income of the estate. (*k*) A widow when not entitled to possession as a widow at the time when she obtains possession of certain property, her possession becomes adverse even against the reversioners of her husband and may acquire absolute title (*l*) by remaining in possession for the statutory period. But if before the expiry of the statutory period to enable a daughter to acquire right by adverse possession in a property against her mother, the property vests in her as heir of the last full owner, her previous adverse possession comes to an end. (*m*)

Adverse possession against widow's estate,

A widow, who acquires occupancy rights in *Abadkor* rights succeeded by her, acquires them in her own right and not representing her husband's estate (*n*) So a property becomes her *stridhan* property if acquired by adverse possession. (*o*) The general proposition that a widow in adverse possession of any property takes it as her separate *stridhan* property, requires *same* limitations if the property is acquired by a widow claiming as such. (*p*)

against other properties

(*i*) Lajwanti *v* Safi, 5 L. 192 51 I A 171 28 C W N 960 20 M L W 10: 24 M L T 87, 22 A L J. 304 2 P L R 245 1924 P C 121, this followed in Anant *v* Mahadev, 1929 B 333, *see* Behari *v* Ramkaran, 1928 O 237, (daughter), Bhagwan *v* Shib, 1930 A 341 (widow)

(*j*) Umrao *v* Pirthi, 1925 A 369 85 I C 445, Desa *v* Dani, 1929 L 327, Mahajan *v* Purbo, 11 L 424 (remained in possession for more than 12 years after she gave birth to an illegitimate son)

(*k*) Tarif *v* Phool, 1927 A 274

(*l*) Rikhdeo *v* Sukhdeo, 49 A. 713 1928 A 45, Suraj *v* Tilakdhari, 7 P 163 : 1928 P 220 *See* Chandra *v* Jagjiwan, 1929 O 215, but see observation in Mathuswami *v* Ponnayya, 1928 M 820, 822

(*m*) Dhurjati *v*. Ram, 52 A 222

(*n*) Narain *v* Sada, 6 L 134 88 I C 64 1925 L 305

(*o*) Rampal *v* Bajrang, 1926 O 211

(*p*) Jagmohan *v* Prayag, 6 P.L.T. 205 87 I C 473 : 1925 P 523.

No adverse possession in property given for maintenance

Where a widow is in possession of properties belonging to a joint family in lieu of her maintenance, her possession is not adverse to the other members of the family and she cannot acquire title by prescription. (*q*) If after the death of the husband a widow is found in possession and enjoyment of joint family, it is to be ordinarily attributed to a maintenance allotment and her possession cannot be adverse. (*r*)

Same principle as a Mit father

What passes in sale in execution against widow.—Here again the same difficulty may arise as in a suit against the Mitakshara father alone, for a debt due by the whole family,—the difficulty in fact distinguishing between proceedings against the widow personally, and those against her as representing the whole estate. In execution of a decree against the widow for a debt contracted for legal necessity, the right, title and interest of the widow may be sold according to the Civil Procedure, and the question may arise what was purchased, the whole estate, or the life-interest of the widow? And it will have to be decided by the application of substantially the same principles as have been laid down in the case of a Mitàkshara father (*s*)

Thus, where a widow's estate was sold in execution of a decree against her personally, for arrears of maintenance payable by her, which was a charge on the estate, only the widow's interest passed to the purchaser. (*t*)

To find if decree binding on estate

What executing Court can do—A Court executing a consent decree obtained against a widow whereby a charge was created on her husband's estate—the question of necessity binding the estate not being gone into by the trial court must determine whether the charge subsist after the death of the widow when the execution is sought after her death. (*u*)

(*q*) Bhagwani *v.* Mohan, 29 C W N 1037 41 C L J 591 . 49 M L J 55 23 A L J 589 88 I C 385 1925 P C 132

(*r*) Yeshwant *v* Daulat, 89 I C 663

(*s*) *See* Ishwari *v* Babu 47 A 563 88 I C 193 1925 A 495, *ante p* 471.

(*t*) Baijun Doobey *v.* Brij Bhookuni, C 133 2 I A 275 24 W R 335

(*u*) Munabai *v.* Aburubammal, 53 M 750 1930 M 688.

Court may go beyond decree

But in another case in which the widow's right, title and interest only has been sold in execution of a decree, it has been held that the Court is at liberty to look into the judgment to ascertain what was sold thereunder, and that as it appeared from the judgment that the decree against the widow was in respect of the husband's estate and binding on the reversionary heir, the purchaser took the estate absolutely. (v)

and look into pleadings etc

In ascertaining what was purchased at a sale in execution against the widow, the question is what was liable to be sold under the decree, and what in fact was sold, and for the purpose of ascertaining what estate was intended to be affected by the decree, the pleadings, the judgment, the decree, the execution proceedings, the sale proclamation, the amount of the purchase-money and the conduct of the parties must all be taken into account. (w)

The test

In the absence of any evidence to the contrary it may be inferred that the creditor intended to obtain a decree binding on the estate, when the litigation was with respect to a debt which was in part or in whole binding on the estate, but this may be rebutted when a valuable property was sold for an inadequate price. (x)

Personal security of widow

When the husband's property is sold in execution of a decree for money lent on the widow's personal security only, though for legal necessity, the purchaser would be entitled to the widow's life intrest only (y) The Madras High Court (z) has differed from the above Calcutta decision holding that it is not in accordance with the law enunciated by the Privy Council in *Babuasin's* case (a) and *Daulatram's* case. (b)

Madras differs from Cal

(v) Jugul v Jatindra, 11 I A 66 : 10 C 985

(w) Rameswar v. Provabati, 19 C W N 313, 320 20 C L J 23 25 I C 84, Srinath v Hari, 3 C W N 637, Braja v Joggeswar, 9 C L J 346 11, C 62, Roy Radha v Nauratan, 6 C L J 490, Kiranbala v Kali, 32 I C 587 (C), Trilochan v Bakkeswar, 15 C L J 423 14 I C 839, Punit v Rajkumari, 22 C L J 400 32 I C 580, *see* also Jugul v Jatindra *ante* and Raj Narayan v Bejoy 754, 757

(x) Thirumalaisamy v Venkatarama, 1929 M 601

(y) Giribala v Srinath, 12 C W N 769, Kallu v Fayaz, 30 A 394

(z) Veerabadra v Marudaga, 34 M 188 21 M L J. 320, 339-340 8 I C 1072

(a) 13 C 21 . 13 I.A. 1

(b) 15 C 70 14 I A. 187

Sec. 9—PARTITION WITH HUSBAND'S CO-PARCENERS

Can a widow claim partition,

When can widow claim partition.—Although right to partition is an incident of joint ownership and every joint owner of property is as a general rule, entitled to obtain partition, or in other words to be placed in a position to enjoy his own right separately and without interruption and interference by his co-sharer, (*c*) yet two or more widows or daughters who have only a limited interest in the property jointly inherited by them cannot have the right to claim partition in the sense of division of title, neither can they have an unqualified right to claim partition in the sense of divison of possession, as the same may be a temporary arrangement only. It is therefore discretionary with the Court to allow it or not, and it would be allowed if in the circumstances separate possession appears necessary for securing equal enjoyment to each of them. Still it should be carried out in such a manner that it may not be detrimental to the future interests of the reversioners. (*d*)

it depends on the discretion of Court

When partition with husband's co-sharers allowed

As regards the widow's right of partition against her husband's co-parceners, the same rule applies, that is to say, it depends on the discretion of the Court whether partition should be allowed or not. There are two descriptions of cases: one in which the husband's co-parceners are the reversioners, and the other in which the husband's daughter and daughter's sons are the reversioners. In the latter, there cannot be any objection to partition. But as regards the former in which the husband's estate is to go after the widow's death to the same co-parceners against whom the partition is claimed, the advantage to the widow from separate enjoyment of her share and to both parties from the cessation of disputes and disagreements, is often counterbalanced by the expenses and trouble attending the temporary severance. Hence the Court may without division by metes and bounds, decree separate possession and enjoym ent

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(*c*) Hemadri v. Ramani, 24 C 575, 580 1 C W N 406.

(*d*) Janoki v. Mothura, 9 C. 580, 585 (F. B.)

in such a mode that the reversionary interest may not be prejudicially affected. (*e*)

Widow can claim partition in f ... ore

The Lahore High Court has held that the widow has a statutory right to claim partition against her husband's co-sharers. (*f*)

How waste of moveables to be prevented

Moveables and cash how divided—Where in apartition there is reasonable apprehension of waste of *moveables* and cash, provision should be made in the final decree for prevention of waste, a separate suit for injunction is not necessary. (*g*)

Sec. 10—REVERSIONERS

Sub-Sec 1—RIGHT OF REVERSIONERS

Reversioner according to Hindu law.

Reversioner.—It should be borne in mind that the term reversioner as used in Hindu law bears a sense different from its ordinary meaning, for a Hindu reversioner has no present interest in the property, the actual reversioner may be a person different from the presumptive reversioner and his heirs: the terms the next heir of the last full owner or the then next taker or heir may be used instead of the above expression. A female heir may be a reversioner or the next heir having a qualified estate. There appears to have been some misconception about the matter. It had to be settled by a Full Bench that when a maiden daughter succeeds in preference to her married sisters and after marriage dies leaving a son, the estate will go to her qualified sister as the next reversioner in preference to her son. (*h*)

Collaterals get as separate property.

It has been held that in case of succession of collaterals after the death of the holder of the *widow's estate* the property inherited by the reversioners is the separate property of all of them, (*i*) and they get *per capita* (*j*) The male reversioner is entitled to the reversion as the heir of the last full owner and not on account of his relationship

(*e*) Soudaminey v Jogesh, 2 C 262, 271, Janoki v Mothura, 9 C 580, 585 (F B), Mohaday v Haruk, 9 C 244, 250, *see* also Bepin v Lal, 12 C 209: 6 B L R 134 Boulnois 139, Hurrydass v Uppoornah, 6 M I A 433, Padmamani v Jagadamba, *Mt Dal v* Panbas, 8 C W N 658.
(*f*) Gopali v Shamon, 7 L 346
(*g*) Durga v Chintamoni, 31 C 214 8 C W N 11
(*h*) Tinumoni v Nibarun, 9 C 154
(*i*) Shib v Ram, 87 I C 938, 1925 A 79
(*j*) *See pp* 557, 559 and 609 *ante*.

with the holder of the widow's estate or on account of being the heir or representative of his father. (*k*)

Reversion, a chance of succession,

The Reversion—of the so called presumptive reversionary heir is mere *spes successionis* (*l*) or chance of succession to the widow's husband's estate in case he becomes the actual reversionary heir to the husband on the widow's death,—the widow's life being deemed as the continuation of her husband's life for the purpose of determining his heir on her death when the succession opens.

Is not transferable

Hence it is not transferable and a conveyance executed by the reversionary heir in widow's life-time must be inoperative. (*m*) So also during the life-time of the limited owner in possession of her father's estate, her husband as guardian of her minor son, a presumptive reversioner cannot bargain with the property on his behalf or bind him by any contractual engagement in respect thereto, as until the death of the mother the son has nothing to assign or to relinquish or even to transmit to his heirs. (*n*) So a presumptive reversioner cannot enter into a compromise so as to bind the actual reversioner, as at that time he had only a *spes successionis.* (*o*) But a presumptive reversioner can so act as to debar himself from claiming the reversion when it opens (*p*) But an agreement between two reversioners to divide the reversion when falling in, may be the subject of specific performance (*q*) Though a transfer of his interest by a reversioner

When reversioner by conduct estopped

(*k*) *See* Venkataramani v Subramaniam, 1928 M 945

(*l*) Venkatanarayana v Subbammal, 38 M 406 42 I A. 125 · 28 M. L. J 535 19 C W N 641 21 C L J 515 1915 P C 124

(*m*) T P Act, § 6, Nund v Kanee, 29 C 355, 6 C W N 395, Manickam v Rama Linga, 29 M 120, Muthuveeru v Vythilinga, 32 M 206, 19 M L J 88, Bhograj v Addepalli, 35 M 560, Vaddadi v Kocharlakota 49 M L J 295, Maroti v Rawant, 1928 N 262, Thakar v Uttam, 10 L 613, 1929 L 295, Thakur v Dipa, 10 P 352, Bindeshwari v Har, 1929 O 185

(*n*) Amrit v Gaya, 45 C 590, 603, 22 C W N 409, 27 C L J 295, 34 M L J 298, 12 I C 123 20 Bom L R 546, 16 A L J 255 44 I. C. 408, Sankata v Kali, 22 O C 48 51 I C 545

(*o*) Nagar v Khase, 86 I C 893 1925 A 440, *See* "Estoppel by act of reversioner", *p* 807 *below*

(*p*) *See* "Estoppel by conduct of reversioner", *p* 807 *below*, Kanhai v Brij, 40 A 487 45 I A 118 28 C L J 394 22 C W N 914 16 A L J 825 35 M L J 459 5 Pat L W 294 20 Bom L R 1048

(*q*) Pindiprolu v Pindiprolu, 30 M 485 17 M L J 505, *see also* Ram v. Ganesh, 73 I C 542 (P)

is void, he may by becoming a party to a compromise be estopped from claiming as reversioner. (*r*) But by an agreement of surrender from the nearest reversioner, the widow cannot enlarge her life-estate into an absolute estate. (*s*)

Transfer

Reversioner cannot enlarge her estate

Though a reversioner has no present alienable interest, he is entitled to appear and be heard in a Probate Proceeding, (*t*) but if he refuses the next person in the order of succession may exercise the right. (*u*)

Probate proceeding

Section 43 of Transfer of Property Act. (v)—It has already been stated (*w*) that the interest of the reversioner is not transferable. The provision of Section 43 of the Transfer of Property Act does not apply, when any transfer of such interest has actually been made because such a transfer cannot be said to have been made 'fraudulently' or by 'erroneous' representation. (*x*).

Sub-Sec ii—SURRENDER

Surrender.—A female heir may surrender or properly speaking withdraw her life-estate and destroy her rights so as to accelerate succession and vest the whole estate in the then next heir, in the same way as if she were dead at that time. (*y*) It is worthy of special notice that by the so-called deed of surrender, all that the widow should do is to declare that she feels no desire for exercising rights of ownership over her husband's estate, and so she gives up her rights therein and possession thereof, and to declare that her interest being thus withdrawn and destroyed, the immediate reversioner becomes entitled to the estate by the operation of the law of inheritance, but not by any act of transfer made by herself. This is *bona fide* done when the person to whom the deed is addressed, and in whose favour the relinquishment

What is surrender.

(*r*) Annada *v* Gour, 48 C 536 25 C W N 496 33 C L J 457: 65 I C 27, *see* P C 40 C L J 10, *see p* 807 below "Estoppel by conduct of reversioner"
(*s*) Gangabai *v* Hari, 45 B 1167 23 Bom L R 500 62 I C 680
(*t*) Shyama *v* Prafulla, 21 C L J 557 19 C W N 882 30 I C 161,
(*u*) Shib, *In the goods of*, 56 C 1070 1930 C 150.
(*v*) Act IV of 1882 as amended by Act XX of 1929
(*w*) *See* page 792 *foot note* (*m*) above
(*x*) Jagannath *v* Debbo, 31 A 53 6 A L J 49, Annada *v.* Gour, 48 C 536, 545, Bindeshwari *v* Har, 1929 O 185
(*y*) Nofer *v* Modhu, 5 C 732, Mansingh *v* Nawlakhbati, 73 I C. 822, confirmed by P C 43 C L J 259

operates, is also her own relation, for instance when the surrender is made by the widow in favour of her own son, her daughter or grandson In all other cases it is a mere pretext for an arrangement whereby the property is divided between the last owner's relations and the widow herself, the latter getting her share absolutely, so that she might give the same to her own relations.

No deed nor Registration needed

There is no particular form to be observed to surrender her interest. (z) It need not be in writing, but if a deed be executed it is required to be registered. (a)

Rule how originated

The rule originated from the doctrine that retirement from world, or extinction of one's desire for property is according to Hindu law, civil death, and causes, in the same way as natural death, the extinction of his rights in property, and has the effect of accelerating inheritance. And because retirement from the world or renunciation depends on the will of the person therefore it has been held that without the remotest idea of retiring, or renouncing, the widow may do that which would follow from her actual retirement or renunciation.

Whole estate, absolutely, in favour of all next reversioner is valid surrender.

But in order to accelerate the inheritance of the reversioner, the widow realising the true effect of surrender (b) must convey the whole of her limited estate absolutely (c) and completely (d) in favour of the then reversioner or reversioners (e) and not in favour of one of them, (f) nor to one of the same degree , (g) hence where a widow executed a deed in favour of daughter's son reserving her life-interest and declaring him to be entitled to the estate after her death, it has been held that there was no surrender at all, and therefore no title accrued to him so as to exclude another daughter's son.

(z) Kotireddi v Subbareddi, 1925 M 382 (a) Gouri v Gaya, 1927 N 44

(b) Krishna v Subbanna, 1929 M 611

(c) See Bhagwati v Dadu, 1925 N 95 81 I C 878, Dawlat v Nagorao, 123 N L R 57 1927 N 230

(d) Jagwanti v Udit, 1927 A 587

(e) Narayanaswami v Rama, 53 M 692 34 C W N 1045 appeal from 1926 M 609 See Basangavda v Basangavda, 39 B 87. 16 Bom L R 693 27 I C 167, Sham v Jaichha, 39 A 520, Ram Bodh v Ram Narain, 65 I C 776 5 O L J 512, Baij Nath v Mangala, 6 P L T 731 90 I.C 732.

(f) Manjaya v Seshgiri, 49 B 187

(g) Bechu v Dulhma, 1925 A 8

(*h*) Nor can there be a valid surrender in favour of daughter's sons when the daughters are the next reversioners. (*i*) But the question whether daughter's consent could validate such a surrender, is kept open (*j*)

Following the analogy of an adoption in Bombay, made by a widow without any authority, it has been held that the validity of a *surrender* by her cannot be called into question on the ground of improper motive or of any condition being imposed by her , accordingly, where a widow conveyed the whole of her husband's estate to the next reversioner, in consideration of an undertaking by him to reconvey a portion of the property to her brothers, the conveyance is held to be good and valid, as well as that executed by him in favour of her brothers, neither of which can be impeached by the other reversioners. (*k*)

Whether consent of reversioner necessary to surrender

The Madras High Court has held that one of two co-widows cannot, without the conjunction of the other, surrender the estate, (*l*) nor can relinquishment by one, of her interest in favour of the other, accelerate the reversioner's rights if the latter pre-deceases the former. (*m*) It cannot be denied that a widow can extinguish her rights in her husband's estate so as to accelerate the rights of the reversioner whether he consents to it or not. (*n*) The gift by the widow of the entire husband's estate to the daughter's son during the life-time of the daughter does not operate as an acceleration of the estate of the daughter's son. (*o*) But the gift of entire estate to the daughter, (*p*) or to the reversioner by the mother along with all the daughters, (*q*) or with their consent, (*r*) will accelerate the daughter's or the reversioner's estate as the case may be,

(*h*) Behari *v* Madho, 19 I A 30 19 C. 236, see also Palla *v* Challa, 23 I C. 98 1 L W 237 (*i*) Narayanaswami *v* Rama, *Supra* (*j*) *Ibid*
(*k*) Challa *v* Palury, 31 M 446
(*l*) Anna *v* Jaggu, 1925 M 153
(*m*) Chengappa *v* Buradagunta, 43 M 855 39 M L J 567 60 I C 135.
(*n*) *See* Basangavda *v* Basangavda, 39 B 87 16 Bom L R 699 27 I C 167
(*o*) Raja Dei *v* Umed, 34 A 207 9 A L J 158 13 I C 632
(*p*) Rup Ram *v* Rewati, 7 A L J 645 6 I C 541
(*q*) Chinaswami *v* Appaswami, 42 M 25 35 M L J 512 48 I C 147, Chito *v* Jhunni, 1930 A 395 in this connection *see* Narayanaswami *v* Rama, 34 C W N 1045, 1050 P C
(*r*) Janki *v* Sundar, 22 O.C. 166 : 6 O. L. J 466 53 I C 462.

Surrender if affect prior alienation :

But she cannot relinquish her estate so as to affect prior alienation made by her which will be good for her life or until re-marriage (s) Mr. Justice Page of the Calcutta High Court, in an elaborate judgment, discussing the various texts and decisions of different High Courts, has held that the reversioner is competent to challenge the validity of alienation made by the surrendering holder of the *widow's estate* even during her life-time. (t) Against his decision there was an appeal under Clause 15 of the Letters Patent. Their Lordships in appeal came to the conclusion that the alleged surrender was for valuable consideration; and, hence, it has been held that it was unnecessary to consider the question, whether in case of an absolute surrender by a Hindu widow in favour of the reversioners, the latter can, during the life time of the widow, recover possession of properties previously alienated by her. (u) The Madras High Court, (v) however, as is stated above, in an almost similar case expressed a contrary view and a recent decision of this Court has disagreed with the view expressed by Mr. Justice Page of the Calcutta High Court. (w) The Allahabad High Court (x) entertains the same view as that of the Madras High Court.

Calcutta,

Madras,

Calcutta, Allahabad.

Mad & Bom. hold after alienation widow cannot surrender

But the Madras (y) and Bombay (z) High Courts have held that a widow, after making some alienation not binding on the estate, cannot make a valid surrender as she has put it out of her power to surrender the whole estate. These decisions seem to contemplate *surrender* of widow's estate by the holder thereof as a kind of transfer.

It is a settled law (a) that surrender is an effacement of the widow which opens the succession to the estate of the

(s) Subbamma v Subramanyan 39 M 1035 30 M L J 250 32 I C 813, *see also* Sundarasiva v Viyamma 48 M, 933 49 M L J 266 1925 M 1257 ayya v Narayya, 1927 M 530; Meenamlal v Aburnteammal 53 M. 750 1930 M. 688

(t) Profula Kamini v Bhabani, 1926 C 121

(u) 30 C W N 1011, 1038.

(v) Sundarasiva v Viyama, 48 M 933 49 M L J 266, *see foot note* (s) above.

(w) Karuppa v Irulayee, 1927 M 429

(x) Lachhmi v Lachho, 49 A 334 1927 A 258, 262

(y) Vijiaraghavacharier v Ramanujachariar, 1929 M 37

(z) Sakharam v Thama, 51 B 1019, 1928 B 26

(a) *see ante pp.* 793-794

next heir of the last full owner. "That is to say, she can so to speak by voluntary act operate her own death."(*b*) Applying this principle of law it appears that the view, of Mr. Justice Page, that the reversioners who inherit the estate after surrender, may challenge the unauthorised alienations made by the holder of the widow's estate, even during her life-time, is more consonant to reason than the strong contrary (*c*) opinion. By surrender the rights of the next heir of the last full owner is accelerated and there is no reason why the reversioner will not get all the rights then available including the right to challenge an unauthorised alienation made by the widow who in the eye of law is deemed to be dead Her right with respect to the property in which she had a widow's estate have come to an end.

View of Mr Justic Page reasonable

The view of law that there cannot be a valid surrender when the widow has made unauthorised alienation seems to be equally fallacious The act of surrender of a widow's estate does not depend on the volition of any one else except the widow. No one can prevent the operation of law coming into play by the simple wish of the holder of the widow's estate. Nor can any one force her to enjoy the widow's estate simply because she had made an alienation not binding on the estate. Whatever is left by the widow after her proper use of the widow's estate, will vest in the reversioner, and if any improper alienation had been made by the surrendering widow, the reversioner may be at liberty to set it aside.

and why

The Privy Council, in the case of *Man Singh*, v. *Nawlakhbati* (*d*) in which two widows, when Wards of Court, surrendered the estate without sanction of the Court has held, "The so-called surrender in the present case was, as

Serrender and Sec. 60 Court of Wards Act,

(*b*) Rangasami v Nachiappa, 46 I A 72, 79 42 M. 523 36 M L J 493: (1919) M W N 262 23 C W N 777: 29 C L J 539. 21 Bom L R 64 · 17 A L J 536 50 I C 498

( ) *see* p 796 *foot notes* (*w*) (*x*) and (*y*)

(*d*) 5 P. 290 43 C L J 259 31 C W N 49

stated above, void in law, and was also void as being in contravention of Section 60 of the Act" The Courts in India, perhaps, decided the case on the only question, whether the surrender was valid in view of Section 60 of the Court of Wards Act, (*e*) and consequently their Lordships observed as follows "Those learned Judges might have found on facts that the deed was void independently of Section 60 of the Act."

Their Lordships did not give any reasons for holding why the surrender was invalid under Section 60, which runs as follows:—

Sec 60

"60. No Ward shall be competent to create, without the sanction of the Court, any charge upon, or interest in his property or any part thereof,"

In cases of surrender, as has been stated above, the holder of the widow's estate is deemed as civilly dead and hence, she cannot be said to 'create' any 'interest' in her property, she can, at best, be said to have extinguished her own rights in the property and thereby expedited, the succession of the reversioner. It has been observed by Sir Naliniranjan Chatterjee, Kt., the Acting Chief Justice of the Calcutta High Court, (Rankin and Chakrabarti JJ. agreeing) that there must be an effacement of the widow—an effacement which in other circumstances is effected by actual death or civil death—which opens the estate of the deceased husband to his next heirs at that date (*f*) It is similarly held by the Allahabad High Court (*g*) that if a widow brings about a complete effacement of herself, the entire estate vests in the next reversioner. If a holder of a widow's estate, when a Ward of a Court, but not a minor, leaves the life of a householder and begins to reside in a holy place maintaining herself by begging alms, giving up all her interests in the property observing all formalities, how can a Court hold that there was no valid surrender as no sanction of the Court was obtained under Section 60.

(*e*) Act IX of 1879
(*f*) Prufollo Kamini v Bhabani, 30 C W N 1011, 1038.
(*g*) Maru v. Hanso, 48 A. 485. 1926 A. 413.

Surrender and reconveyance

Surrender and reconveyance—Where, however, a widow relinquished the whole estate in favour of the then reversioner, and the latter made an absolute gift of half the estate to the widow to enable her to make a provision for maintenance of a son adopted by her, whose adoption had been declared invalid in a suit by the reversioner, it has been held that the relinquishment is valid as to one-half of the estate, and invalid as to the other half reconveyed to the widow. It is difficult to follow the distinction. for the widow intended really to relinquish one-half *in consideration* of getting an absolute litle to the other half. (*h*)

when form part of same transaction

In a later case, however, this ruling is held to apply only when the conveyances formed parts of one and the same transaction and therefore the conveyance by the reversioner to the widow, which is not established to have formed one transaction with the deed of surrender executed by the widow in favour of the reversioner, is held to be not open to objection. (*i*)

But in another case, where the widow and the nearest reversioners executed a deed whereby the latter, in consideration of a portion of the estate being conveyed to them by the widow, did *bona fide* give up all their rights to the remaining portion, and consent to the disposal of the same by the widow according to her pleasure, it is held that the actual reversioner, who claim through the consenting reversioners, are *estopped* and bound by the consent of their father, upon the authority of the case of *Bajrangi Singh* v. *Manokarnika Singh*, (*j*) although the learned judges were of opinion that the reversioners could not grant a general release of their reversionary right, with a view to enlarge the widow's power and enable her to give an absolute title by prospective alienation. (*k*) It is doubtful whether the actual reversioner who derives his right directly from the last full owner can be estopped by his father's consent, (*l*) and whether *Bajrangi's* case really

(*h*) Hemchunder *v* Sarnamoyi, 22 C 354 (*i*) Kanuram, *v* Kashi, 14 C W N 226

(*j*) 35 I A 1 12 C W N 74 6 C L J 766 5 A L J 113 M L T 1 9 Bom L R 1348. (*k*) Rangappa *v* Kamti, 31 M.366

(*l*) *See* Bahadur *v* Mohar, 29 I A 1

supports the view of estoppel. But it has been held that surrender for consideration will not be invalid provided it was for the entire estate. *(m)*

P C view on valid surrender,

The Privy Council after considering various cases on the point has summarised the law thus: "An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, and not a device to divide the estate with the reversioner." *(n)*.

surrender with stipulation

maintenance, residence, payment of her debts.

A reasonable stipulation for maintenance *(o)* and residence, *(p)* or to pay the widow's debts, *(q)* does not affect the validity of a surrender provided it is a *bona fide* surrender of the entire interest of the widow and not a device to divide the estate with the next reversioner. But a surrender is not valid, when made with the object of providing a sum of money to the daughter under the terms of surrender, inasmuch as the holder of the widow's estate was fairly certain that on her death the reversioner would not carry her wishes, and when the transaction was resorted to to get at the corpus paid into Court by Government as compensation. *(r)*

(m) Brahamanaikudu *v* Mahalakshmi 24 M L J 533 17 I C 487

(n) Rangasami *v* Nachiappa, 42 M 523, 536: 46 I A 72 36 M.L J. 493 · 23 C W N 777 29 C L J 539: 17 A L J 536 21 Bom L R 640 50 I C 498 approved in Bhagwat *v* Dhauukadhari, 46 I A 259 47 C 466 24 C W N. 274 37 M L J 513 · 22 Bom L R 477: 17 A L J 1036, see Sureshwar *v* Maheshrani, 48 C 100. 47 I A 233 25 C W N 194 P C 39 M L J 161 18 A L J 1369 57 I.C 325, Khawani *v* Chet Ram, 39 A 1 37 I C 86, Sham *v* Jaicha, 39 A 520, Moti *v* Laldas 41 B 93 18 Bom L R 954, Indra *v* Carbasova, 41 C L J 341 87 I C 930 1925 C 743 Sambasiva *v* Ramaswami 353 16 I C. 772 1935 M 803 Venkata *v* Loti 82 I C 1025 1925 M 382

(o) Bhuta *v* Manga, 1930 L 9

(p) Angamuthu *v* Varatharajulu, 42 M 854, 861 F B 37 M L J 384 531 I C 386, Munugarra *v* Manugarra 34 M L J 229: 42 I C 939 Chineswami *v* Appaswami 42 M 25 35 M L J 512 48 I C 147, Supdi *v* Maruti 67 I C 960 (N), Mokham *v*. Bansidhar, 9 O L J 350 68 I C 972 1923 O 14, Abhoya *v* Ram, 89 I C 770 1926 C 228, Gohal *v* Surendra, 85 I C 804: 1925 C 1004, Anna Nana *v* Gojra, 1928 B 333

(q) Rajagopal *v* Suryanarayana 41 M L J 208 64 I C 488: (1921) M W N. 431

(r) Siva subramania *v* Piramu 49 M.L J 128 90 I C 1024 1925 M. 1111,

It has been held that the interest of the widow in the property reserved for her maintenance need not be a life-estate. (*r*)

Sub-Sec iii—SALE OR GIFT TO REVERSIONER

Alienation of a portion to reversioner

Sale or Gift by widow of a portion to Reversioner.— It should be noticed that the *acceleration of succession* by the widow's relinquishment of her right in favour of the reversioner, must relate to the *whole* estate, upon the theory of retirement from the world or renunciation or extinction of temporal affections or of desire for property, operating as *civil death*. But the gift or sale by the widow of a *portion* of her husband's estate to the reversioner, was held to convey an absolute title without any legal necessity whatever, and to be good and valid against the actual reversioner. (*s*)

invalid

But the Privy Council in the cases (*t*) referred to above has finally settled the question and has held that a widow in possession of a limited estate cannot make a valid transfer of an absolute right with respect to a portion of the estate to the reversioner ; as it is the effacement of the widow which opens the right of the reversioner and as there cannot be a widow who is partly effaced and partly not so.

Sub-Sec iv—ALIENATION WITH REVERSIONER'S CONSENT

Alienation with reversioner's consent

Alienation with reversioner's consent—In some cases the validity of an alienation with the nearest reversioner's consent is sought to be deduced from, or supported by, the widow's power of surrender or relinquishment of her interest in her husband's estate, causing the same to be vested in the nearest reversioner. But this is an effect of the civil death recognised by Hindu law, to take place on the happening of any one of three events, namely, (1) degradation for the commission of a heinous sin causing the guilty person to be outcasted, (2) adoption of a religious order, and (3) renunciation or extinction of worldly affections and desire for property , and civil death causes destruction of ownership in all descriptions of property whether it be her *Stridhana* or

What constitutes civil death

(*r*) Karruppa *v* Mudali, 43 M L J 36 67 I C 397
(*s*) Annada *v* Indra, 12 C W N 49 , Kanuram *v* Kashi, 14 C W N 226.
(*t*) See *foot note* (*n*) above

Reversioner's right accrues by operation of law on surrender

inherited by her, and opens succession to the next heir by accelerating inheritance. It should be borne in mind that the reversioner's ownership arises by the operation of the law of inheritance and not by any act of transfer by the widow, who only destroys her interest, but does not cause the accrual of the next heir's ownership, except indirectly by accelerating succession. *Surrender* must therefore comprise the whole of the husband's estate ; it can by no means explain alienation of a portion of property ; nor is it at all necessary to rely on it for that purpose, as the two are unconnected according to Hindu law. Alienation with the *consent* of the husband's *kinsmen* is expressly laid down ; but this rule raises the question, whether the consent of *all* or *some* of the kinsmen is necessary , and for the solution of this question reliance is placed on the doctrine of surrender by the widow's renunciation accelerating inheritance, and causing the estate to vest in the *immediate* reversioner, who is therefore deemed the *kinsman* to be principally considered as interested, and his *consent* must be taken to be necessary and sufficient by the intendment of law.

Conflict of decisions

The conflict of decisions on this point, of the different High Courts, is mainly attributable to the erroneous view that the widow's act of withdrawing, destroying, or relinquishing her interest, is the direct cause of the nearest reversioner's right, and that she may relinquish her rights in a portion only of the estate, and that this liberty to surrender a portion forms the foundation of the validity of an alienation with the immediate reversioner's consent It would be convenient to consider the law of the Bengal School, first

Dayabhaga

It is laid down in the Dàyabhàga itself (*u*) that the widow may, with consent of the husband's kinsmen, deal with his estate in any way , and the reason is, that they are her lawful guardians in default of the husband and the male issue This follows from her status of perpetual tutelage under the Hindu law (*v*) her supposed want of discretion being supplied by their *auctoritus* It is only with their permission, that she may make any gift to her own relation on her father's or on mother's side This rule is supported by the authority of the following text of Narada —

Narada's text

मृते भर्त्तर्यपुत्रायाः पतिपक्षः प्रभुः स्त्रियाः ।
विनियोगेऽर्थरक्षासु भरणे च स ईश्वरः ॥
परिक्षीणे पतिकुले निर्मनुष्ये निराश्रये ।
तत् सपिण्डेषु चासत्सु पितृपक्षः प्रभुः स्त्रियाः ॥ नारदः ॥

(*u*) D B 11,

(*v*) Texts Nos 2 and 3

which means,—"When the husband is deceased, the husband's kin are the guardians of his sonless wife in the *disposal* and care of the property, as well as in (the matter of) maintenance, they have full power But, if the husband's family be extinct, or contain no male, or be helpless, or there be no *sapinda* of his, then the kin of her own parents are the guardians of the widow"

While commenting on this text the author of Dàyabhàga says, that "*disposal*" means "gift and the like" which expression means and implies "gift, sale and mortgage," *i e*, any disposition of property

Whose consent necessary

This doctrine that the widow may with the consent of the husband's kinsmen deal with her husband's property, was acted upon by the Courts of Justice from the earliest times But the difficulty which was felt for a long time, was, as to whether by "the consent of husband's kinsmen" is intended, the consent of all persons who may possibly be heirs of the husband, or the consent of the nearest or the presumptive reversionary heirs

Presumptive reversioner's consent sufficient.

This difficulty has now been removed and it has heen held that the presumptive reversionary heir's consent is sufficient, because the widow may by retirement or by renunciation, cause the estate to be vested in the reversioner, and he is the person to be principally regarded in this connection (*w*)

Reversioners' consent seem to give widow absolute powers;

So it appears that the widow and the presumptive reversioner are together competent to deal with the whole interest of the widow and of the reversioner in the property in any way they please, (*x*)but not in a portion of it (*y*)

When there are more reversioners than one, of the same degree, the consent of *all* is necessary, the consent of only one or some being of no legal effect, the alienation in such a case is absolutely void (*z*) This decision has been approved by the Judicial Committee in *Bajrangi's* (*a*) case. So a non-consenting reversioner can recover back his share int he reversion from the alienee after the widow's death. (*b*)

consent may be given retrospectively,

The Privy Council in the same case lays down for the first time an important principle, namely, that the reversioner's consent need not be given at the time of the alienation by the widow. (*c*) If subsequent ratification

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(*w*) Nobokishore v. Hari Nath, 10 C 1102 (F B), Raj Lukhee v Gokool, 13 M.I.A 209, 228 12 W R 47 · 3 B L R P C 57
(*x*) Bhola v Harimani, 30 C L J 6, Jiwatmal v Gianibai, 10 S L R 49 · 35 I C 681.
(*y*) Rames v Sasi, 23 C W N 1025 30 C L J 56 53 I C 654
(*z*) Radha v Joy, 17 C 896 and note 900 (Sristidhar v Brojo), see in this connection Sumitrabai v Hirbaji, 1927 N 25, Yeswant v Tulsabai, 1927 N. 134
(*a*) 30 A 1 . 35 I A. 1 12 C W N 74 . 6 C L J 766 5 A L J 1 . 3 M L.T 1 : 9 Bom L R 1348
(*b*) Ajudeia v. Mathura, 1926 A 609
(*c*) *See* Malik v Malikarjunappa, 38 B 224 15 Bom L R 1142 22 I C. 292, but see *contra* Mulugu v Mudigonda, 31 M.L J 406, 36 I C. 407.

is not sufficient for validating a previous alienation, then arises the question whether a prior consent can validate a future alienation? In other words, will consent have prospective as well as retrospective effect? There seems to be no difference in principle between the two

Recent decisions hold to be presumption of necessity

The Privy Council (*d*) and the Courts in India (*e*) have lately considered the effect of consent of the presumptive reversioners in an alienation made by one who had only a *widow's estate* in the property. It is now clearly explained that the widow and the reversioner do not represent the whole estate, inasmuch as the reversioner has got no vested interest in the estate but merely a *spes successionis*. Hence. it is now finally settled that "when the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde* and the alienee does not prove enquiry on his part and honest belief in necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one." (*f*)

in alienation;

Value of such presumption.

The value of such presumption depends on the circumstances of each case. (*g*) But the presumption is not affected even if

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(*d*) Rangaswami *v* Nachippa, 42 M 523 46 I A 72 · 36 M.L J 493 : 23 C W N 777 29 C.L J. 539 17 A L J 536 21 Bom L R 640 50 I C 498 on appeal from 28 M L J 1, Bejoy *v* Girindro, 41 C 793 18 C-W N 673,681 19 C L.J 620 12 A L J 711 16 Bom L R 425 27 M L J 123 23 I C. 162 Hari Kishen *v* Kashi, 45 C. 876 42 I A 64 19 C W N 370 21 C L J 225 13 A L J 223 28 M L J 565 27 I C 674

(*e*) Debi Prosad *v* Golap, 40 C 721 (F B) 17 C W N 701 17 C L.J 499 : 19 I C 273, Shymadas *v* Radhika, 22 C.W N 846, 29 C L J 24 47 I C 853, Gopeswar *v* Durgamani, 17 C W N 1062 19 C L J 318 21 I C 200, Ramesh *v* Shasi 23 C W N 1025 30 C L J 56 : 53 I C 654; Marudhamuthu *v* Srinivasa, 21 M 128 (F B) 8 M L J 69, Nachiappa *v* Rangaswami, 28 M L J (1, affirmed by P C 46 I A 72 see above), Bhup *v* Jhamman, 44 A 95 19 A L J 881 64 I C 630, Pilu *v* Babaji, 34 B 165 11 Bom L.R. 129, Moti *v* Laldas, 41 B 93 18 Bom L R 954 37 I C 945, Bai Parvati *v* Dayabhai, 44 B 488 22 Bom L R 704 58 I C 256 (in connection with Bombay cases *see* Vinayak *v* Sitabai, 1927 N 312), Nabin *v* Hem 20 I C 248 (C), Mata *v*. Devi 58 I C 576 (A), Bhagwana *v* Rameshwar, 6 O L J. 460 : 22 O C 256. 53 I C 674, Baij Nath *v* Mangala, 6 P L T 731 90 I C 732

(*f*) Rangasami *v* Nachiappa 42 M 523 *supra*, see Ramaswami *v* Rajagopalachariar, 22 L W 518. 1926 M 29.

(*g*) Thakur v Dipa 10 P 352

the reversioner received a substantial benefit under the transaction. (*h*)

The presumption of existence of legal necessity by reason of the consent of the reversioner does not, however, arise if the transfer was in favour of such reversioner, (*i*) or with the consent of female reversioner. (*j*)

Female reversioner's consent

The consent of a female reversioner, however, will not be effectual, (*k*) though under the Bombay school, she is entitled to absolute estate on succession (*l*) But her consent is sufficient to estop her from challenging an alienation, (*m*)

Presumption on reversioner's consent

But the principle that alienation with the reversioner's consent raises a strong presumption that the transaction is valid and proper, has no application in case of a gift *inter vivos* (*n*) or by Will (*o*) made by the widow. Such a gift with the presumptive reversioner's consent will not bind the actual reversioner or the adopted son. (*p*) But in a case of gift of a portion of the property to a reversioner and a Will of another portion in favour of a third person, both executed on the same day, the deed of gift being signed by the third party and the Will by the reversioner, it has been held that the reversioner is estopped from challenging the devise in fovour of the third person. (*q*)

She and reversioner cannot turn absolute estate.

Thus the widow and the reversioners cannot combine to turn the widow's estate into absolute one. (*r*)

What constitutes consent

What constitute reversioner's consent—The reversioner ordinarily gives his consent by joining the widow in executing the deed of transfer, or by attesting the deed reciting his consent to the transfer, when he is aware of its contents. (*s*)

(*h*) Ambika *v* chandramani 8 P 396 1929 P 389, *sec* Ramgonda *v* Bhausaheb 52 B 1 54 I A 396 32 C W N 88 1927 P C. 227, Tangeva *v* gobindappa, 1928 B 495 Krisnnaswamy *v* Muthlukashime, 1928 M 1097

(*i*) Upendra *v* Gurupada 34 C W N 404, 408 1930 C 508

(*j*) Kurvoteppa *v* Nigayya 1930 B 299

(*k*) Bepin *v* Durga, 35 C 1086 · 8 C L J 120 12 C W N 914

(*l*) Kishan *v* Namdeo, 1929 N 277

(*m*) Akkava *v* Sayadkhan 51 B 475 F B, 1927 B 260, Taneeva *v* Govindappa, 1928 B 495

(*n*) Abdhulla *v* Ram, 34 A. 129 8 A L J 1318 12 I C 601, Drigpal *v* Harhar 24 O C 245 64 I C 80, Pilu *v* Babaji, 34 B 165 1 Bom L R 1291.

(*o*) Durga *v* Ramkrishna, 18 C LJ 162 21 I 714

(*p*) Tukaran *v* Yesu, 55 B 46

(*q*) Puran *v* Duti, 1926 A 684

(*r*) Thakur *v* Dipa 10 P 352

(*s*) Sham *v*. Achhan, 25 I.A. 183, 189, Udai *v* Gajendra, 70 I C. 815.

When the reversioner negotiated the transaction and he with the other reversioners attested the deed, the alienation is to be treated as done with the reversioners' consent. (*t*) But mere attestation is not necessarily equivalent to consent, (*u*) nor is a reversioner estopped by signing the deed, from disputing the validity of an alienation made by the widow. (*v*) But if the reversioner stands as surety for the due performance of the considerations of a mortgage deed executed by the widow, it is tantamount to a consent. (*w*).

a question of fact

But such assent should not be inferred from ambiguous act or be supported by dubious oral testimony. (*x*) It is a question of fact, and may be proved otherwise than by a writing, it must be established that the reversioner consented to the destruction of his reversionary interest, in consideration of deriving some benefit by the transaction. Accordingly, where a widow sold a portion of her husband's estate through the presumptive reversionary heir who acted as her Mukhtiar, but who did not receive any portion of the consideration, it is held that although it was stated in the deed that—"the vendor has become absolute owner of the share sold from the date of sale"—yet there being no evidence of necessity, the widow's life-interest only passed, and therefore the then reversioner's grandson who was the actual reversioner was entitled to eject the purchaser. (*y*)

A transfer by widow of a portion to the presumptive reversioner purporting to surrender all her interest and a sale of the same property by the latter the next day, both deeds being registered on the same day consecutively, constitutes a transfer by widow with the reversioner's consent;

(*t*) Srinivasaragavachariar *v* Rajagopalachariar, 1927 M 438.

(*u*) Abhoy *v* Attarmoni, 13 C W N 931 1 I C 415 Upendra *v* Bindeshri, 22 C L J 452 20 C W N 210 32 I C 468, Mathura *v* Jagat, 18 I C. 289 (O); in this connection *see* Gaja Sing *v* Uchhaba, 1929 A. 223

(*v*) Lala Rup *v*. Gopal 36 C 780 13 C W N 920. 10 C L J 58 6 A L J 567 5 M L T 423 11 Bom L R. 833 93 P.R (1909) 3 I C 782, Thakur *v* Dipa, 10 P 342, *but see* Chandi *v* Gur 1930 O. 339

(*w*) Sunder *v*. Kamun 1929 N 516

(*x*) Hari Kishen *v* Kashi, 42 C 876 42 I A 64 19 C.W N. 370. 21 C.L J 225. 13 A L J. 223 28 M.L J 565 27 I C. 674.

(*y*) Jiwan *v*. Misri, 23 I A I.

the actual reversioner after the death of the widow, therefore, cannot get the sale set aside without proof of want of legal necessity. (z)

Registration.

The assent may be in writing but such writing is not compulsorily registrable. (a)

Family settlement

Estoppel by conduct of reversioner.—A reversioner has got no *præsenti* interest in the reversion during the life time of the holder of the widow's estate. His interest, as has already been stated, a mere *spes successionis.* But a reversioner may enter into a family settlement or agreement with the holder of the limited estate, so as to preclude himself from challenging an alienation made by the limited owner on the strength of the agreement. (b) But the question whether the alienation can be questioned by the actual reversioner, had been kept open by the Privy Council ; (c) but a subsequent decision of the Board has expressed that if some person other than the one who was a party to the family arrangement had been, at the death of the holder of the widow's estate, the nearest heir of the last full owner, it might have been open to him to question the alienation. (d) The heir of the person who was party to the settlement and who trace his inheritance through him are, however, equally estopped to question the alienation. (e) So a male reversioner who succeeds to the estate will not be bound by any act of the female reversioner immediately preceeding him, though she herself might have been estopped by her own conduct when the estate vested in her after the first holder of the widow's estate ; because the male reversioner traces his inheritance from the last full owner and not through either of the preceeding limited owners. But the Calcutta High Court

Heirs of reversioner

(z) Malik v Mallikarjunapa, *Supra foot note* (c) p 803

(a) Said v Kunwar Darshan, 50 A 75.

(b) Ramgowda v Bhansahe, 52 B 1 54 I A 396 32 C W N 88 · 1927 P C 227; Hardei v Bhagwan, 24 C W N 105 50 I C, 812 P. C , Chahlu v Parmal, 41 A 611 51 I C 919, Barati v Salik 38 A. 107 31 I C 919, Pulliah v Varadarajulu, 31 M 474, *see p* 745 *foot note* (r), *p* 792 *foot notes* (p) and *foot note* (q) of p 805, Nakched v Sukhdeo 1030 A. 430,

(c) Hardei v Bhagwan, *see above*

(d) Ramgodowda v Bhausaheb, *see above*

(e) Ibid.

in a recent case seems to have held a contrary view. (*f*) If this view of law be applied a widow holding her husband's estate in collusion with her daughter who is the presumptive reversioner, may deprive the male reversioner absolutely if the daughter happens to survive the mother.

Reversioner's assent how far effective.

Similarly a reversioner be he a male or female (*g*) who assents to the alienation by the widow is estopped from questioning the validity of the alienation (*h*) even if the assenting reversioner succeeds to the estate after another intervening female reversioner. (*i*) The position is not altered even if the assent was obtained for valuable consideration (*j*) But in each case of consent at the time of the transaction, the reversioner cannot be said to be estopped from contesting the transaction after the death of the limited owner, (*k*) and when both parties were aware of the true state of affairs. (*l*) So also a reversioner is bound in equity by his agreement for good consideration not to claim the property when the succession opens. (*m*)

Though the reversioner is estopped from claiming possession, the title to immoveable property, in the absence of proper instrument duly registered, cannot pass to a person, merely because the reversioner admitted of a valid oral gift by the widow to the donee. (*n*)

(*f*) Madan *v* Rakhal, 33 C W N 1042 in this connection see also Upendra *v* Gurupada, 34 C W N 404 1930 C 508

(*g*) Akkava *v* Sayadkhan, 51 B 475 F B 1927 B 260, Tangeva *v* Govindappa, 1928 B 495

(*h*) Ramakotayya *v* Viraraghavayya, 52 M 556 F B 1929 M 502, Mahadeo *v* Mata, 44 A 44, 50 19 A L J 799, 63 I C 721 affirmed in Fateh *v* Thakur, 45 A 339 F B 1923, 387, Mata *v* Debi, 58 I C 575 (A); Amar *v* Rajendra, 87 I C 790. 1925 C 1205, Shib *v* Dulken, 28 C L J 123 · 48 I C 78, Basappa v Fakirappa, 46 B 292 23 Bom L R 1040. 46 B 292; 23 Bom L R 1040 64 I C 214, Shiba *v* Ram, 25 I C 90, Shunmuga *v* Koyappa, 60 I C 635 (1920) M W N 679, South Indian *v* Subbier, 28 M L J 695, 29 I C. 957, Bhallamuddi *v* Thirumamidi, 48 M L J 284 88 I C 765 1925 M 638, Viraraghayya *v*. Rama, 1926 M 508

(*i*) Ramakotayya *v* Viraraghavayya, *see above*

(*j*) Ambika *v* Candramani, 8 P 396: 1929 P 389; see Tangeva *v*. Gobindappa, 1928 B 495, see also Rengan *v* Palanivandi, 1928 M 1101

(*k*) Rajagopalachariar *v* Sami, 1926 M 517,

(*l*) Swamnatha *v* Swaminatha, 1927 M 458,

(*m*) Raghubir *v* Narain 1930. A 498

(*n*) Bachchi *v* Debi, 1929 A 300

An attestation by a presumptive reversioner on a deed of transfer by a widow, does not by itself create estoppel against the reversioner nor imply his consent. *(o)*

Sub-Sec v -SUITS BY REVERSIONERS

Persons competent to question alienation,

(a) Presumptive reversioner,

Declaratory suit by reversioner, female and male— It has already been said that when a widow alienates without legal necessity or alienates more property than what is necessary for raising the amount required, the presumptive reversioner may bring a suit for a declaratory decree, though his interest is merely a contingent one. *(p)* Execution of a Will by a Hindu widow will not, *(q)* unless for special reasons be considered to afford sufficient ground for granting a declaratory decree to a presumptive reversioner *(r)* But where the immediate reversioner has fraudulently colluded with the parties to the alienation, *(s)* or is unwilling to take the trouble, or owing to poverty unable to sue *(t)* or is a woman *(u)* who herself has but a qualified interest and could not even by joining in the act of alienation give an absolute title, the remote reversioner may bring such a suit. *(v)* But the nearest reversioner may be directed by the Court to be made a party to the suit. *(w)*.

(b) Remote reversioner

(o) Thakur *v* Dipa, 10 P 352

(p) Raj Lukhee *v* Gokool, 13 M I A, 209 12 W R P C 47, Goolab *v* Rao Kurun, 14 M I A 176, Jumoona *v* Bamasoondari, I C 289 3 I A 72 25 W R 235, Jigdeep *v* Jaibasi, 19 C W N 1191, Motising *v v* Sobhomal, 9 S L R 69 30 I C 968, Balbhaddar *v* Prag 41 A 492: 17 A L J 765 50 I C, 938, Obala Kondama *v* Kandasamy, 47 M 181 · 51 I A 145 28 C W N 1050 P C, (declaration for amortgage decree not binding) Manakshi *v* Palaniappa, 1928 M 1138, (Suit by female reversioner) Bal Kaur *v* Har, 1928 L 242

(q) Umrao *v* Badri, 37 A 422 13 A L J 551 29 I C 302

(r) Jaipal *v* Indar, 26 A 238 31 I A 67: 8 C W N 465 6 Bom L.R. 495 M L J 149

(s) Ambika *v* Chandramani, 8 P 396 1929 P 289, Vaiamali *v* Kundau, 1928 L 267, Bullraju *v* Butchi, 1130 M 412 (withdrawal for valuable consideration of suit brought challenging a Will left by last full owner).

(t) Amar *v* Ralli, 1930 L 211

(u) Jawahra *v* Data, 1925 L 156

(v) Abinash *v* Harinath, 32 C 62 9 C W N 25, Ramyad *v* Rambihari, 4 Pat L J 734 (Women intervening), Chidambara *v* Nallammal, 33 M 410 5 I C 164, Deoki *v* Jwala, 50 A 678 1928 A 216, Lakhpati *v* Rambodh, 37 A. 350 · 29 I C 218 13 A L J 616 (daughter intervening), Gumanan *v* Jahangira, 40 A 518 16 A L J 465 46 I C 186, in this connection *see* Surjo *v* Dalelo, 7 L L J 474. 87 I C 937 1925 L 573

(w) Sita Saran *v* Jagat, 49 A 815

The minority of the nearest reversioner does not empower a more distant reversioner to sue; the more distant reversioner may, however, appear and sue as the next friend of the minor. (x).

P C on who can sue.

It has been held by the Privy Council that ordinarily the right to sue belongs to the presumptive reversioner, (y) but "There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other woman whose acts are impugned." (z) The next reversioner can continue the suit but not the legal representative of the deceased reversioner; (a) but the remote reversioner is not to wait till the suit becomes barred by limitation against all the presumptive reversioners.

Limitation.

The period of limitation is twelve years under Art. 125 of the Second Schedule to the Limitation Act (1908) from the date of alienation for both the nearer and remote reversioners. (b)

Presumptive reversioners' act if bind actual reversioners.

An actual reversioner is not affected or bound by laches or contract of a presumptive reversioner, (c) even when the former is related to the last full owner through the latter. (d) In this case a Full Bench of the Allahabad High Court reviewed all the previous decisions, and held that one reversioner does not derive his title from another even if that other be his father, but he derives his title from the last full owner. (e) If, therefore, the right of the nearest rever-

(x) Kalicharan v Bageshra, 23 A L J 653 89 I C 374 1925 A 585, Viranwali v Kundan, 19 28 L 267

(y) Jhandu v Tarif, 37 A 45 19 C W N 197 21 C L J 26 28 M L J 453 17 Bom L R 44 27 I C 892, Mata v Nageswar, 30 C W N 626 52 I A 398 28 O C 352 50 M L J 18 1925 I C 272, Gumanan v Jahangira, 40 A 518 16 A L J 465 46 I C 186.

(z) Venkatanarayana v Subbammal, 38 M 406, 412 42 I A 125 19 C W N. 641 21 C L J 515 29 I C 298 28 M L J 535, Janaki v Narrayanasami, 39 M 634 43 I A 207 31 M,L J 225 20 C W N 1323 24 C L J. 309 14 A L J 997, 37 I C 161, Fateh Singh v Jagannath Baksh, 29 C W N 749, 751 P C

(a) China v Lakshminarasamma, 37 M 406 22 M L J 375 15 I C 213

(b) Kunwar v. Bindraban, 37 A 195 13 A L J 196 26 I C 737, Gadiraju v Dandu, 53 I C 171, Varamma v Gopaladasayya 41 M 659 (F B.) 35 M L. J 57 46 I C 202, Ranga v Ranganayaki, 35 M L J. 364

(c) Abdul v Bishan, 1930 A 9

(d) Bhagwanta v Sukhi, 22 A 33 (F B)

(e) *See* Veerayya v Gangamma, 36 M 570 23 M L J 269 16 I C 839.

sioner for the time being to contest an alienation or adoption is allowed to be barred by limitation as against him, this will not bar the similar right of a remoter reversioner.

Limitation,

The period of limitation for instituting a suit for declaring the invalidity of an alienation being twelve years from the date of the alienation, should the same be allowed to elapse by the reversioner, then no new cause of action can arise after his death to a remoter reversioner who may bring a suit for possession after the widow's death, though barred as regards a declaratory suit (*f*)

A suit for declaration, brought within the three years after a minor reversioner attained majority but more than twelve years after the alienation in question was made, will be barred by limitation if there were other reversioners of the same degree, as the provision of Section 7 of the Limitation Act does not apply in such cases. (*g*)

Declaratory suit that plaintiff reversioner does not lie.

The reversioners, however, cannot sue for a declaration that he is the nearest reversioner, (*h*) unless the decision of that question is incidental to the grant of some other relief to which he may be entitled. (*i*)

P C on remote reversioner's rights

In the case of *Bahadur* v. *Mohar*, (*j*) in which a certain arrangement between a widow and the then reversionary heirs was contended to be binding, as a contract, on the actual reversioners who were the appellants before the Judicial Committee, their Lordships made the following observations,—"assuming that this arrangement ** amounted to a contract between the then claimants and Pritu (the widow), such a contract is not binding on the appellants (actual reversioners). According to Indian law, the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own rights as heirs of Mohar,

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(*f*) Mesraw *v* Girijanunda, 12 C W N 857
(*g*) Neelakantamior *v* chinnu, 1927 M 216
(*h*) Deoki *v* Jwala, 50 A 678; 1928 A 216, Janaki *v*. Narayanasami, 39 M 634 43 I A 207. 31 M L J 225 20 C W N 1323 24 C.L J 309 14 A.L J. 997 37 I C 161, *see* also Saudagar *v* Pardip, 45 I A. 21 45 C 510 22 C W N 435. 27 C L J. 185 34 M L J 67 16 A L J 61 20 Bom L R 509
(*i*) Navaneetha *v* Ramaswami, 40 M 871. 33 M L J 277 39 I C 253: (1917) M W.N 201
(*j*) 29 I.A. 1, 8 9. 24 A 94 6 C W.N. 169 4 Bom. L.R. 233.

when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces descent."

Exceptions.

There are some cases in which the actual reversioner is held affected by the laches of presumptive reversioners. (*k*)

Onus re husband's immoral debts

In a suit for declaration that a mortgage executed by the widow to pay her husband's real debt due not to the mortgagee, is not binding on the estate, the onus is shifted on the reversioner to prove that the debt contracted by the husband of this widow was tainted with immorality. (*l*)

When remote reversioner interfere

When the nearest reversioner enters into a compromise and thus prevents himself from claiming the property, the next remote reversioner does not thereby acquire any right to challenge an alienation by the widow during the life time of the nearest reversioner. (*m*)

Effect of declaratory decree against actual reversioners

The Specific Relief Act provides for declaratory decrees in Section 42, and then lays down in Section 43 that a declaration made by the Court in a suit for a declaratory decree is binding only on the parties to the suit and on persons claiming through them respectively Hence it follows that as one reversioner does not claim through another, one cannot be bound by such a decree in a suit by another In *Jumoona* v *Bama*, (*n*) the Privy Council expressed a doubt as to whether a decree in favour of an adoption passed in a suit by a reversioner to set it aside, would be binding upon any other reversioner In a later case by the presumptive reversioner to set aside an alienation, their Lordships indicate strongly that such a decision would not be binding as *res judicata* on a new reversioner (*o*) So in a case for declaration, that a Will in which an issue was raised and decided as to the position of the plaintiff as next reversionary heir, their Lordships pointed out in order to guard against any possible misapprehension, that the present decision will have settled nothing as to who would succeed, when the inheritance opens by the death of the widow, the issue being decided only between parties to to the suit (*p*)

The Madras High Court has taken a view in favour of the binding character of the decrees in declaratory suits

(*k*) Pershad *v* Chedee, 15 W R 1, Mrino *v* Bhoobbun, 23 W R 42 and 285, Harnabh *v* Mandil, 27 C 379, 403
(*l*) Mangal *v* Deva, 1929 L 846
(*m*) Mithan *v* Nabi, 1927 A 508
(*n*) 3 I A 72, 84 1 C 289 25 W R 235
(*o*) Isri *v* Hansbutti, 10 C 324, 331 10 I A 150, 157, see Arunachela *v.* Kuppunadha, 21 I C 502 (1913) M W N 866
(*p*) Jaipal *v* Indar, 266 A 283, 244 31 I A 67 70 8 C W N 465 6 Bom L R 495 · 14 M L J 149, see Veerammal *v* Kamu, 30 I.C. 815 2 L W 850.

relating to adoptions. (q) In a suit by a reversioner for a declaration that the adoption made by widow is invalid, the Privy Council has held that "such a suit by the presumptive reversioner is in a representative capacity on behalf of all the reversioners." (r)

Calcutta view,

The Calcutta High Court, has applied the above principle in a case in which a mortgage was executed by the widow and the presumptive reversioner and a decree was obtained by the mortgagee in a suit in which both the widow and the presumptive reversioner were impleaded as parties. The Court held "a reversioner so impleaded may be deemed a party in a representative capacity, (s) and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow. * * * The title of the purchasers in this case can consequently be defeated by the plaintiff, only after the decree, which is the root of that title, has been successfully impeached for fraud, collusion or other like reason" (t) So a collusive decree with the presumptive reversioner does not bind the actual reversioner. (u)

View of P C.

The Privy Council in the case of *Janoki Ammol v. Narayanasami*, (v) has explained the law which has been quoted with approval in a subsequent decision of the same Board. (w) It is observed as follows .—"* * * a reversionary heir * * * is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life * * * a reversionary heir thus appealing to the Court truly for the conservation and just administration

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(q) *See ante pp* 284 285

(r) Venkatanarayana *v* Subbemal, 42 I A 125 38 M 406, 411 19 C W N 641 21 C L J 515, 28 M L J 535 29 I C 298, *see* Varamma *v* Gopoladasayya, 41 M 659 F B 35 M L J 57 · 46 I C 202

(s) Venkatanarayana *v* Subbammal' *supra*

(t) Ganga *v* Indra, 22 C W N 350, 353 25 C L J 391 35 I C. 49.

(u) Gadhu *v* Bansgopal, 1929 A 859

(v) 39 M 634 43 I A 207 20 C W.N 1323 24 C L J 309 31 M L.J. 225. 14 A L J 997 37 I C 161

(w) Kesho Prasad *v*. Sheo Pargash, 46 A 831 51 I A 381 29 C W N 606, *see* Mata *v* Nogeshar, 47 A. 833. 30 C W N 626.

of the property does so in a representative capacity * * *." The Madras(x) and Lahore High Courts(y) have held a similar view.

Madras Lahore,

A decree for declaration enures for the benefit of the reversioner who succeeds after the death of the widow, though the reversioner was not in existence when the decree was obtained. (z)

Immediate possession by reversioners

An unauthorised alienation made by a widow does not entitle the next reversioner to immediate possession, (a) nor to follow the consideration money. (b)

Reversioners entitled to possession

Suit for possession after widow's death —After the widow's death, the then heir of the husband or the actual reversioner is entitled to recover possession by ejecting the purchaser, of any property alienated by the widow without legal necessity, or without the presumptive reversioner's consent, whether the property be moveable or immoveable. (c)

Onus

He is to establish that he is the nearest reversioner, (d) but any one setting up a kinship nearer than that of the plaintiff is to prove that relationship. (e) But in his suit against a trespasser, no strong evidence is required to prove the death of a nearer reversioner. (f)

He is not bound to *set aside* the alienation while suing for recovery of possession from the alienee, (g) as contemplated in Article 91 of Schedule I of the Limitation Act. Accordingly, if there be more reversioners than one, each of them can maintain a suit for his share only, and is not bound to sue for recovery of the whole estate. (h)

Legal necessity.

It is not necessary for the reversioner to plead absence of legal necessity, it being incumbent on the alienee to prove legal necessity for

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(x) Hussain v Venkata, 47 M L J 545 . 83 I C 140 1925 M 86
(y) Thakar v Uttam, 10 L 613, 642 1929 L 295 , Kahir v. Umar, L 421.
(z) Narain v Waryam, 1928 L 545
(a) Sarabjit v Bhagwot, 30 I C 578 (C)
(b) Ramayya v Mahalakshmi, (1921) M W.N 434 64 I A. 481.
(c) Pandhorinath v. Govind, 32 B 59 9 Bom L R 1305
(d) Javitri v Gendan, 46 A 779, Sarfaraz v Rajana, 1929 O. 129
(e) Javitri v Gendan, 49 A 779
(f) Badal v Saraswati, 1927 A 687
(g) Harihar v Dasarathi, 33 C 257 : 9 C W N, 636 : 1 C L J 408, *See* Kesho v. Chandrika, 68 I. C 394 . 3 Pat. L T 797 ; Rukhamabai v. Keshav, 31 B 1
(h) Sankar v Bejoy, 13 C.W N 201 ; 8 C.L J 458 . 4 I C 513

establishing his title to the property alienated by a widow. (*i*) Even when an alienation may be partially justifiable, or a portion of the consideration may be valid, the whole alienation must be set aside.(*j*)

Voidable;

It has already been stated that an unauthorised alienation by a holder of a widow's estate is not void but voidable at the instance of the reversioner, (*k*) it is not a personal right to the reversioner but an interest in the property which, upon the death of the holder of widow's estate, has descended to him from the last full owner. So a transferee of the reversioner can challenge an alienation made by the widow for want of legal necessity. (*l*) But an alienee of the reversioner cannot question that his alienor was not represented in the previous suit, because the reversioner who brought the suit, did not *bona fide* contest it. (*m*)

what alienee can question?

Whether alienee entitled to compensation for improvement

When an alienation by a widow cannot remain valid after her death, there being neither necessity nor the next heir's consent, the purchaser cannot have any equity against the reversioner for money spent by him for erecting any building on, or making any improvement of, the land improperly alienated. (*n*) But in the case of *Kidar Nath v. Mathu Mal*, the first Court of Appeal, though held that alienee from the limited owner is not entitled to costs for improvements made by him on the property without the knowledge or acquiescence of the reversioner, yet granted him a reasonable compensation. The Privy Council on appeal without expressing whether the alienee is entitled to any compensation, assessed it at a reasonable sum. (*o*) In a still later case the Privy Council (*p*) has allowed expenses for improvement which have increased the value of the property being set off against the claim for mesne profits.

PC view

(*i*) Sham *v* Achhan, 25 I A 183, 191
(*j*) Deputy Commissioner *v* Khanjan, 22 A 331 34 I A 72, Hari *v* Pajrang, 9 C L J 453 13 C W N 544
(*k*) *See ante p* 758, 773.
(*l*) Nishakar *v* Ram, 16 I C, 634, (c), Thakar *v* Uttam, 10 L 613, 637 1929 L. 205, Sheik Mahammed *v* Ramchandra, 1925 N 179
(*m*) Narain v Waryam, 1928 L. 545
(*n*) Vrij Bhukandas *v* Dayaram, 32 B 32 9 Bom L R 1181, Muddusami *v* Bhaskara 29 M L J 357 30 I C 853
(*o*) 40 C 555 17 C W N 797
(*p*) Bhagwat *v* Ram, 26 C W N 257 3 P L T 229 35 C L J 121 24 Bom. L R 336 20 A L J 26 42 M L J 243 65 I C 69

Sale in excess of necessity

It has already been said that when the sale is excessive the reversioner may have the sale set aside on payment of the amount necessary to be raised. (q) But it seems that the difference should be considerable, for justifying such a course.

Representative suit

A suit to set aside an alienation by a reversioner is brought in a representative capacty and binds others. (r)

Various alienees may be joined in one suit,

Various alienees joined in one suit—A reversioner in the same suit can claim his share of the property against another reversioner who was in possession of some of the properties and against three other persons, two of whom were purchasers and one a mortgagee from the widow. (s) But in case of success, the plaintiff may be allowed costs so far as each set of defendants is concerned, proportionate to the value of the property in which such set of defendants may be interested. (t)

Deceased widow's debts,

Deceased widow's debts—The actual reversioner succeeding to the possession of the estate after the death of the widow is bound to pay off the debts contracted by the widow for a valid purpose for which she might have alienated any portion of the estate, although the debts were not charged upon the estate. It was so held by the Calcutta High Court in the case of *Ramcoomer Mitter* (u) in which a widow had borrowed money for the purpose of defraying the marriage expenses of the daughter of a son who had predeceased his father and died without repaying the debt. But the Allahabad (v) and Bombay (w) High Courts dissent from this view.

(q) *Ante p* 765

(r) Kesho *v* Sheo, 44 A 19 F B 89 A L J 749 : 64 I C 248 1922 A 301 overruling Chhiddu *v* Durga, 22 A 382 and Darbari *v* Gobind, 43 A 558

(s) Order 1, Rule 3 of Civil Procedure Code (Act V of 1908) Lala Rup *v*. Gopal, 36 C 780, 798 36 I A 103 3 I C 382, Balkrishna *v* Hira, 36 A 406 24 I C 95

(t) Ranganatha *v* Rajagopalachariar, 1928 M 16

(u) 6 C 36

(v) Dhiraj *v* Manga, 19 A 300

(w) Bhagwantrao *v* Ramanath, 52 B 542 : 1928 B 310

FB of Calcutta on binding nature of contract on reversioner.

In the case of *Hurrymohun Roy (x)* it has also been laid down by a Full Bench of the Calcutta High Court that if a female heir, who represents the entire estate, enters into a contract with a tradesman, which has conferred a benefit upon the estate, and is such as a prudent owner would make for the preservation of the estate, the obligation arising out of it will be annexed to the estate in the hands of the reversioner, if she dies before discharging the same. The facts of the case were as follows :—A daughter inheriting a large estate belonging to her father, ordered for a quantity of lime for the purpose of making repairs to certain houses of the estate. the repairs were completed, but she died without paying the price of the lime supplied on credit. The lime-merchant was declared entitled to recover from the estate in possession of the reversionary heir.

Theory on nature of widow's estate.

It should be borne in mind that the widow takes the estate as the surving half of her husband, her life is deemed as the continuation of her husband's life, for the purpose of ascertaining the reversionary heir. The estate is fully vested in her in the same way as if the husband lived in her, the distinction being that her power of alienation and of charging the estate for debts is qualified. If the debts contracted by her are lawful, then the same consequences should follow as if the same were the husband's debts, that is to say, the debts should be a charge on the estate in the hands of the reversioner who must be deemed to be the heir of the widow representing the husband, and as such, liable to pay her lawful debts. The reversioner cannot succeed in most cases except upon the theory that the husband lives in the widow, and dies when she dies. It appears to be perfectly reasonable and equitable that his liability should be determined by the same theory which forms the foundation of his right, he being entitled to the residue left after meeting the widow's lawful expenses. When the reversioner is entitled to the rents and profits that accrued and became due to, but were

(x) 10 C 823, *see* South *v* Viswanatha, 24 I C 398 (M), Ganap *v* Subbi, 32 B 577 10 Bom L R 927, Makhan *v* Gayan, 33 A 255 8 A L J 13 9 I.C. 199, *see contra*, Giribala *v* Srinath, 12 C W N 769

unrealized by the widow, then on the same principle he should be held liable to pay the debts which could be realised from estate, were the widow alive.

Bom F B on widow's trade debts,

Accordingly, it has been held by a Full Bench of the Bombay High Churt presided by the Chief Justice Sir Lawrance Jenkins that debts properly incurred by a Hindu widow for purposes of the business or a trade to which she as heiress of her husband succeeded, are recoverable after her death from the assets of the business as against the reversioners, even in the absence of a specific charge. (*y*) The Madras High Court also holds the same view. (*z*) But a Division Bench of the Bomay High Court has made a distinction between a debt incurred for business or trade and one incurred for the purchase of bullocks for the purpose of cultivation and held, distinguishing the above Full Bench decision of the same Court and disagreeing with that of the Calcutta High Court, that the reversioner is not liable for the latter debt if unsecured. (*a*) It seems that the distinction is without difference and that the observation of the Judicial Commitee noted below was not drawn to their Lordships' notice. The Judicial Commissioner of Nagpur discussed the decision of the Division Bench of the Bombay High Court and disagreed with it (*b*)

Madras,

Bom distinguished F B, and disagreed with Cal,

Nagpur,

P C view on debts

It has been held by the Judicial Committee to be a general principle of Hindu law that he who takes an estate becomes liable for the debts of the estate, (*c*) the reversioner is liable for debts which the widow was justified in incurring especially when but for the debt the estate would have been lost to him.

Sub-Sec vi—DECEASED WIDOW'S DEBTS ETC

Widow's Sraddha—The expenses of the *Sraddha* or the exequial right of the widow should come out of the

(*y*) Sakrabhai *v* Maganlal, 26 B 206 3 Bom L R 738
(*z*) Regella *v* Nimushakavi, 33 M 492 20 M L J 412 5 I C 271
(*a*) Bhagwantrao *v* Ramanath, 52 B 545 1928 B, 310,
(*b*) Kongshi *v* kandaji, 1929 N 191
(*c*) Karimuddin *v* Gobind, 31 A 497 36 I A 138 13 C W N 1117 3 I C 795 11 Bom L R 911 10 C L J 243 19 M L J 687, See Venkayya *v* Bangarayya, 1925 M 401, Bhudhar *v* Ganga, 28 O C 80 84 I C 394 1925 O 272

estate and every one of the reversioners is bound to contribute his share of the reasonable expenses for it (*d*) When a nephew and a grand-nephew of the husband of a widow maintained her during her life-time, she being not in enjoyment of any self-acquired property of her husband, it has been held that they are liable to pay her funeral expenses equally. (*e*)

Sub-Sec vii— LIMITATION

Limitation —The time within which a reversioner is to sue for possession after the widow's death, is twelve years from the date when the property vests in him under Article 141 of Schedule I to the Limitation Act (Act IX of 1908). (*f*)

Limitation

The Privy Council has held that a Hindu widow in possession of her husband's estate is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death, and hence an alienation by her is not absolutely void, but is voidable at the election of the reversionary heir. (*g*) Their Lordships have held that the reversioner shows his election by commencing an action to recover possession of the property after the death of the widow and that such an action by the reversion will not be barred if brought within 12 years from the death of the widow. (*h*) In this case there was a prayer for declaration for holding the deed not binding on the reversioner.

12 years fro death of widow,

In another case, in which the reversionary heir brought a suit for possession on a declaration that a certain alleged adoption was a nullity, but subseqently amended the plaint by expunging the prayer for declaration set out above, the Privy Council (*i*) has held that Art 141 of the Second Sche-

Art 141

(*d*) Ramdhari *v* Permanund, 19 C W N 1183

(*e*) Shiva *v* Rangappya 49 M L J 719 1926 M 233.

(*f*) *See ante p* 786

(*g*) Bijoy Gopal *v* Krishna, 34 C 329, 333 34 I A 87 11 C W N 424, for further reference *see ante p* 758

(*h*) *Ibid*

(*i*) Kalyandappa *v*. Chanbasappa, 48 B. 411 28 C W N 666, *see ante p*. 290

dule to the Limitation Act of 1908 will apply and that the reversioner will get 12 years time from the death of the widow to recover possession

As to limitation for suits for declaration during widow's life time see page 810.

CHAPTER XIII

SUCCESSION TO STRIDHANAM

Sec-1—ORIGINAL TEXTS

१। ऋक्थ मृताया कन्याया गृह्णीयु: सोदरा स्वय।

तदभावे भवेन् मातु स्तदभावे भवेत् पितु ॥ बौधायन: ॥

1 The wealth of a deceased maiden, let the uterine brothers themselves take, on failure of them, it shall belong to the mother, in her default, it shall belong to the father Baudhayana, cited in Mit 2, 11, 30 and in D B 4, 3, 7

Heirs of maiden

२। दत्वा कन्या,हरन् दण्ड्यो व्यय दद्याच्च सोदय।

मृताया दत्तम् आददात् परिशोध्योभय व्यय ॥ याज्ञवल्क्य ॥

2 For detaining a maiden after betrothing her, the offender shall be punished, and shall also make good the expenditure (incurred by the bridegroom's side) together with interest, if she die (after troth plighted) let the bridegroom take back the gifts he had presented, meeting however the expenditure on both sides —Yajnavalkya

Bridegroom's gift to maiden to be returned

३। जननया सस्थितायान्तु सम सर्व्व सहोदरा।

भजेरन् मातृक ऋक्थ भगिन्यश्च सनाभय ॥

मातुश्च यातुक यत् स्यात् कुमारीभाग एव स।

स्त्रियास्तु यद् भवेद् वित्त पित्रा दत्त कथञ्चन।

ब्राह्मणी तद् हरेत्,कन्या तदपत्यस्य वा भवेत् ॥

ब्राह्म दैवार्ष गान्धर्व्व प्राजापत्येषु यद् धन।

अप्रजायाम् अतीतायां भर्त्तुरेव तद् इष्यते ॥

यत् त्वस्या. स्याद् धन दत्त विवाहेष्वासुरादिषु।

अतीतायाम् अप्रजायां मातापित्रोस्तदिष्यते ॥ मनु ॥

3 When the mother is dead let all the uterine brothers and uterine sisters equally divide the maternal estate But whatever property is the mother's *Yautuka* (gift at the time of marriage), that is the share only of her maiden daughter The wealth of a woman, which has been in any manner given to her by her father, let the *Brahmani* daughter take, or let it belong to her offspring It is admitted, that the property of a woman (married) in the forms called *Brahma, Daiva, Arsha, Gandharva and Prajapatya*, shall go to her husband, if she die without issue But the wealth given to a woman (married) in the forms of marriage called, *A'sura* and the like (i e, *Rákshasa* and *Paisácha*) is ordained on her death without issue, to become the property of her mother and father —Manu

Mother's heirs in

I *Yautuka* and

II Non-*Yautuka* stridhan

४। मातु-दुहितर., शेषम्, ऋणात्, ताभ्यऋतेऽन्वय.।

अप्रज-स्त्रीधनं भर्त्तु, ब्राह्मादिषु चतुर्ष्वपि।

दुहितृणां, प्रसता चेत्, शेषेषु-पितृगामि तत् ॥ याज्ञवल्क्य. ॥

Mother's heirs acording to Yajnavalkya,

4 The daughters share the residue of their mother's property after payment of her debts, in their default the (male) issue The property of a childless woman (married) in the four forms beginning with the *Bràhama* belongs to her husband, but if she leaves progeny, it belongs to daughters and in other forms of marriage, it goes to her parents (on failure of her issue) —Yàjnavalkya

५। सम सर्व्वं सोदर्य्या द्रव्यम् अर्हन्ति कुमार्य्यश्च ॥ शङ्खलिखितौ ॥

Sanka and Likhita,

5 All the uterine brother's and maiden sisters are equally entitled to the property —Sankha and Likhita

६। सामान्य पुत्र कन्यानां मृताया स्त्रीधनं स्त्रिया।

अप्रजाया हरेद् भर्त्ता माता भ्राता पितापि वा ॥ देवलः ॥

Devala,

6 A woman's property is common to her sons and daughters, when she is dead, but if she leaves no issue, her husband shall take it, or her mother, brother or father —Devala

७। मातु र्दुहितरोऽभावे दुहितृणा तदन्वय ॥ नारद ॥

Narada, and

7 Daughters take their mother's property, on failure of daughters, their (or her) issue —Nárada

८। स्त्रीधनं दुहितृणाम अप्रत्तानाम् अप्रतिष्ठितानाञ्च॥ गौतम ॥

Gautama,

8 A woman's property belongs to her daughters, unmarried, and unprovided—Gautama

९। पितृभ्याञ्चैव यद् दत्तं दुहितु स्थावर धनं।

अप्रजायाम् अतीतायां भ्रातृगामि तु सर्व्वदा ॥ वृद्धकात्यायन ॥

Parent's gift of immoveables

9 But whatever immoveable property is given by the parents to their daughter, goes to her brother, on her dying without leaving issue —Senior Kàtyàyana

१०। बन्धुदत्तन्तु बन्धूनाम्, अभावे भर्त्तृगामि तत् ॥ कात्यायन. ॥

Kindred's gifts

10 But what is given by her kindred, belongs to her kindred, in their default, it goes to her husband —Kàtyàyana

११। स्त्रीधनं तदपत्यानां दुहिता च तदंशिनी।

अप्रत्ता चेत् समूढा तु न लभेत् मातृकं धनं ॥ बृहस्पति. ॥

Heirs of woman according to Vrihaspati

11 A woman's property belongs to her children, and the daughter is a sharer of it, but if there be an unmarried daughter, the married daughter does not get the maternal property —Vrihaspati

१२। मातु. स्वसा मातुलानी पितृव्य स्त्री पितृस्वसा।

श्वश्रु. पूर्व्वज पत्नी च मातृतुल्या प्रकीर्त्तिता. ॥

यदासाम् औरसो न स्यात् सुतो दौहित्र एव वा।

तत्सुतो वा, धनं तासा स्वस्त्रीयाद्या. समाप्नुयु ॥ बृहस्पति. ॥

12 The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced equal to the mother if they leave no issue of the body, nor son, nor daughter's son, nor their son, the sister's son and the like shall take their property —Vrihaspati

Meanings of sister's son and the like.

The term "the sister's son and the like" in this text means the male co-relations of the six female relations declared equal to the mother, namely, her own sister's son, her husband's brother's son, her own brother's son, her son-in law and her husband's younger brother, respectively

१३। सर्व्वासाम् एक पत्नीनाम् एका चेत् पुत्रिणी भवेत्।

सर्व्वास्ता तेन पुत्रेण पुत्रिण्यो मनुरब्रवीत्॥ मनुः॥

Step-son is son of all co widows

13 If among all the wives of the same man, one becomes mother of a son, Manu says that by that son, all of them becomes mothers of male issue —Manu

Sec 2—GENERAL

Wife's right, over husband's gifts,

Husband's gift to wife—Gift of property by a Hindu husband to his wife is not deemed to create such an absolute right of the wife over it during the husband's life-time, as to entitle her to dispose of it according to her pleasure, (*a*) and it is doubtful whether such property would go to her heir if she dies during the husband's life, having regard to the peculiar relation between them, and to the difficulty of ascertaining whether any moveable property was intended to be absolutely given to her by the husband. It has been held by a Division Bench of the Bombay High Court presided by Chief Justice Sir Lawrence Jenkins that except in the case of *saudāyika*, (*b*) a woman's power of alienation over her *stridhana* is subject to the control of her husband during coverture, and without his consent she cannot bequeath by Will when the husband survives (*c*)

over immoveable in original law

Husband's gift of immoveable property—It has already been seen that according to Hindu law, the wife takes only a life-estate in the immoveable property given by the husband, and she has no power of absolute alienation over it, whether it be a gift *inter vivos* or a bequest, (*d*) and it appears to pass to the husband's heirs after her death.

The Hindu law raises a conclusive presumption against the gift, by a husband to his wife, of a higher than life-interest in immoveable property. The term दान —*dana* or gift is thus defined by Hindu lawyers,—
स्वस्वत्वनिवृत्तिपूर्व्वक परस्वत्वापत्ति फलको दानपदार्थे —"The meaning of the term *dana* or donation is that it is that, of which the effect is, the genaration of

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(*a*) D B. 4, 1, 8.

(*b*) *See Ante p* 719

(*c*) Bhau *v* Raghunath,, 30 B, 229, 7 Bom L R 936

(*d*) Koonjbehari, *v* Premchand 5 C, 684, see *supra p* 719

another person's proprietary right, after the extinction of the donors own proprietary right" Hence the words "I give the property to you" are sufficient according to Hindu law, to pass to the donee whatever interest the donor has in the property at the time, and the addition of any other words expressing that the gift is intended to be absolute, is superfluous and unnecessary Hence the position that if there are words in the deed of gift, showing the intention of granting an absolute estate to the wife, then she is entitled to such estate,—is contrary to the rule of Hindu law

Analogy of English law.

The principle upon which this rule of Hindu law is founded appears to be similar to that which underlies the Restraint on Anticipation in English law, the present case being the converse of that instance in English law There is no reason why a Hindu husband should give immoveable property to the wife in such a manner that the same may ultimately go to her parents or their relations A Hindu husband feels himself bound to make such provision for the wife as will enable her to get maintenance for her life, or so long as she retains the character of being his wife or widowed wife If a Hindu husband is found to execute a deed of gift purporting to make an absolute gift of immoveable property to his wife, it must be presumed to have been made to purchase peace, that is to say, the making of the deed was caused by such importunity of the wife as took away the free agency of the donor, or it must be presumed that the husband was week-minded and the wife was of a commanding disposition and acquired great ascendancy over the husband, so as to exercise undue influence to such an extent as to compel him to execute the deed according to her wishes In every such case the husband is found to be a mere puppet in the hands of his wife who is in the majority of instances considerably younger than the husband His conduct in this respect is often most unnatural and unreasonable in the estimation of Hindu society Hence Hindu law says that a Hindu husband's gift of immoveable property to his wife can never be operative and effectual after her death

Motive for husband's gift

Principle underlying

The principle underlying this rule of Hindu law must be either that the husband is incompetent to make an absolute gift of immoveable property to his wife, or that the wife is incompetent to acquire an absolute title in the husbnd's immoveable property, in whatever way it may come to her hands, *i e*, where by gift, inheritance or partition. The latter appears to be the right principle, as it has been held to apply to inheritance and also to the share allotted to her on partition.

Duties of Court

This rule of Hindu law makes it incumbent on the Courts construing such a deed of gift, to start with a *pre-*

sumption against the grant by a husband to his wife, of more than a life-interest in immoveable property. (*e*) But this presumption does not arise in case of any other woman other than a wife. (*f*) The Patna High Court has held that under Mithila law immoveable property taken by a wife as a gift from her huband is heritable but inalienable, except for necessary purpose. (*g*) Where the words used in the deed of disposition are clear and unambiguous, the sex of the donee will not be a disqualification. But where the words are consistent with the creation of an interest which the law ordinarily gives to woman, then the rule of law is that the testator intended to conform to the principle of law by which the parties in the absence of a testamentary disposition are governed. (*h*)

Mithila

Actual practice in gifts by husband

A Hindu husband, however, is not legally incompetent to make an absolute gift of immoveable property to his wife. Hence this rule of Hindu law does not apply when the deed of gift shows a clear intention of giving an absolute estate ; it is not necessary that there should be such words as are ordinarily used to pass an absolute estate . the intention is a matter of construction and may be expressed in other ways. (*i*) So a grant of a power of sale in a deed of gift in favour of one's wife in lieu of maintenance conveys an absolute estate. (*j*) An absolute gift with gift over to another person in case the widow did not *alienate*, will convey an absolute estate to the widow. (*k*) In case her interest be absolute, the property will pass to her heirs.

Cases where absolute interest is given.

But the view expressed by Chief Justice Farran of the Bombay High Court in the following passage, appears to be what is consistent with the original principle of Hindu Law, namely, —"his wife is *to take possession and*

law as interpreted by Farran, C J.

(*e*) Sasiman *v* Shibu, 39 I C 755 1 Pat L W 375, on appeal to P C *see foot note* (*o*) below , *see* Sures *v* Lalit, 20 C W N 463 : 22 C L J 316 31 I C 405 , *see* also Mahadeo *v* Babya, 1929 N 27

(*f*) Atul *v* Sanyasi, 32 C 1051 9 C W N 783 2 C L J 50 (devise to mother) , Ramlal *v* Indraraj, 1927 N 273 (gift to daughter)

(*g*) Hitendra *v* Rameswar, 4 P 510 , 88 I C 141 1925 P 625 , P C appeal in 32 C W N 763

(*h*) Ratna *v* Narayanaswami, 26 M L J 616 , 24 I C 796

(*i*) Ramnarain *v* Peary, 9 C 830 , Hirabai *v* Lakshmi, 11 B 573 , Rajnarain *v* Ashutosh, 27 C 44, affirmed in Rajnarain *v* Katyayani, 27 C 649 4 C W N 337 , Janki *v* Bhairon, 19 A 133 . 17 A W N 4

(*j*) Muthuvenkatanarayanan *v* Athipandurenga, 51 I C 217 : (1919) M W N 103

(*k*) Suresh *v* Lalit, 20 C W N 463 22 C L J 316 31 I C. 405 , Mohan *v* Niranjan 60 I C 619 (L)

enjoy the property but he adds to this no words of inheritance, nor does he directly give her any power of disposition over it The Courts have always leaned against such a construction of the Will of a Hindu testator as would give to his widow unqualified control over his property By the use of such expression as, 'my wife is the owner after me,' or 'my wife is the heir,' it is usually understood that the testator is providing for the succession during the life-time of the widow and not altering the line of inheritance after her death " (*l*)

as interpreted by Privy Council,

The Privy Council has thus explained the law * * * "as some misapprehension appears to exist as to the effect of certain decisions of this Board and notably *Surajmani* v. *Rabi* (*m*) their Lordships think it desirable to remove this doubt, lest error should creep into the administration of law in India with regard to the rights of a Hindu widow. In the case referred to when originally heard before the High Court (*n*) it had been stated that under the Hindu law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of the Board did no more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including of course, the power to alienate, which the High Court had thought, required to be added by express declaration. In that case it is true that there is some comparison drawn between the gift to a widow and a gift to a person not under disability, but that was not the foundation of the decision, which depended entirely upon the wide meaning attributed to the words in which the decisions of this Board *Sasiman* v. *Shib* (*o*) *Bhaidas* v. *Bai Golap* (*p*) do nothing but repeat this same position in other words " (*q*)

It is thus explained by the Patna High Court —

(*l*) Harilal *v* Bai Rewa, 21 B. 370, 380 , *see* also Seshaya *v* Narasamma, 22 M 357

(*m*) 30 A 84 35 I A 17 17 C L J 131 12 C W N 231 10 Bom L R. 59 18 M L J 7

(*n*) 25 A 351

(*o*) 49 I A 25 26 C W N 425 35 C L J 427 20 A L J 362 24 Bom L R. 576 42 M L J 492 66 I C 193, on appeal from 1 Pat L W 375 39 I C 755

(*p*) 49 I A 1 26 C W N 129 . 20A.L J 289 : 42 M L J 385 . 15 L W 412 65 I C. 974

(*q*) Ramchandra *v* Ramchandra, 45 M 320 49 I A 129, 135 26 C W.N. 713 35 C L J. 545 20 A L J. 684 24 Bom L R 963 43 M L J 78 67 I C 408.

and explained by Patna

"There is nothing in Hindu law which prohibits a woman, whether a wife, or widow, from acquiring an absolute estate in property including the power of alienation If words of grant are used imputing the transfer of full proprietary rights, then effect must be given to them irrespective of the sex of the grantee It may appear, however from the context or from the surrounding circumstances that a limited power of disposal was intended to be conferred, even where an estate of inheritance is granted When ambiguity exists in the document itself or where the words are not of sufficient amplitude to confer full powers of alienation it is legitimate to assume that the grantor had in mind the ordinary disability which the Hindu law attaches to a woman's rights over property and this may be considered in determining the intention even when an estate of inheritance is granted (r) On appeal to the Privy Council their Lordships lay down the principle thus "As they understand the Mithila law a simple and pure gift by the husband to the wife does not convey to her absolute ownership She takes it only for her live without any right of alienation unless power of alienation is expressly conferred on her" (s)

Privy Council decisions

Conclusion—On appeal from the decision of the Patna High Court (t) their Lordships of the Judicial Committee have not noticed the distinction as of general application. (u) But the Board on an appeal from the Allahabad High Court states the law thus. "According to the Hindu Law, such property is taken by her as *stridhan* and is descendible to her heirs and not to his (husband's) * * * but over such property, * * * she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her" (v) This latter case is not, however, one governed by the Mithila school. A recent dicision of the same Board, without referring to the last mentioned decision, has laid down that the proposition, namely, that under the Hindu law, in case of immoveable property given or devised by a husband to his wife, the wife had no power of alientio unless it is conferred upon her in express terms, is held by the Board as not sound. (w) The

(r) Hitendra v Sir Rameswar, 4 P 510, 593 88 I C 141
(s) 7 P 500 32 C W N 762, 48 C L J 83 1928 P C 112.
(t) Hitendra v Rameswar, *supra*
(u) 7 P 500 32 C W N 762 48 C L J 83 1928 P C 112
(v) Narshingh v Maha Lakshmi, 50 A 375 32 C W N 1065 48 C L J. 106 this followed. Chalapati v Subba, 1929 M 691 *see* Jagmohan v. Sri Nath 3 Luc 302 1928 O 203
(w) Shalig v Charanjit, 11 L 645 34 C W N 1073 P C

Privy Council has, without similarly noticing the Board's earlier decision in *Narsing Rao's* case, confirmed the last-mentioned decision of the Board, holding that it is not necessary that express power of alienation should be bestowed upon her, inorder that she may enjoy absolute ownership when it is conferred upon her. (x)

Rule, exception to Statutes.

The rule of Hindu law appears to be an exception to the rule of construction embodied in Section 95 of the Succession Act (new), and in Section 8 of the Transfer of Property Act, namely, that in the absence of *express* reservation, the entire interest of the testator or transferor will pass respectively to the legatee or transferee. (y) The Privy Council in effect uphold this view. (z) By the recent amendment of Section 2 of the Transfer of Property Act (XX of 1929) the whole of Chapter II of this Act in which Section 8 is included, has been made applicable to the Hindus and the Hindu law on this subject, has thus been abrogated. Section 95 of the Indian Succession Act (XXXIX of 1925) is also made applicable to the Hindus (*vide* Sec. 57) with some reservation, (*vide* Sch. III) para. 2) of the restriction.

Advancement.

Advancement —"The general principle of equity, both in this country and in India, is that in the case of a voluntary conveyance of property by the grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has, however, been made in English law, and a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in the name of a wife or, where a deposit is made, in the joint names of both husband and wife." (a)

Indian law.

This exception has not been admitted in Indian law and there is no presumption of deposit in such circumstances, of

(x) Jagmohan v Pandit, 35 C W N 4 P C 1930 P C 253 on appeal from 3 Luc 302 1928 O 203, *See* Pramatha v Suprakash 58 C 77, 81

(y) *See* Hitendra v Rameswar, 4 P 510, 550 88 I C 141 1925 P 625

(z) 7 P 500 33 C W N 762 48 C L J 83 1928 P C 112, Narsingh v Maha Lokshmi, 50 A 375 . 33 C W N 1065 48 C L J 106

(a) Guran Ditta v. Ram, 55 C 944, 950 . 32 C W N 817 . 48 C L J 119.

Benami transaction

intended advancement in favour of the wife. (*b*) In this connection read the next topic *Benami purchase.*

Benami purchase—In coming to the conclusion on the principle of advancement just noted their Lordships of the Judicial Committee relied on the principle laid down by it (*c*) In this case their Lordships lay down that *Benami* transaction is recognised in India and in such a *Benami purchase* in the name of a wife or child no presumption of an intended advancement arise as in England (*d*) But the purchase money must be traced to have come from the husband or the father. (*e*)

Their Lordships have again stated the law on the *Benami* transaction thus.

P C on purchase in name of wife

"There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction by which the beneficial interst in the property is in the husband, although the ostensible title is in the wife. The rule of law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India."(*f*).

But there is no presumption that a woman in whose name the property stands is not the real owner. (*g*)

Sec. 3—MAIDEN'S PROPERTY BOTH SCHOOLS

Succession to Maiden's property

A maiden's property—goes in the following order, as provided in Baudháyana's text (*h*) according to both the Mitákshará and the Dàyabhàga —

(1) Full brother, (2) mother, and (3) father.

Mitakshara

In default of them, the nearest relations of the parents take according to the Mitàksharà school : the Viramitrodaya

(*b*) Ibid
(*c*) Kerwick *v* Kerwick, 48 C 260, 263 47 I A 275, 278 32 C L J 490 39 M L J 269 23 Bom L R 730 57 I C 834 13 L W 455
(*d*) Ibid Gopeekrist *v* Gungapersaud, 6 M I A 53, Uzberali *v* Bebee, 13 M I A 232
(*e*) Kerwick *v* Kerwick, *see above*
(*f*) Sura Lakshmiah *v.* Kothandrama, 49 M L J 109 29 C.W N 1013 42 C L J 8
(*g*) Official Assignee *v* Natesa, 1927 M. 194, Shanmuga *v* Kaveri, 1928 M. 708
(*h*) No. 1, *supra p.* 821.

cites Baudhâyana's text, and then adds—"On the failure of the mother and the father, it goes to *their nearest relations*." It seems that a maiden's *status* is similar to that of a woman married in a *disapproved* form of marriage, both being under the *patria potestas* of their father. (*i*) The term "*their nearest relations*," must be the father's relations, in the first instance, (*j*) inasmuch as they are also the mother's relations so the term is not to be taken distributively, and in default of such relations, the relations of the mother alone become heirs.

Bombay

Accordingly, it has been held by the Bombay High Court that the maiden's father's mother's sister is to be preferred to her maternal grandfather. It should be noticed that the nearness or propinquity is the principle on which the order of succession is worked out in the Mitâkshará, hence, the relations are to take a woman's property in the same order in which they would become heirs to her husband or father, or mother. (*k*)

step-mother

fathe'r siste

A step-mother is entitled to succeed in preference to a mother's sister, (*l*) the father's sister succeeds in preference to the father's *gotraja sapindas* five or six degrees removed, (*m*) and the father's paternal uncle's son inherits in preference to father's sister to the Stridhana property of a maiden girl. (*n*)

Bengal

In the Bengal School the paternal relations must take a maiden's property in the same order in which they inherit a married woman's non-*yautuka* property, in default of the issue of her body and of her brother and parents.

Property given to a damsel by an intending bridegroom must be returned to him on her death before marriage.

Sec 4—MITAKSHARA

Succession to married

A married woman's property according to the Mitakshara—passes in the following order —

(1) Maiden daughter

(*i*) See Dwarka *v* Sarat, 39 C 319 15 C W N 1036 15 C L J 23 11 I C 8..

(*j*) In this connection see Sundar.. *v* Ramasamia, 43 M, 32 52 I C 821

(*k*) Janglubai *v* Jetha, 32 B 409. . Bom L R 522, *see* cases cited at *p.* 831-832 *infra*

(*l*) Kamala *v* Bhagirathi, 38 M 45 23 M L J 518 16 I C 939

(*m*) Tukaram *v* Narayan, 36 B 339 F B 14 I C 438

(*n*) Sundaram *v* Ramasamia, 43 M 32 52 I C 821

(2) Married but unprovided or indigent daughter: (o) there must be marked difference in wealth in order to give preference to the poorer daughter. (p)

(3) Married provided daughter.

(4) Daughter's daughter [no preference of maiden over married daughters.] (q), preferred to daughter's son. (r)

(5) Daughter's son, [is preferential heir as compared to son. (s)

(6) Son (t) [including adopted son who is preferred to husband's collaterals. (u)] An illegitimate son of a Sudra does not succeed to the Stridhana property of the putative father's wife. (v)

(7) Son's son (including son's adopted son).

Husband etc, if married in approved forms,

(8) Husband (w) and his heirs in the same order in which they take his property, [Stridhana property of woman devolves on her death on her husband, and failing the husband on his Sapinda and on failure of the husband's Sapindas, it devolves on the blood relations of the deceased], (x) if the marriage took place in approved forms. (y)

Among the *Nattu kattai chette* caste, if the daughter dies issueless her jewels, vessels and many, presented to her by her parents at the time of her marriage, will revert according to their custom to her parents, but there is no such custom when she leaves behind a female issue (z)

in disapproved form father etc

But if the marriage took place in any of the disapproved forms, then instead of the husband and his heirs, the mother the father the father's heirs, [under the Mayukha and Mita-

(o) Wooma Daee v Gokoolanand, 3 C 587 5 I A 40
(p) Totawa v Basawa, 23 B 229 (q) Ram Kali v Gopal, 48 A 648
(r) Amargit v Algu, 51 A 478 1929 A 71, Narsing v Maha Lakshmi, 50A 375, 390 32 C W N 1065 : 48 C L J 106
(s) Dharma v Parmeshari, 1928 L 9
(t) Sons inherit as tenants in-common, Bai Parson v Bai Somli 36 B 424 14 Bom L R. 400 : 15 I C 774, sons and daughters inherit jointly to *Anvadheya stridhana*, Jagannath v Narayan, 34 B 553, 557 12 Bom L R 545 7 I C 459 (u) Ganga v Budh, 11 I C 27 (A)
(v) Ayiswaryanadaji v Sivaji, 49 M 116, 49 M L J 568 1926 M 84
(w) Raj Bachan v Bhanwar, 1929 O 296
(x) Moti v Kunwar, 48 A 663 1925 A 663
(y) Kanakmmal v Ananthamathi 37 M 293 25 I C 901, Kishen v Sheo, 23 A L J 981 90 I C 358, Gurdial v Bhagwani, 8 L 366, Surajdeo v Ramdewan, 1927 P 392, Sombhai v Jagjiwan, 1928 B 380, Sital v. Harpal, 1929 O 11, for approved form *see ante pp* 122-123
(z) Palaniapp v Chockalingam, 1930 M. 109

kshara, the full brother of a Hindu woman would exclude her half-sister from her absolute property, (a)] and in their default the mother's relations take.

when married in approved form,

Accordingly, when the marriage of a woman was in an approved from, her estate goes to her husband in preference to a stepson, (b) her sister, (c) or a son born of her by adulterous intercourse, (d) to her co-widow in preference to her husband's brother or nephew or first cousin's son, (e) to her co-widow's daughter in preference to her husband's *sapindas* ; (f) to her husband's full-brother in preference to his half-brother ; (g) and to her husband's sister's son, in preference to her own sister's son (h) that is to say, it descends in the same way as if it had belonged to the husband himself. In the Bombay School the heirs to succeed are the heirs to the woman herself though her heirs in the husband's family. (i)

in disapproved form,

But if the marriage of a woman was in a disapproved form her estate would devolve as if it had belonged to her father ; and accordingly her sister succeeds in preference to a sister's son, (j) and her father's mother's sister, in preference to her mother's parents. (k)

Mitakshara

As regards the succession of the issue of woman's body it is worthy of notice that according to the Mitakshara the female issue are preferred to the male issue who however, succeed to the father's estate to the exclusion of the female issue · thus the offspring of the same sex with the parent are preferred for the purposes of inheritance. But the Dayabhaga recognises the preference of daughters only, and that too is limited to *yautuka* or nuptial only, as is set forth below.

(a) Ghanshamdass v Saraswati, 21 L W 415 87 I C 621 1925 M 861
(b) Bhimacharya v Ramacharya, 33 B 452, step-son no heir, Lalsingh v Girdhari, 14 S L R 224 60 I C 263
(c) Gobinda v Dawlat, 6 N L R 3 5 I C 426
(d) Jagannath v Narayan, 34 B 553 12 Bom L R 545 7 I C 459.
(e) Bai Kesser v Hunsraj, 33 I A 176 30 B 431, Krishnai v Sripati 30 B 333
(f) Nanja v Sivabogyathachi, 36 M 116 : 21 M L J 850
(g) Parmappa v Shiddapa, 30 B 607
(h) Ganeshi v Ajudhia, 28 A 345, sister's daughter is not an heir, Secretary v Shaman, 6 I C 210
(i) Manilal v Bai, 17 B, 753, 764
(j) Raju v Ammani, 29 M 358 Chunilal v. Suraj, 33 B, 433
(k) Janglubai v Jetha, 32 B 409.

Marriages usually in approved forms.

It should be observed that generally marriages now take place in the approved form called *Brahma* among the superior castes. But even among some sections of the higher castes, and among the lower orders who form the majority of the Hindus, the *Asura* form prevails. It has however, been held that under the law of the Benares School a marriage must be presumed to have taken place in one of the approved forms. (*k*)

It is to be noted how completely a Hindu woman becomes identified with her husband's family, her own relations are excluded by those of her husband just as she is excluded by her father's relations living jointly with him.

Mitakshara and Viramitrodaya differ,

The above text (No 12) of Vrihaspati enumerating the sister's son and the like as heirs to *Stridhana* is not cited in the Mitakshara, but it is cited in the Viramitrodaya and the Vivada-Ratnakara and these commentaries appear to lay down that these six relations are to take before the relations included under the general rules, that is, before the husband's heirs in case of approved forms of marriage of the deceased woman and before the parents' heirs other than the brother in the disapproved forms of marriage, respectively.

latter followed in Mithila and Benares

The authority of this text has been recognised in Mithila cases, (*l*) and also in a case governed by the Benares School. (*m*)

Step-son

It would seem that the rival wife's son and daughter should come in before these six relations for the same reason. The rival wife's son and an adopted son taken by the husband with the first rival wife before the birth of the aforesaid son inherit jointly the jewellery of the third wife who had no issue. (*n*)

Six relations, their order

The order of succession—among the six relations in the cases of approved marriage appears to be as follows — (1) the husband's younger brother, (2) the husband's brother's

(*k*) Jagannath *v* Ranjit, 25 C 354
(*l*) Mohun *v* Kishen, 21 C 344
(*m*) Ranjit *v* Jagannath, 12 C 375
(*n*) Gangadhar *v* Hira, 43 C 944 20 C W N 489 23 C L J 372 34 I. C. 10

son, (3) the husband's sister's son, (4) her own brother's son, (5) her own sister's son (6) and the son-in-law. (o)

Benares and Bengal.

The Judicial Committee has held that the Viramitrodaya is *declaratory* of the law of the Benares School. (p) But the Calcutta High Court has held that that treatise cannot be referred to, when the Mitakshara is clear, that as the Mitakshara gives completely and exhaustively the order of succession to *Stridhana* property and that no effect can be given to the text of Vrihaspati and to what is laid down in the Viramitrodaya on the strength of that text. (q)

Sec 4—MITHILA, MAHARASTRA AND DRAVIRA

Mitakshara not followed in entirety.

Mithila, Maharashtra and Dravira Schools.—With respect to succession to Stridhana property, the rule laid down in the Mitakshara is not followed in its entirety by these schools Having regard to the conflicting texts of the sages, they limit the daughter's preferential rights to certain descriptions of woman's property, (r) such as the *yautuka*, (s) and as regards the rest, they maintain the joint succession of the son and the maiden daughter. (t) The son succeeds in preference to son's son to the Stridhan property which is not *Anvadheya*, (u) a technical Stridhana, in cases governed by the Mayukha School. (v) The details are not given here, but it should be mentioned that these schools do not agree in all respects, nor do they lay down the order of succession in a complete and exhaustive manner.

Mayukha school

As regards the Maharashtra School, it should be noticed that, except in those districts where the authority of the Mayukha is followed, the Mitakshara rule prevails. (w)

Sec. 5—SULKA

Succession to bride's price

The Sulka or bride's price—(x) however, goes to a woman's uterine brother in preference to her own issue;

(o) Bachha v Jugmon, 12 C 348
(p) Gridari v Bengal, 12 M I A 448
(q) Jagannath v Ranjit, 25 C 354
(r) See Govinda Doomi, 65 I C 672 (N)
(s) See pp 718 and 837 838.
(t) See Dayaldas v Savitribai 34 B 385 F B 6 I C 530; 12 Bom L R. 386, (sons and daughters equally maiden preferred to married daughters)
(u) See page 718 (v) Bai Raman v Jagjivandas 41 B. 618.
(w) See Govinda v Doomi, 65 I C 671 (N) (x) See page 716.

but if there be the mother, she is to be preferred to the brother. (*y*) The reason is that originally it belonged to the parents ; but later on it was declared to become the bride's *stridhana* ; and this rule of succession appears to be a compromise between the original and the later views. (*z*) In order to apply the special rule of succession to *sulka*, "it must be distinctly alleged and proved by cogent evidence that the property given to a girl was of that character, the gift having been prompted by a desire to confer pecuniary benefit, immediate or ultimate, on the parents who have been induced to give her in marriage. In the present advanced stage of society every ante-nuptial settlement or gift cannot be classed as *sulka*". (*a*)

Sec 6—MITAKSHARA AND DAYABHAGA RULES

Mit and Daya.

Mitakshara and Dayabhaga.—The Mitakshara rule of succession to Stidhanam, whereby in default of the issue of her body a woman's property goes when her marriage was of an approved description to her husband and his relations, to the total exclusion of her own relations including her parents, brother and other dear and near ones , and when her marriage was of a disapproved description, to her own relations, to the total exclusion of her husband and his relations, is an archaic one founded on the facts that the ancient system of succession was confined to the family moulded on the principle of *patria potestas*, and that marriage with or without transfer of the same over the daughter, determined her status of becoming a member of her husband's family in the first case, or of continuing a member of her father's family in the latter. Very strong though the family tie or agnatic relation has all along been in India, it became in the course of time affected by the claim of the natural nearness and dearness of a few cognate relations, and accordingly has arisen the distinction between the Mitakshara and the Dayabhaga with respect to succession. The change of law made by the founder of the Bengal School consists in the re-adjustment of

(*y*) Mit ii, xi, 14
(*z*) This view accepted Bhola *v.* Dhani, 1929 A. 25, 27
(*a*) *Ibid.*

the order of succession which was originally confined to the family, by the recognition of consanguinity to some extent, in addition to the agnatic relationship.

Sec. 7—DAYABHAGA SUCCESSION

Dayabhaga rules on succession,

Dayabhaga rules—on the subject are not so simple as those of the Mitakshara. The author divides *Stridhan* property into two classes, namely, *yautuka* and *ayautuka* or non-*yautuka*, the latter includes property received previously or subsequently to marriage, but the former is not entirely confined to presents given actually before the nuptial presents, the limits within which such presents become *yautuka stridhan* are somewhat narrow. (*b*)

Distant succession to both the above descriptions of *Stridhan* is the same. The courses of descent in the earlier stage are different.

doubt as to order

There is a doubt about the authenticity of a particular passage of the Dayabhaga (*c*) which affects the position of the rival wife's son, daughter and grandson, there is also difference between the works of authority in Bengal, and there is besides difficulty as to the construction of certain passages, so the following orders of succession should be taken as provisional only being not settled yet in some respects.

now removed

The doubt as to the authenticity of the said passage of Dayabhaga (*d*) has now been removed and rightly held that passage to be spurious and interpolation, (*e*) and so the rival wife's progeny must now occupy their proper place in the order of succession as is suggested below with some hesitation.

Succession to yautuka is in the following order.—

Succession to *yautaka*

(1) Maiden daughter, (2) betrothed daughter, (3) married daughter,—1st, one having or likely to have a son, 2nd, one that is not so,—(4) son (including adopted son), (5) daughter's son, (*f*) (6) son's son, (7) son's grandson, (8) husband, (9)

(*b*) See *ante p* 718

(*c*) D B 4, 3, 33

(*d*) D B iv, iii, 33

(*e*) Purna *v* Gopal, 8 C L J 369, 428

(*f*) Daughter's daughter is not an heir to Stridhana property: Madhumala *v.* Lakshan, 20 C W N 627, 632.

brother, (10) mother, (11) father, (12) rival wife's son, daughter, son's son and daughter's son.

to *ayautuka*

Succession to ayautuka (other than father's gifts) —

(1) Son (*g*) and maiden daughter, (*h*) (2) married daughters (*i*) having or likely to have sons, (3) son's son, (4) daughter's son, (5) barren and childless widowed daughters, (6) son's grandson, (7) whole-brother, (*j*) [half brother's position is not before sister's son. (*k*)] (8) mother, (9) father, (10) husband, (11) rival wife's son, daughter, son's son and daughter's son.

The half-brother's true position in the order, is not free from doubt and difficulty. It has been held that his position is not before the husband's younger brother. (*l*)

to all classes after above heirs

Succession to all classes of Stridhan after the above relations, is in the following order —

(1) Husband's younger brother, (*m*) (2) husband's brother's son, (3) sister's son, (*n*) (4) husband's sister's son, (5) brother's son, (6) son-in-law, (7) husband's *sapindas* &c., (8) father's kinsmen.

Relations include half-blood

It has already been said that words importing relations include those of the half-blood, accordingly it has been held that a woman's half-sister's son takes in preference to her husband's elder brother (*o*)

Husband's position in non yautuk

It should be observed as regards non-*yautuka* property the husband is postponed to the woman's parents and brothers according to the Dayabhaga, so that property given by the husband's relations, will go to her parents and brother, in preference to the husband. (*p*)

The Bengal authorities are in conflict with each other with reference to succession to *Stridhan*.

(*g*) Preferential rights in father's gift. *see p* 839 *foot note* (*v*)
(*h*) Delanney *v* Pran, 22 C W N 990 (*i*) *Ibid*
(*j*) Brother preferred to husband in case of *ayautuka* stridhana, Mahendra *v* Giris, 19 C W N 1287
(*k*) Sukhamoyee *v* Manaranjan, 89 I C 827 (C)
(*l*) Debiprosanna *v* Harendra, 37 C 863 12 C L J 385 15 C W N 383
(*m*) Gunomoni *v* Debiprasanna, 23 C W N 1038
(*n*) Includes half-sister's son, it is observed that sons of full-sister and half-sister inherit jointly, Sashi *v* Rajendra, 40 C 82 16 C W N 1094 15 I C 225, sister's son preferred to half-brother, Sukhamayee *v* Manoranjan, 89 I C. 827 (C)
(*o*) Dasharathi *v* Bepin, 32 C 261, but see *contra* 4 C W N. 743
(*p*) Judoo *v*. Bussunt, 19 W R. 264, Hurrymohan *v* Shonatun I C 275

Father's gift

why stated to descend as *yautuka*

Father's gifts other than nuptial presents—were stated in previous editions of this work to descend in the same way as *Yautuka,* on the authority of *Srikrishna's* Synopsis of heirs to *Stridhan* given at the end of his commentary on the 4th Chapter of the Dayabhaga, as well as of his Dayakrama-Sangraha. This view of Srikrishna is found on the first interpretation put by Jimùtavahana on Manu's text (*q*) in the Dayabhaga, (*r*) according to which the daughter, and not the son, is entitled to succeed first to a father's gift whenever made, in the same manner as to *Yautuka.* Srikrishna appears to apply to this kind of *Stridhan* the entire order of succession applicable to *Yautuka* or nuptial presents. It is extremely to be regretted that the attention of the Court was not invited to these authorities in the case of *Gopalchandra Pal v. Ramchandra Pramanik,* (*s*) in which therefore the order given above is dissented from, as being based on no authority, and the brother is held preferential heir to the husband. It may be that the result would have been the same, but still the doubt would have been set at rest.

Jimutavahana on father gift

It is worthy of remark that Jimùtavahana himself condemns the said first interpretation of Manu's text on the ground that the word Brahmani in the text would be ignored in that interpretation ; and accordingly he puts on that text another interpretation according to which the text applies when a man's wife of an inferior càste dies without any issue of her body, leaving a step-daughter of a Brahmani co-wife. Thus it is shown by the author of the Dayabhaga that there is nothing in this text to support a separate rule of succession applying to the father's gifts in ordinary cases, different from the two rules already laid down by him.

Mother succeeds in preference to husband, to father's gift

In the case of *Ramgopal* v. *Narain Chandra* (*t*) the question arose as to whether the husband or the mother was entitled to succeed to an immoveable property ***given* by** the father in the from of a *mokarari maurusi* lease reserving

(*q*) 3rd Sloka of Text No 3. (*r*) D. B. 4, 2, 16.
(*s*) 28 C. 311 (*t*) 33 C. 315 : 3 C.L.J 15.

a quit rent ; it was undoubtedly a *gift* by the father of all his interests *minus* the rent. Upon a consideration of all the conflicting authorities, the mother was held preferable to the husband. Their Lordships endeavoured to reconcile the conflict between Jimuta and Srikrishna. The conflict, however, seems to be irreconcilable. (*u*) But it must be admitted that the question is beset with considerable difficulty arising from apparent contradictions.

A son has been held to be entitled, in preference to a married daughter, to inherit their mother's non-*yautuka gift* by her father. (*v*)

Nature of woman's connection

Joint family system and succession to Stridhan.— The order of succession to *Stridhan* property, in some respects, many seem to be arbitrary, unnatural and inexplicable unless the joint family system, which is the real key to many rules of Hindu law, and the nature of a woman's connection with the different members thereof and with her own relations are taken into consideration. If not after marriage, after the *Dviragamana* ceremony, a woman does seldom, if ever, go to her father's house , her brother, father, brother's son, and sister's son may come to her father-in-law's house to see her · but their visits are few and far between. Seldom, if ever, do sisters meet each other. As regards her husband's relations, she does not appear before, nor speak with her father-in-law or his brother, or her husband's elder brother or cousin, or any other male relation of higher degree or rank. She appears before, and speaks with the husband's younger brothers and cousins, his nephews and other relations of inferior rank , and with these she comes into contact continuously. The husband's younger brother is called in Sanskrit, *devara*, meaning a *playmate* ; in fact, a woman is very intimate with him, to whom she may speak in the presence of all female relations and males of inferior rank, and from whom she gets great help, inasmuch as she cannot speak to her husband in the presence of any male

husband's relations,

(*u*) See Dayakarma-Sangraha, 2, 4, 11
(*v*) Prosanno *v* Sarat, 36 C. 86

or female relation of higher rank. This is the usage in most places and among most castes.

explains order of succession

It may now be understood why the husband's younger brother and the husband's brother's sons are preferred to her own nephews, and why the father-in-law and the husband's elder brother are placed lower in the order of succession.

No distinction between whole and half-blood

There is very little distinction between the husband's younger brother of the whole-blood and one of half-blood, as regards a woman's connection with them in a joint-family, their equality appears from the rule in the Dayabhaga that both kinds of brothers jointly succeed to undivided immoveable property of a deceased brother if succession opens to the brothers. although it is not followed by the Calcutta High Court.

not recognised by Calcutta

In a case of competition between them, the husband's uterine brother is entitled to preference in his default the husband's half-brother is entitled to inherit a woman's *Stridhana* in the same circumstances in which the husband's full-brother would have succeeded, had he been in existence. There is no valid reason for restricting the term—"the husband's younger brother," as used in the Dayabhaga, (*w*) to the husband's *full* brother. But it appears to be so restricted in a case in which it has been held that a woman's brother's son is entitled to succeeed in preference to her husband's younger brother of the half-blood. (*x*) This view is, however, contrary to the Dayabhaga and other commentaries of the Bengal school.

Calcutta view

contrary to commentaries

Co-wife's issue

The husband's male issue by another wife is treated by a childless woman as if sprung from her own body, he addresses her as mother, and the mutual attachment is oftner than not very strong,

The faculty of feeling is stronger in women than in men, and a woman retains her affection for her parents and other relations though they are out of sight. When a daughter leaves her father's house and lives with her husband in her

(*w*) D B iv, iii, 36 and 37.

(*x*) Toolsee *v* Luckhy, 4 C W N 743

father-in-law's house, it is the mother who anxiously enquires about and looks after her . and the son-in-law also is an object of her love and affection, so as to be recognized as heir in certain circumstances stated above.

Sec 8—FALLEN WOMAN'S HEIRS

Relationship of degraded women is not severed : Calcutta

Woman of the town —Should a woman become degraded by becoming a woman of the town, then according to the present view of the Calcutta High Court, her connection with her undegraded relations does not cease, so that the latter can be her heirs. (*y*) So the Madras High Court, also has held that prostitution does not sever her legal relation, and the consequent degradation does not entail cessation of the tie of kindred, and that therefore such a woman's stepson is entitled to inherit her property. (*z*) The same view has been held by the Allahabad High Court (*a*)

Madras

Allahabad

Hindu Law governs succession to their property

It has been held that a Hindu woman does not cease to be a Hindu by reason of her degradation on becoming a woman of the town , and succession to her property is governed by Hindu law. (*b*) There is a difference of opinion as to the effect of this decision, (*c*) and there is a conflict between the earlier and the later decisions , and accordingly, the question was referred to a Full Bench of the Calcutta High Court, but was not decided inasmuch as a fact upon which the question arose was not, and could not be found for want of evidence, and the Full Bench refused to assume that fact for the purpose of deciding it (*d*) If the tie of kindred be not severed by reason of the unchastity not being so heinous as to cause civil death, her undegraded heirs would succeed. But should it be of such a character as to operate as civil death and to make her an out-caste, then it is difficult to say who would be her heir. But now that the Courts have held that the tie of kindredship is not *severed* by reason of adopting the life of prostitute, such woman's property in

(*y*) *See supra p* 667 , but see Satish *v* Mahabali, 21 O C 272 48 I C 750.
(*z*) Subbaraya *v* Ramasami, 23 M 171
(*a*) Naraın *v* Tirlok, 29 A 4 , Bhanga *v* Din, 65 I C 593 (A)
(*b*) *See Supra p* 667 , Sarna *v* Secretry, 25 C 254.
(*c*) Sundari *v* Nemye, 6 C L J 372 , Bhutnath *v* Secretary, 10 C W N. 1085
(*d*) Chatoo *v* Rajaram, 11 C L J 124

the light of the view thus expressed, should pass to the undegraded kindred in preference to her degraded relation after her death, (e) and, at any rate, to the exclusion of the Crown (f)

Position of illegitimate issue

The illegitimate children of persons other than Sudras are not their heirs, (g) but the illegitimate daughter even among twice-born classes, inherits the property of her mother in preference to trespassers. (h)

Case of dancing girls

The ordinary law of inheritance which excludes women or prefers males to females, and which allows only a limited interest to female heirs, has no application to the dancing girl caste. (i)

(e) *See Supra p* 669, but see Siva v Minal 12 M 277, Maharana v Thakur, 12 I C 778 14 O C 234
(f) Narayan v Laxman, 51 B 784 1927 B 456
(g) Meenakshi v Mudiandi, 38 M 1144 25 I C 957
(h) Kasturi v Lote, 56 I C 952 (N)
(i) Subbaratna v Balakrishna, 33 M L J 207

CHAPTER XIV

HOLY ORDERS AND ENDOWMENT

Sec 1—ORIGINAL TEXTS

१। श्री-सदाशिव उवाच,—

चत्वारः कथिता वर्णाः आश्रमा अपि सुव्रते ।
आचाराश्चापि वर्णानाम् आश्रमाणां पृथक् पृथक् ॥
कृतादौ, कलिकाले तु वर्णाः पञ्च प्रकीर्त्तिताः ।
ब्राह्मणः क्षत्रियो वैश्यः शूद्रः सामान्य एव च ॥
एतेषां सर्व्ववर्णानाम आश्रमौ द्वौ महेश्वरि ।
ब्रह्मचर्य्याश्रमो नास्ति वानप्रस्थोऽपि न प्रिये ।
गार्हस्थ्यो भिक्षुकश्चैव-आश्रमौ द्वौ कलौ युगे ॥
भैक्षुकेऽप्याश्रमे देवि वेदोक्त दण्डधारणम् ।
कलौ नास्त्येव तत्त्वज्ञे यतस्तत् श्रौतसंस्कृतिः ॥
शैवसंस्कारविधिनाऽवधूताश्रमधारणम् ।
तदेव कथितं भद्रे सन्न्यासग्रहणं कलौ ।
विप्राणाम् इतरेषाञ्च वर्णानां प्रबले कलौ ।
उभयत्राश्रमे देवि सर्व्वेषाम् अधिकारिता ॥
ब्राह्मण क्षत्रियो वैश्य शूद्र' सामान्य एव च ।
कुलावधूतसंस्कारे पञ्चानाम् अधिकारिता ॥

महानिर्व्वाणतन्त्रं । अष्टमोल्लासः ।

1 The great ever-auspicious God said—

In Kali age *all* are entitled to be Tantrik Sannyasis

O virtuous Goddess! In the *satya* (golden) and the other (two) ages, the castes and also the orders of life are declared to be four, and the usages also of the (four) castes, and of the (four) orders of life are separately declared for each But in the Kali age, the castes are declared to be five, namely, the Brahmana, the Kshatriya, the Vaisya, the Sudra, and the general body of human beings, (other than these four) O great Goddess! of *all* these (five) castes, the orders of life are two, for, O dear Goddess! the order of life called Brahmacharya or studentship, and the order of life called Vana-prastha or the hermitage (the first and the third of the four orders), do not now exist; (but) the two orders of life, namely, the Garhasthya or the order of the householder, and the Bhikshuka or the order of the ascetic or religious mendicant, only, exist in the Kali age O wise Goddess! the holding of a staff, declared in the Vedas, by the order of the Bhikshu or ascetic, also, does not exist in the Kali age, because that is prescribed for the order of ascetics initiated according to the Vedas O auspicious Goddess! the adoption of the order of Avadhutas or ascetics according to the rules of

initiation prescribed by the God Siva (in the Tantras) is alone declared to be the adoption of Sannyasa (Renunciation or asceticism) in the Kali age O Goddess ! in the advanced state of the Kali age, the Brahmanas and the other (four) castes are *all* entitled to these two orders of life The Brahman, the Kshatriya, the Vaisya, the Sudra, and the general body of human beings, these five are entitled to be initiated as Sannyasis or ascetics according to Tantric system "

The above slokas are not continuous, but are cited from different parts of the Maha-Nirvana-Tantra, Chapter 8

२ । विद्याविनयसम्पन्ने ब्राह्मणे गवि हस्तिनि ।

शुनि चैव श्वपाके च पण्डिताः समदर्शिनः ॥ गीता, ५ । १८ ।

All men are equal

2 "Learned persons look equally on a Brahmana endowed with learning and humanity, on a cow, on an elephant, as well a son a dog and on a man of the lowest outcaste class" For God pervades them all equally — Gita, 5, 18

३ । चिन्मयस्याद्वितीयस्य निष्कलस्याशरीरिणः ।

उपासकानां कार्य्यार्थं ब्रह्मणो रूपकल्पना ॥ रघुनन्दनधृतवचनं ।

For devotees benefit God manifests in images

3 It is for the benefit of the worshippers (or devotees) that there is manifestation in images (male and female forms), of the Supreme Being, which is bodiless, which has no attribute, which consists of pure spirit, and which is without a second (being *i e*, God is the Only Being existing in reality, there is no other being in real existence excepting (Him) — Text cited by Raghunandana

४ । सौवर्णी राजती वापि ताम्री रत्नमयी तथा ।

शैलदारुमयी वापि लौहशङ्खमयी तथा ॥

रीतिका धातुयुक्ता च ताम्रकांस्यमयी तथा ।

शुभदारुमयी वापि देवतार्च्चा प्रशस्यते ॥ मत्स्यपुराण वचनम् ।

Materials for images

4 An image of a God is commended if made of gold, or made of silver, or made of copper, or made of gem, or made of stone or of wood, or made of iron or conch-shell, or formed of brass or consisting of copper and bell-metal, or made of sacred (or sacrificial, wood) — Matsya-Purana

५ । एवं रत्नमयं कुर्य्यात् स्फाटिकं पार्थिवं तथा ।

शुभदारुमयं वापि यद् वा मनसि रोचते ॥ मत्स्यपुराणवचनम् ।

5 Thus should (a Lingam or Phallic Symbol) be made of precious stone, or crystal, or of earth, or of auspicious wood or of what is agreeable to (one's) mind — Matsya Purana

६ । कुड्ये लिखेत् च मे कश्चित् पटे कश्चिच्च मानवः ।

पूजयेत् यदि वा चक्रे मम तेजोंऽशसम्भवे ॥ वराहपुराणवचनम् ॥

6. Some persons worship by image painted in a wall and some in canvas, and some (worship me as embodied) in the sphere (of stone called Salagrama) sprung from a part of my might — Baraha-Purana

७। अथ अस्पृश्य स्पर्शने तु बौधायनः—द्रव्यवत् कृतशौचानां देवतार्च्चानां भूयः प्रतिष्ठापनम् इति ।

देवतार्च्चा देवता प्रतिमा। तासाम् अस्पृश्यस्पृष्टानां प्रकृतिद्रव्यस्य ताम्रादेर्यथायं शौचं कृत्वा पुनः प्रतिष्ठापनात् पूज्यत्वम् इत्यर्थः, इति रत्नाकरः ॥

आदित्यपुराणे—खण्डिते स्फुटिते दग्धे भ्रष्टे स्थानविवर्जिते ।
यागहीने पशुस्पृष्टे पतिते दुष्टभूमिषु ।
अन्यमन्त्रार्च्चिते चैव पतितस्पर्शदूषिते ।
दशस्वेतेषु नो चक्रुः सन्निधानं दिवौकसः ॥
रघुनन्दनस्य देवप्रतिष्ठातत्त्वम् ।

7. Now, in (the case of) touching by what ought not to be touched, Baudhayana (says),—

"Re-consecration (should be made) of the images of gods, the purification of which shall have been made, like that of the materials."

"Devatarchcha" means the image of god, "of them" (*i e* of the images) touched by what ought not to be touched, the materials being touched if the materials such as copper and the like be sufficiently purified and re-consecration be made, then the image would be fit for worship this is the meaning according to the Ratnakara (So) in the Adhipurana (it is declared)—"(If the image) be (1) mutilated, (2) cracked or broken or burst, (3) burnt, (4) fallen down, (5) removed from its place, (6) without worship (or not worshipped), (7) touched by a beast, (8) fallen in defiled grounds, (6) worshipped by reciting hymns addressed to another God, (10) and defiled by the touch of an outcaste—in these ten (images) the Gods do not make appearance (or do not become present)"

Raghunandana's Deva Pratishtha-Tattvam, last paragraph

Re-consecration

८। अथजीर्णोद्धारविधिः । भगवान् उवाच—
जीर्णोद्धारविधिं कृत्स्नं सङ्क्षेपात् कथयामि ते । * * *
यद्-द्रव्या यत्प्रमाणा च या मूर्त्तिर्जीर्णता हरेः ।
तद् द्रव्या तत् प्रमाणा च सा मूर्त्ति-स्तत्र कारयेत् ।
यत्प्रमाणं यदाकारं यन्मय विष्णुम् उद्धरेत् ।
तत्प्रमाण तदाकारं तन्मय तत्र विन्यसेत् ।
द्वितीये वा तृतीये वा दिवसे स्थापयेद्धरिं ॥
अत ऊर्द्ध्वं भवेद् दोषो विधिनापि निवेशिते ।
अनेनैव विधानेन शिलादीन्श्च विसर्ज्जयेत् ।
अन्य प्रकल्पयेत् तत्र तत् प्रमाणम् उदाहृतं ॥—हयशीर्षः

8 "Now (is stated) the prescribed mode of Renewal of Decayed Images Bhagavan says,—"I shall tell you briefly the whole ordinance for renewing decayed images * * *

Renewal of Decayed Images.

"Whatever is the material, and whatever the size, of the image of Hari (or God the protector), that is to be renewed, of the same material and of the same size, an image is to be caused to be made, of the same size, of the same form, (and) of the same material, should be (the new image) placed there, either on the second or on the third day (the image of) Hari should be established, if (it be) established after that, even in the prescribed mode there would be blame (दोष) or censure or sin, in this very mode the Linga or Phallic Symbol and the like (image) should be thrown away (and) another should be established, of the same size (&c) as already described —Haya-Sirsha

[Only two pages of a work called Haya Sirsha evidently the Haya-Sirsha-Pancharatra have been printed—not the whole book There is nothing to show from whose manuscript copy these pages are taken]

९। ईश्वर उवाच –

जीर्णादीनां च लिङ्गानाम उद्धारं विधिना वदे।
असुरैर्मुनिभिर्गोत्रैः तन्त्रविद्भि प्रतिष्ठितम्।
जीर्णं वाप्यथवा भग्न विधिनापि न चालयेत् ॥
अग्निपुराणे त्र्यधिकशततमाध्याये।
असुरैर्मुनिभिर्देवै तत्त्वविद्भि प्रतिष्ठितम॥ इति पाठान्तरम्।

9 "God said,—

Certain images not to be removed

"I shall speak of the renewal in the prescribed mode of Lingas or Phallic Symbols decayed and the like &c * * *

(A linga) established by Asuras, or by sages or by remote ancestors, or by those versed in the Tantras, should not be removed even in the prescribed form, though decayed or even broken"

Agni-Puranam, Chapter 103, (Poona Edition of 1900 A D, p 143)

[There is a different reading of a part of this sloka, noted in the foot-note of the Poona edition of this Purana as one of the Anandasrama series of sacred books according to which instead of—"or by remote ancestors or by those versed in the Tantras"—the following should be substituted, namely]

"Or by Gods or by those versed in the highest religious truths"

१०। अथ जीर्णोद्धार.। स च लिङ्गादौ दग्धे भग्ने चलिते वा कार्य्य.। अयञ्च अनादि-सिद्धप्रतिष्ठित-लिङ्गादौ भङ्गादि-दुष्टेऽपि न कार्य्य। तत्र तु महाभिषेकं कुर्य्यात् इति त्रिविक्रम.॥ निर्णयसिन्धु ः।

अथ जीर्णोद्धार। स च लिङ्गादौ भग्ने दग्धे वा कार्य्य। अयं च अनादि सिद्ध-प्रतिष्ठित लिङ्गादौ भङ्गादिदोषेऽपि न कार्य्य.। तत्र महाभिषेक. कार्य्य.—धर्मसिन्धु।

10 "Now Renewal of Decayed (Images is considered), that is to be performed when the Linga and the like are burnt or broken, or removed (from its proper place) But this is not to be performed with respect to a Linga or the like which is established by a Siddha or one who has become

successful in the highest religious practice, or which is Anadi i e, of which commencement is not known, or which has no commencement But their Mahabhisheka or the ceremony of great anointment should be performed ;—this is said by Tri-vikrama"...Nirnaya-Sindhu of Kamalakara-Bhatta, Bombay Edition of 1900, p 264

Renewal according to Nirnaya-Sindhu and

The author of the Dharma-Sindhu says as above, in almost the same words . .See Bombay Edition of 1888, p 234 of that work.

Dharma-Sindhu

११। तत् असुरादिप्रतिष्ठापिततद् व्यक्तिविषयम्। न तु दैवात् तद् व्यक्तिनाशेन तत्स्थानस्थापितेदानीन्तनताद् व्यक्तिविषयम्।

लौहाद्यं छिन्नभिन्नाङ्ग सन्धाय स्थापयेत् पुनः।

सुवर्णाद्यष्टलौहनिर्म्मित लिङ्गं दैवात् भग्न, स तदेव सज्ज कृत्वा पुनः स्थापयेत इत्यर्थः। इति—प्रतिष्ठामयुखे नीलकण्ठ.।

11 In the Pratishtha-mayukha the above text of Agni-Purana is cited, adopting the second reading, and it is explained to refer to the original image, not to an image, substituted in case of total loss of the original image by reason of theft, flood, burning and so forth p 29

In this work the following text is cited at p 27

"A metallic image of which a limb is cut or disunited should be again established after putting (the parts) together"

Metallic images when broken, should be de mended

And it is explained in the said work thus,—"The meaning is, if a Lingam made of the eight metals beginning with gold, be accidentally broken, the very same should be again consecrated after joining the parts together"

Pratishtha-Mayukha of Nilakantha, the author of Vyavahara-Mayukha a treatise on Positive Law respected in the Bombay school of Hindu Law

१२। (*a*) तप. परं कृतयुगे त्रेतायां ज्ञानम् उच्यते।
द्वापरे यज्ञम् एवाहुर्दानम् एक कलौ युगे॥ मनु. १, १७६।

(*b*) तपो धर्म्म. कृतयुगे, ज्ञान त्रेतायुगे स्मृतं।
द्वापरे चाध्वराः प्रोक्ताः, कलौ दानं दया दम.॥ वृहस्पतिवचनं।

12 (*a*) In the Krita (first) age (the performance of) austerity, in the Treta, (divine) Knowledge, Dvapara, (the performance of) Sacrifice, and in the (present) Kali age, Charity alone, is declared to be chief (*dharma* or virtue)—Manu, 1, 186

Dharma according to Ages

(*b*) Austerity is ordained the Dharma (or religious duty or act) in the Krita (or first or golden) age, true Knowledge, in the Treta (or second) age, and sacrifices are pronounced (the Dharma) in the Dvapara (or third) age, and *Donation* or *Charity*, *Compassion* and *Self-control*, in the (present) Kali age

१३। धर्म्मार्थ-काम-मोक्षाणाम् आरोग्यं साधनं मतं।
अतस्त्वारोग्यदानेन नरो भवति सर्व्वद:॥

आरोग्यशाला कुरुते महौषधि-परिच्छदां।
विदग्ध-वैद्य-संयुक्तां भृत्यावसथ संयुताम्॥ नन्दिपुराणवचनं।

Establishment of Hospitals

13 Freedom from disease is the means of (attaining the ends of man, namely) Dharma or religious merit, wealth, (objects of) desire, and liberation (of the self or soul) from transmigration hence a man by the gift of (the means of medical treatment of persons suffering from disease and so causing) freedom from disease becomes the giver of everything He must establish a *hospital* furnished with valuable medicines and necessary utensils, placed under experienced physician, and having servants and rooms for shelter of the patients

१४। शङ्करात् परम नान्यत् अतस्तस्मै विकल्पयेत्।
यतीनामाश्रय कृत्वा वापि पक्वेष्टकामयं॥
व्याख्यानमण्डपयुक्तम् आसनैर्विविधैर्युतं।
पुष्पोद्यानसमायुक्तं सोदकं शङ्करालय॥
ग्राम दीपेन्धनाद्यर्थं प्रेष्यनाच्छेव वेतने।
कौपीनोपानहाद्यर्थम् आश्रये विनियोजयेत्॥ कालिकापुराण।

House of Sankara

14 There is none superior to the God Sankara to him therefore should dedicate the *house* of Sankara, constituting it the (place of) shelter of the *yatis* or religious mendicants, which is to be built of burnt bricks, possessed of a hall for exposition (of religious doctrines), furnished with different kinds of seats, having flower-garden, and having reservoir of water A village should be assigned for meeting the expenses of the place of shelter, such as lamps, fuel, salary of servants, small pieces of cloth worn by ascetics, sandals, and the like

१५। कृत्वा मठं प्रयत्नेन शयनासनसंयुतं।
पुण्यकाले द्विजेभ्योऽथ यतिभ्यो वा निवेदयेत्॥ भगवतीपुराणे।

15. Having carefully built a Math (or house for ascetics and their disciples), furnished with rooms (or furniture) for sleeping and sitting, should at an auspicious time, dedicate the same to the twice-born or the ascetics, (or religious mendicants and their pupils)—Bhagabati-Purana, cited by Hemadri

१६। देवायतनकर्त्ता च यतीनाम् आश्रयस्य च।
सत्रमण्डपकारी च क्रीडन् याति दिवोत्तमं॥ अगस्त्यवचनं।

Construction of Math and its dedication

16 A person consecrating a temple, also one establishing an asylum for ascetics, also one consecrating an alms house for distributing food at all times (to the poor), ascends to the highest region of heaven.

[जलसत्र (Jala-Sattra) is a place where cool and pure drinking water is stored in the summer, for free distribution to all persons coming there to quench their thirst]

१७। कुर्य्यात् प्रतिश्रयन्तु पथिकानां हिताय च ।
निजगेहैकदेशे वा साधून् पान्थान् निवासयेत् ॥
अक्षय्यं पुण्यमुद्दिष्टं तस्य स्वर्गापवर्गदं ।
सर्व्वकामसमृद्धोऽसौ देववत् दिवि मोदते ॥ मार्कण्डेयपुराणं ।

Rest house

17. Should make a house of shelter for the benefit of travellers, or should lodge pious men (or ascetics) and travellers, in a quarter of one's own dwelling house inexhaustible is declared his religious merit which secures (for him) heaven and liberation, abounding in all objects of desire, he enjoys happiness in heaven like a God

१८। त्रिभमं वा द्विभौम वा कुर्य्यादथैकभूमिकं ।
मठं विचित्रशालाढ्यं विराजत्मतङ्गरथं ॥
ध्यानाध्ययनहोमादिक्रियाख्यानस्थान भूषितं ।
सुधया वा शिलाभिर्वा समताप्तभूमिक ॥
नि॰ यस्त-पुस्तकाधारभुत नूतनसत्क ।
नानाफलाकुलोद्यानराजिमण्डलमण्डितं ॥
निर्म्मलस्वादुपानीयसुसम्भृतजलाशय ।
यतीना पथिकानञ्च निवासमुपसेदुषां ॥
पादुकोपानच्छत्रकौपीनेन्धनवाससां ॥
उपयोगिपदार्थाना अन्येषामपि लब्धये ॥
ग्रामं वा विपुला भुमि प्रदद्याच्छ्रद्धयान्वित. ।
एवं समाश्रयं कृत्वा तापसानां हिताय च ॥
अन्येषामपि लोकानां दुःखिनां आश्रयार्थिनां ।
समाश्रयं प्रयच्छामि प्रीयतां मे जगन्निधिः ॥ वराहपुराणं ।

Construction and equipment of Math,

18 A Math should, by a person having faith in the Shastras, be made three-storied or two-storied or one-storied, consisting of different apartments, possessed of an elephant, accomodated with places for meditation, for study, for burnt offering to consecrated fire and the like, and for teaching having the floor levelled even by plaster or stone, equipped with new shelves containing books arranged thereon, decked with circular rows of various fruit-trees, accompanied by reservoirs well-stored with pure and sweet drinking water And he should endow a village or sufficient land for meeting the expenses, so that the ascetics and the travellers getting shelter (there), may receive sandals, shoes, umbrellas, small pieces of cloth, and also other necessary things Thus having established an asylum beneficial to persons practising austerities, and also to other poor people seeking shelter, he should declare—"I am endowing this asylum—May He who is the support of the universe be pleased with me"—Baraha-Purana.

[The term Math means a monastery, or a residential college, or a college attached to a temple or an asylum for the poor and the ascetics, or a shelter for travellers, or a combination of all these or some of them]

१९। कारयित्वा दृढस्तम्भं शुभं पक्वेष्टकालयं ।
प्रतिश्रयं सुविस्तीर्णं सभूमिं छदनान्वितं ॥
सुधानुलिप्तं गुप्तञ्च सुखशालाविराजितं ।
दद्यादनन्तफलदं शैववैष्णवयोगिनां ॥
प्रतिश्रयं सुविस्तीर्णं सदन्नं सुजलान्वितं ।
दीनानाथजनार्थाय कारयित्वा गृहं शुभं ।
निवेदयेत् पथिभ्यश्च शुभद्वारं मनोहरं ॥ अग्निपुराणम् ।

and dedication to *Saiva* & *Vaishnava* ascetics

10. Having caused to be made an auspicious and spacious Asylum of burnt bricks, with strong pillars, and large compound, accompanied with distinctive mark, covered with plaster, guarded, equipped with comfortable apartments, and conferring endless religious merit,—should dedicate to the Saiva and the Vaishnava ascetics And having caused to be made an auspicious, spacious and beautiful house, furnished with good food, and equipped with pure drinking water, and possessed of an auspicious gate should dedicate it for the benefit of the poor and helpless, and travellers

२०। व्रती यतिर्वैकरात्रं निवसन्नु यतिस्तिथि ।
यस्मान् नित्यं न वसति तस्मात् तम् अतिथिं विदुः ॥ यम ।

Definition of *atithi*

20 "An ascetic or a religious mendicant living only one night is called an *a-tithi* or guest, because he does not stay long, hence he is known as *a tithi* *i e*, not staying one entire day"

२१। धर्माधर्मौ न जानन्ति विद्यादानबहिष्कृता ।
तस्मात् सर्वप्रयत्नेन विद्यादानं प्रवर्तयेत ॥ हेमाद्रिधृतं वचनं ।

Endowment for education

21 Those excluded from education do not know the lawful and the unlawful therefore no effort should be spared to cause dissemination of education by gift of property to meet its expenses

२२। दानं विशेषफलदं जगतीह नान्यत्
विद्या विहाय वदनाब्जकृताधिवासा ।
गो भु हिरण्य गज वाजि रथादि सर्वं
तद् यच्छतां किमिति भूप भवेन् न दत्तं ॥ वह्निपुराणम् ।

confers special spiritual reward

22 In this world, there is no other gift securing special spiritual reward, than the gift (of property for dissemination) of learning that dwells in the organ of speech O king, does not one who gives the same, become giver of cow, land, gold, elephant, horse, car and the like?

२३। वाजपेयसहस्रस्य सम्यगिष्टस्य यत् फलं ।
तत्फलं समवाप्नोति विद्यादानात् न संशय ॥

तस्माद् देवालये नित्यं धर्म्मशास्त्रस्य वा श्रुतेः ।
पठनं कारयेद् राजन् यदीच्छेद् धर्म्मम् आत्मन ॥ वह्निपुराणम् ।

23 "There is no doubt that the fruit of duly celebrated thousand sacrifices is obtained by a person from gift (of property for dissemination) of learning, therefore O king! one should cause the Smriti and Sruti to be daily learnt in the temple of a God, if he wishes for religious merit"

of thousand sacrifices

२४ । वानप्रस्थ-यति-ब्रह्मचारिणां रिक्थभागिनः ।
क्रमेणाचार्य्य सच्छिष्य धर्म्मभ्रातृ कतीर्थिन ॥ याज्ञवल्क्य ।

24 "The heirs to the property of a *Brahmachari* or life-long student, *yati* or ascetic, and a *Vanaprastha* or hermit, are respectively the preceptor, a virtuous pupil, and a religious brother residing in the same holy place"—Yajnavalkya

Heirs of ascetics

२५ । श्रद्धयेष्टञ्च पूर्त्तञ्च नित्यं कुर्य्याद् अतन्द्रित ।
श्रद्धा-कृते ह्यक्षये ते भवतः स्वागतैर्धनैः ॥ मनु ४, २२६ ।
दानधर्म्मं निषेवेत नित्यम् ऐष्टिक पौर्त्तिक ।
परितुष्टेन भावेन पात्रमासाद्य शक्तित ॥ मनु ४, २२७ ।

25 A man should always without being tired perform with faith *ishta* and *purta* or *religious* and *charitable* work (=gift), these being made with faith and honestly acquired wealth become inexhaustible (means of procuring bliss) Manu IV, 226 *Dharma* consisting of donation, *religious* or *charitable*, (a man) should always make with a cheerful heart according to his ability (and also) when he finds a worthy object Manu iv, 227

Ishta and *Purta* works

Sec. 2—PERSONS OF HOLY ORDERS

Different stages of life.—The life of a Hindu of the Brahmana and the other twice-born classes, was divided into four stages. He had to pass the first stage of his life as a *Brahmachari* or student, living with the *Guru* or preceptor of the sacred literature as a member of his family and supporting himself by begging the second, as a *Grihastha* or house-holder, being married when his studentship was over, the third as a *Vanaprastha* or one retired from the world, residing in some solitary place with persons of the same order, engaged in religious practices and contemplation of the deity, being free from all wordly cares, and living on the vegetables growing in forests, or on alms,—the retirement having the effect of extinguishing his rights to the property he had at the time of retiring, and vesting them in his sons or other heirs, and the fourth, as a *Yati*

Four Stages of life

i *Brahmachari*,

ii *Garhastha*

iii *Vanaprastha*,

iv, *Yati*

or itinerant contemplative ascetic, supported by what is voluntarily given by people, or by begging in the evening, and taking no more than what is sufficient for the day, and living under a tree or the like shelter.

Brahmachari i ordinary ii, life long

A *Brahmachari* or student was of two descriptions, *viz*, *Upakurvana* or an ordinary student and *Naishthika* or a life-long student. The former became a house-holder in due course, while the latter was a student for life, devoted to the study of science and theology, felt no inclination for marraige, did not like to become a house-holder, and chose to live as a perpetual student, the austere life of celibacy

Four stages of life

The ideal of life which the sages contemplated by the different modes prescribed for adoption by persons of higher castes in the different stages of life, was intended to cause actual practice to accord with theory, by giving practical effect to the religious doctrines of *Karma* or *Adrishta*, and Metempsychosis or transmigration and *Moksha* or liberation from the same *Adrishta* is the invisible dual force being the effect of *Karma* or good and bad deeds done by a person in past time without beginning, determining respectively happiness and misery at present and future, Metempsychosis is the asumption by the soul of different material bodies determined by its *Karma* or *Adrishta*, and the *Moksha* or liberation is the release of the soul from the necessity of being confined in some material body The pleasures and pains of the body are not the pleasures and pains of the soul in reality It is through *maya* or illusion that the soul identifies itself with the body, and labours under the delusion that he is the agent of bodily acts which are done in reality by the *agency* of *Prakriti* or nature This illusion is dispelled by true knowledge which is the only means of attaining *moksha* or liberation, or communion with the Supreme Soul It is doubtful whether this ideal was actually followed in practice except by a few only

Succession of house-holder,

Succession *—The law of succession that has already been explained, applies to the property left by a house-holder or an ordinary student.

persons of holy order,

The above text (No. 24) of Yajnavalkya lays down succession to the property which the persons of these holy orders may have while in such orders, and leave behind on their death.

life long student,

ascetic

The property of a life-long student goes to his preceptor; of one retired, to a religious brother; and of an itinerant ascetic, to a virtuous pupil. in their default to one of the same order (or hermitage) or to a fellow-student.

* *See post* Sec. 11 *p.* 909.

The Hindus of the present day rarely adopt the third and the fourth stages of life A life-long student, such as is contemplated by the sages, is also rare now Nor do the ordinary students observe the rules of the Shastras relating to their mode of life, and to the study of the sacred literature

Vaishnavas are Hindus

Vaishnavas *—There are now persons belonging to certain religious sects of modern origin, such as *Vaishnavism*, that do in some respects resemble the life-long students and itinerant ascetics. They are connected with the well-known *maths* or *mohuntis*. Vaishavas are a class of Hindus (a)

What is Math

A math—means a place for the residence of ascetics and their pupils, and the like. (b)

Who are sannyasis,

Sannyasis —The founders of these *maths* were learned *sannyasis* or monks of the *vaishnava*, *saiva* or *sakta* sect, who observing celibacy and leading a pious life of austerity, wandered from one place to another carrying with them an image of the Deity, representing a certain attribute of Him, and teaching the truths of religion to those that attracted by the sanctity of their life, flocked to them They were prevailed upon by the piety of some Rajas or influential men that became their, disciples, to settle in particular localities, receiving grants of land from them, for the maintenance of themselves and their pupils called *chelas*, that accompanied them, lived with them and observed celibacy. Succession to the office of the *Mohunta* or the head of a *math* is moulded on the analogy of the rule laid down in the above text of Yajnavalkya

Who can be Sudra, Mahomedan,

It has been held that a Sudra cannot become a *sannyasi* or ascetic. (c) This is undoubtedly the doctrine propounded in the Smritis But the learned Judges have not taken into consideration the modern usages introduced by the Vaishnava and the Tantrika and other systems according to which a Sudra and even a non-Hindu such as a Mahomedan may become a Hindu *sannyasi* (d) There are many religious

* *See ante* Ch X, Sec 2, Sub-Sec 1 p 672
(a) Nalinaksha v Rajani, 35 C W N 726, 729
(b) Text No 18
(c) Haris v Atir, 40 C 545 17 C W N 517 18 I C 474, Narsinhdas v Khanderao, 70 I C 860 1922 B. 295, Lochan v Adhar, 35 I C 630 (C), Dharmapuram v Virapandiyam, 22 M 302, see in this connection Somasundaram v Vaithilinga, 40 M. 846 at 859.
(d) Text No. I.

Caste

sects of ascetics among whom caste distinction is unknown, who accordingly initiate and admit Sudras into their brotherhood if otherwise qualified. In esoteric Hinduism also, caste is individualistic not hereditary, it being determined by qualification and not by birth. There is ample and abundant authority in the Shastras in support of this view of caste. (*e*) The highest virtue taught by the Hindu religion is that a man should regard other persons and beings as his own self reproduced in them, as the same Supreme Soul pervades them all (*f*)

Proof

relinquishment of worldly possessions,

ceremonies,

civil death

Proof that a person is Sannayasi.—In order to prove that a person has adopted the life of a Sannyasin it must be shown that he has actually relinquished and abandoned all worldly possessions and relinquished all desire for them, (*g*) or that such ceremonies are performed which indicate the severance of his natural family and the secular life (*h*) It must also be proved in case of orthodox *Sannyasin* that necessary ceremony has been performed, (*i*) without which the renunciation will not be complete. After a person becomes initiated as Sannyasin he becomes dead for the purposes of succession and inheritance and the person who is entitled to succeed him takes his property. But 'dies', in Section 50 of the Civil Procedure Code refers to natural death and not civil death. (*j*)

"Means" in Cr P Code

A Jain Sadhu.—If by his vows he become incapable of holding any property or earning money, then he may be said to have no 'means', within the meaning of Section 488 of the Criminal Procedure Code and may be exempted from maintaining his wife (*k*)

Proselytism—was unknown to Hinduism which is distinguished by toleration. Hindus have respect for all systems of religion, and are free to admit the divinity of

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(*e*) *ante pp* 144-148. (*f*) Text No 2

(*g*) Kondal *v* Iswara, 33 M L J 63, Gouri *v* Nader, 18 C W N 59, 63 · 23 I.C. 287, 288, 289

(*h*) Ramdhan *v* Dalmir, 14 C W N 191 2 I C 385, Sheo Ghulam *v* Shaim 50 A 485 1928 A 257

(*i*) Kondal *v* Iswara, *supra* Boldeo *v* Arya 52 A 789 1930 A 643

(*j*) Madho *v* Gur, 53 A 529

(*k*) Muni *v*. Bai Lilawati, 56 B 260, *see ante p* 688, foot note (*f*).

Jesus Christ, and the divine inspiration of Mahomet It is perfectly consistent with their religion that God became incarnate in other countries for the purpose of teaching religion to the people there. Thus it is said in the Gita —

Christ, Mahomet

यदा यदा हि धर्म्मस्य ग्लानिर्भवति भारत ।
अभ्युत्थानम् अधर्म्मस्य तदात्मानं सृजाम्यहं ॥
परित्राणाय साधूनां विनाशाय च दुष्कृतां ।
धर्म्मसंस्थापनार्थाय सम्भवामि युगे युगे । ४, ७-८ ।

"Whenever there is decay of Dharma or religion or virtue, O Bharata, and exaltation of Adharma or irreligion or vice, then I become incarnate · for the protection of the virtuous, and for the destruction of evil-doers, and for the sake of completely establishing Dharma, I am born from age to age".—Bhagabat-Gita, 4, 7-8

Sec 3—ENDOWMENT

Dharma—Different meanings of the terms *Dharma*, given in the different Sanskrit Lexicons .—

Meanings of Dharma

1 Medine,—

धर्म्मोऽस्त्री पुण्य आचारे स्वभावोपमयोः क्रतौ ।
अहिंसोपनिषन्न्याये ना धनुर्यम सोमपे ॥

Dharma in the masculine or neuter gender (is used in the sense of) (1) religious merit, (2) custom or usage, (3) nature, disposition or character (4) simile, similarity, or comparison, (5) Sacrifice, (6) Harmlessness or non-injury, (7) Upanishad, (8) Law, justice or equity , (it is only) in masculine gender (used in the sense of) (9) Bow, (10) Self-control, or God of death (11) Drinker of Somajuice or sacrificer

2 Viswa—

धर्म्मः पुण्येयमेन्याये स्वभावाचारयोः क्रतौ ।
उपमायामहिंसायां चापे चोपनिषद्गते

It gives the above meanings with the exception of Upanishad and Sacrificer, (7) and (11)

3 Hemachandra,—

धर्म्मोयमोपमापुण्य स्वभावाचारधन्वसु ।
सत् सङ्गेऽर्हत्यहिंसायां न्यायोपनिषदोरपि ।
धर्म्मं दानादिके ।

It omits (5) sacrifice and (11) sacrificer mentioned in Medine, but adds three more meanings, namely (12) Company of the good or virtuous, (13)

The quality of being fit to be worshipped, veneration or adoration, (14) Donation and the like

4 Trikanda—Sesha,—

धर्म्मोऽस्त्रि सोपमायोगोपनिषत्सु धनुष्यपि ।

It gives some of the above meanings

5 Amarakosa,—

धर्म्मः पुण्ययमन्यायस्वभावाचारसोमपाः ।

It gives some of the forgoing meanings

When a Hindu gives property for *Dharma* he intends that the property is to be appropriated to religious and Charitable works for the purpose of securing religious merit

श्रद्धयेष्टञ्च पूर्त्तञ्च नित्य कुर्य्याद् अतन्द्रित ।

श्रद्धाकृते ह्यक्षये ते भवत स्वागतै धनैः ॥

दान धर्म्म निषेवेत नित्यम् ऐष्टिक पौर्त्तिकं ।

परितुष्टेन भावेन पात्रमासाद्य शक्तित. ॥

मनुः, ४, २२६-२२७ ।

A man should always without being tired perform with faith *Istha* and *Purta* or religious and charitable works these being made with faith and with honestly acquired wealth become inexhaustible (or imperishable means of procuring bliss) Manu, iv, 226

Dharma (consisting) of donation, religious or charitable (a man) should always (or daily) make with a cheerful heart according to his ability, (and also) when he finds an worthy object (of gift)

These texts show that property given for *Dharma*—is gift for the benefit of man or the public, either in the form of religious or charitable The compound or conjoint word *dana dharma* shows that *dharma* is identical with *dana* or donation

Charity is supreme Dharma in Kali age

While dealing with *Dharma* or man's religious duty, Manu (*l*) declares (दानम् एकं कलौ युगे) that in the present (kali) age, *charity* alone is the supreme *Dharma* or religious duty to be performed by man for his spiritual welfare, Vrihaspati also ordains the same rule by saying that in the present age *Dharma* consists of Charity, Compassion, and Self-control (*m*) The three terms imply what true charity involves, in fact charity depends on sympathy and self-sacrifice The Sanskrit word दान *dana* which is rendered into charity means primarily *gift* and is used to signify transfer of pro-

(*l*) Ch I verses 81-86.

(*m*) Text No 12 *see p* 847

perty for the benefit of the public in the advancement of religion, knowledge, health, shelter, maintenance, and the like objects, beneficial to man.

Dharma,

When a Hindu gives property for the purposes of *Dharma* he intends to secure *dharma* in the sense of religious merit by appropriating or applying the property for the benefit of man in two forms, namely, *ishta* or *purta i. e., religious* or *charitable* but charity underlies both, as *dharma* consists in donation or charity, and the compound term *dana-dharma* shows that *dharma* is, in this connection, identical with *dana i. e., donation* or *charity* which is called *ishta* or *anter-vedika*, *i. e.,* made within the sacrificial altar, and *purta* or *vahir-vedica*, *i e*, made *outside the altar* or non-sacrificial, so that the gift of property for a religious purpose must necessarily be charitable (*n*) What is called *purta* or charitable work for the benefit of man may take various forms set forth in Hemadri's *Dana-dharma* of which the prominent ones are given below.

Ishta, Purta

Modes of charity temples, hospitals, Maths,

The forms or modes of charity are substantially the same here as in England They are Consecration of image of the Deity in temples for worship. Establishment of Hospitals (आरोग्यशाला) Establishment of *Maths* (मठ) which are either Monasteries for the Sannyasis or monks or persons adopting holy orders, and their disciples receiving religious instruction, or Residential colleges for students, or Asylums for the poor and the religious mendicants, or Shelters for travellers or Guest-houses, or Temples where education is imparted to resident students, or a combination of some or all of them establishment of *Sattras* (सत्र) or Alms-houses for distribution of food to the poor at all times Establishment of *Atithi-salas* (अतिथिशाला) or places of shelter for pilgrims, wayfarers and ascetics who do not stay more than one day. Establishment of schools (पाठशाला) for dissemination of knowledge, (the last three are often connected with temple of Gods) Excavation and consecration of wells,

residential colleges, asylums, guest-houses, alms-houses,

places of shelter,

schools,

wells,

(*n*) Manu's Text No 25, Parthasarathy *v* Thiruvengada, 30 M 340 17 M L J 379

tanks,

planting trees

tanks and other reservoirs of water, for drinking, bathing or irrigation purpose, (consecration implies dedication to the public): Planting and consecrating shady trees for the benefit of wayfarers and the like. The Text Nos. 12-23 describe some of the numerous forms of charity As religion and charity are intimately connected, charitable institutions are, oftener than not, associated with temples for the worship of some image of the Deity. It should be noticed that an endowment for the worship of a God amongst Hindus is a form of charity, whereby the Brahmanas and the poor specially, and the public generally are benefited, the Brahmanas being the repositories and preceptors of religion, the Hindus are benefited by what is intended to support the Brahmanas, their spiritual guides they are deemed public officers or servants.

Dharma conveys charity.

The word *Dharma* therefore, conveys the idea of *charity*, hence when a Hindu makes a gift of property for the purpose of *Dharma* he clearly intends to dedicate the same to Charity The general but absolute intention to appropriate the property to charitable purpose is manifest when property is given for *Dharma*, the particular mode in which the same is to be carried into effect is left uncertain, and it is not difficult to ascertain what form of charity is most required in the locality, and intended by the donor, though not expressed But unfortunately a gift for *Dharma* has been held void for vagueness and uncertainty. (*o*) Their Lordships refer to the different meanings of the word *Dharma*, given in Wilson's Dictionary, that support the conclusion as to vagueness. But it is submitted, with great deference, that although the word *dharma* bears more than a dozen different senses, a Hindu making a gift of property for *dharma*, specially while contemplating his death, should be taken to use that term in the sense consistent with usage and gift of property and to intend only *charity* by that word, or the *religious merit* resulting from *charity*. Three of the senses of that word are

but P.C holds gift for Dharma is void,

(*o*) Runchordas *v* Parvati, 26 I A. 71 23 B 725 affirmed Vundravandas *v* Cursondas 21 B 646, Chandi *v* Haribola 46 C 951 23 C W N 645 29 C L.J 366; 51 IC 215

(1) पुण्य religious merit, (2) क्रतु sacrifice, and (3) दान donation, of which the first is the effect of the latter two, namely, religious and charitable works, A popular religious maxim says,—

एक एव सुहृद्-धर्म्मो निधनेऽप्यनुयाति य ॥

which means,—"Dharma is the only friend that accompanies (the soul of) a person even after death" Here (पुण्य) religious merit arising from religious and charitable work is meant by *Dharma.* In dealing with the question, whether a gift of property for *Dharma* is void for uncertainty, Mr Justice Subrahamania Ayyar has held that a Hindu donor is to be presumed to have used the term in the sense of *ishta* and *purta* donations enjoyed by the Shastras, that meaning being perfectly well-settled. (*p*)

Madras view

The Privy Council has held that a bequest to any *chat-ram* charity which has been indicated, is not void for vagueness and uncertainty (*q*)

Another P C view.

Charitable institution are badly wanted in poor India, and the Courts should carry into effect the gifts for *Dharma* which are undoubtedly intended for charity, by supplying the particular mode which is left uncertain, instead of rejecting them on the ground of vagueness.

What should be the view

Private and public Endowments.—Endowments are either public or private. In the former the public is interested and in the latter certain definite persons only are insterested. When property is dedicated to charitable, educational or religious uses, for the benefit of an indeterminate body of persons, or where the public are freely allowed to worship and no permission of the head is necessrary for such purpose, (*r*) nor can he impose any fee for entrance into the temple, (*s*) the endowment is a public one. But when property is set apart for the worship of a deity of a particular family, in which no outsider is interested, the endowment is a

(*p*) Parthararathy *v* Thiruvengada, 30 M 340 17 M L J 379
(*q*) Vidyanatha *v* Swaminatha, 51 I A 282 47 M 884 29 C W.N 1541 40 C L J 454 26 Bom L R 1121 22 A L J. 983 47 M L.J. 361 82 I C 804. 1924 P C 221
(*r*) Pesapat *v* Kanduri, 30 I C 822 : 2 L.W 858.
(*s*) See Asharam *v* Manager, 44 B 150.

private one. A *Math* or *Mohunty* is a public endowment. Where a temple was originally a private temple, there must be a clear and strong proof of subsequent dedication

***The distinction between private and public—endowment is an important one**, for it has been held by the Privy Council that "in the case of a family idol the consensus of the whole family might give the estate another direction", (*t*) for instance, if all the members of the family renounce Hinduism and choose to throw the family god into the waters of the Ganges, and themselves enjoy its property, no outsider can raise any objection, the endowment being a private one, the public is not interested It has been observed by the Calcutta High Court (*u*) that that question cannot be said to be settled, but, relying on two earlier decisions, (*v*) it has been held that even if the consensus of the whole family can convert an absolute *debutter* property into secular property, such consensus must be of all the members, male and female, who are interested in the worship of the deity. Similarly, it has been held in an earlier decision of the same Court, that the term "whole family" must mean all male and female relations of the founder (*w*) of the private endowment, who are interested in maintaining the worship and thereby preventing the evil effect arising from non-worship of the God, to the founder who dedicated the property for conducting the worship, with the view that he might not incur sin should the God consecrated by him be not worshipped for want of funds. It follows, therefore, that his descendants other than those who, as his heirs, are in charge of the property, are interested in maintaining the worship, and are entitled to prevent breach of

How debutter property converted secular by whole family,

meaning of "whole family"

(*t*) Konwar Doorga *v* Ram, 2 C 341, 347 4 I A. 52, Gobinda *v* Debendra, 12 C W N 98; Tulsidas *v*. Siddhi, 20 C L J 315 note 9 I C. 650, Appu *v*. Kurumba, 21 M L J 588 11 I C 633

(*u*) Chandi Charan *v* Dulal, 54 C 30 30 C W N 930, 934-935, 938 44 C L J 479 1925 C 1083, see Gopal *v* Radha, 41 C L J 395 88 I.C 616 1925 C. 996

(*v*) Monmohan *v* Siddeswar, 27 C W N. 218, Lalit *v* Brojendra, 53 C. 251, 257, appeal *in* 45 C L J 41

(*w*) Chandi Charan *v* Dulal, *above*

of trust by the latter, so detrimental to the founder's spiritual welfare.

Division of debutter property does not turn property secular, nor gift to another family for *puja*

Division of property by Sebayets.—But the mere fact that the *sebayets* have chosen to divide the *debutter* property or the property of an idol and treated it as secular property, does not alter the true character of the property (*x*)

A gift of an image and its endowed property—with concurrence of the whole family to another family for carrying on the worship, is valid, (*y*) and does not alter the character of the property

Deed, Will, Registration, P C view.

Dedication how effected.—A dedication may be made by a written instrument either by a gift *inter vivos* or by a Will. A gift to the trustees on behalf of an idol must be in writing and registered, where, on the occasion of marriage or death, a dedication is to an idol by *mantras* or recitations from the *sloka* or by word of similar import, it need not be in writing or registered. (*z*) A document constituting a trust of property for public religious purpose (*a*) does not require registration nor a gift to God (*b*) require a registered document for its creation, (*c*) even if it relates to landed property (*d*)

Regarding the question of gift, *see* Ch XVI, Sec 3 and for requisites of a valid gift *see* Ch. XVI, Sec. 3, Sub-Sec. 11.

Religious endowment always for public worship.—This distinction, however, appears to be contrary to the true intent of the Hindu law of endowment, according to the principles of which, a trust for the worship of a consecrated image

(*x*) Dharmadas *v* Gosta, 16 C W N 39 11 I C 947, Bhabataran *v*. Behari, 10 I C 399 (C), Madhub *v* Sarat, 15 C W N 126 6 I C 26

(*y*) Khetter *v* Hari, 17 C 557, *see* Rajeshwar *v* Gopeshwar 34 C 828 11 C.W N 782 On appeal from 35 C 226; Nirad *v* Shibadas, 36 C 975, 977 13 C W N 1084 3 I C 76

(*z*) Ramalinga *v* Sivachidambara, 42 M 440 36 M L J 576 49 I C 742 25 M L T. 253, Chandi Charan *v* Dulal *supra*, *but see*, Hira *v*. Anmol, 1928 A 699

(*a*) *See* Section, 5 read with the saving clause of Section, 1 of the Indian Trust Act (Act II of 1882)

(*b*) *See* Section 123 read with Section 5 which contemplates of *living* person of the Transfer of Property Act (Act IV of 1882 and amending Act XX of 1929), *see* Debi *v* Nandalal, 1929 *P* 591

(*c*) Narashimha *v* Venkatalingam, 50 M 687 F. B. 103 I.C. 302 1927 M 636, Rangacharya *v* Guru, 1928 A 689

(*d*) Gangi Reddi *v* Tanmi, 50 M 421, 425 54 I A 136.

of God is to be regarded, as one created for public charitable purposes. (*e*) The distinction seems to be borrowed from English Law, but the Hindu Law, unlike the English Law, makes no distinction between the religious endowments on the ground of such as are established for the worship of a household deity, being assumed to be a private one, and not intended for the benefit of the public, every image when originally consecrated must have been a household deity, but in no case is an outsider prevented to worship what is called a family god, if he wishes, and it would be contrary to religion and usage and deemed sinful to do so. (*f*) Every religious endowment is beneficial to the Hindu community in a religious point of view and it benefits at least the officiating priest in a secular point of view who must be a Brahmana deemed to be a public servant according to the organisation of Hindu society, holding, as he does, the office of a religious instructor of the Hindus. (*g*)

Family deity may be worshipped by public

Endowment irrevocable—When the donor of an endowment has completely divested himself of the property dedicated, he cannot revoke the trust or derive any benefit therefrom, except what has been reserved. (*h*)

Doctrine of *cypres* when applied

If the object of an endowment fails, and the funds cannot be applied to the original purpose, then according to the doctrine of *cypres*, they are to be appropriated to an object of a similar character.

Sec. 4—DEITY—IMAGE

Sub-Sec i—IMAGES

What image represents,

Images, symbol for deity—The images worshipped by the Hindus are visible symbols representing some form of the attribute of God contemplated as having one only of His threefold attributes, upon which is based the Hindu idea of Trinity, namely, God the Creator, God the Preserver, God the Destroyer, the same perhaps, as God the Father, God the Son and God the Holy Ghost.

(*e*) See Manohar v Lakhmiram, 12 B 247
(*f*) Rupa v Krishnaji, 9 B 169
(*g*) Bhupati v Ram Lal 37 C 128 (F B) 14 C W N 18 10 C L J 355 : 3 I C. 642
(*h*) Gopeenath v Gooroodas, 18 W R 472, Nam v Ramoon, 23 W R 76; Sreepati v Krishna 41 C L J 22, Dasami v Param 51 A 621

Its material,

Substance of images.—The images may be made of any of the substances mentioned in the Texts Nos. 4-6.

its object.

Object of image.—The object of worship is not the image, but the God believed to be manifest in the image for the benefit of the worshippers who cannot conceive, or think of the deity without the aid of a perceptible form on which he may fix his mind and concentrate attention, for the purpose of meditation. The lump of metal, stone, wood or clay forming the image is not the God, but the invisible *personified* Deity manifesting itself to the devotees by means of the image, is the God to a Hindu

Whether image can be removed,

Removal of images—When an image has once been consecrated with appropriate ceremony, it must be worshipped, and it cannot be replaced by another image, unless it has become unfit for worship by reason of any of the grounds stated in the Text No. 7. (*i*) But the removal of the idol from an old dilapidated temple to a newly built temple has been held to be not within the powers of the trustee when a large number of worshippers are against the removal, (*j*) but, if all the worshippers who manage the temple, built a new temple on a better sanitary place convenient to the worshippers, as the old one was in ruins and was in an insanitary place, no one else is entitled to prevent building a new temple and removing the image there. (*k*) When there is no fixed abode of the image and when the image is removed from place to place by the *sebayet* during his turn of worship, the Court has, with the consent of the representatives of the parties, directed the erection of a suitable building as the permanent temple of the image. (*l*)

An endower imposed no condition as to the removal of the family deities but his son after the death of his father erected a *Thakurbari* for the location of one of the deities

(*i*) Doorga *v* Sheo, 7 C L R 278
(*j*) Hari *v* Antaji, 44 B 466 56 I C 459 22 Bom L R 334
(*k*) Venkatachala *v* Sambasiva, 1927 M 465, as to the powers of the whole body of worshippers of private endowment, *see p* 860 *foot notes* (*t*) (*u*) (*w*), and (*x*) to which his Lordship's attention seems to have not been drawn In the case in question the whole body of worshippers reported to have joined in the removal of the image
(*l*) Sirish *v*. Debendro, 1929 C 828

on a piece of land acquired by him. *In the declaration of trust he stated that the deities should not on any account* be removed until a similar or better *Thakurbari* was built. The condition, it was held by the High Court, was for the benefit of the deities, valid in law and should have been observed (*m*) The Privy Council on appeal, (*n*) has held that the will of the deity in regard to its location must be respected and as the contest has related to the establishment of individual rights as between contesting *sebayets*, the deity should appear by a disinterested next friend appointed by the Court But it must not be taken that a general proposition has been laid down by their Lordships. (*o*) Their Lordships also held that the interests of female members of the family, especially, in view of the fact that they are excluded from the management of the deity, requires protection and hence the female members should also be joined in such a contest. (*p*)

What amounts to pollution

Destruction and pollution of images.—If the image is cracked, broken, mutilated, or lost it may be substituted by a new one duly consecrated. (*q*) Fresh consecration or substitution is also necessary, if the image be polluted in any way Removal from the temple amounts to pollution in the case of an image of Siva only in some cases. A new image cannot be substituted when the original one is free from any defect of the kind mentioned.

Image when replaced

Nor can the old image be replaced by a new one, by reason of the occurrence of any defect therein, such as cracking, when it is an ancient image believed to have been established by a god, or by a saint, or by an *Asura*, or by a remote ancestor of a family, or when its origin is unknown. Nor is a new image necessary if it can be restored by rejoining its broken parts together, as when the same is made of metal and a limb is severed (*r*) When an image is to be

(*m*) Pradyumna *v* Pramatha, 27 C W N 684 77 I C 833 1923 C 708
(*n*) 52 C 809 52 I A 245 49 M L J 30 27 Bom L R 1064 41 C L J 551 30 C W N 25 23 A L J 537 87 I C 305 1925 P C 139
(*o*) Brojendra *v* Lalit, 45 C L J 41 1927 C 267
(*p*) *See foot note* (*n*) *above*
(*q*) Bijoychand *v* Kalipada, 41 C 57 17 C W N 1013 18 C L J. 347 20 I C 78
(*r*) *See* Texts Nos 7-10

replaced by a new one, it must be done as soon as possible, for the damaged image ceases to be the abode of God, and cannot be worshipped in those cases in which substitution of a new image is necessary. (*s*)

Calcutta view on replaced image slightly different from the old

But the Calcutta High Court, in a case in which an old image was broken forty years ago and the worship was carried on with a *ghat* (earthen pot) on an adjoining piece of land, and in which there was some difference in the form of the replaced image as compared with that of the former, has held that the new image is a validly replaced image, in-as-much as it was meant to be so and the people interested treated it as a restoration of the old image, and because the text of *Hayat Sirsha* does not say that restoration of an image is invalid (*t*)

Endowment not destroyed with image

It should be observed that the destruction of an image does not destroy the endowment (*u*)

Sub Sec ii—JURIDICAL PERSONS

Deity in image a juridical person.

Possessions of property—When a Hindu dedicates property for the worship of the deity by means of an image, which is directed to be set up and consecrated, the property is by a legal fiction deemed to be vested in a Juridical, Juristic or Judicial (*v*) person The God which is believed to be manifested in the consecrated image ought to be deemed the fictional person holding the property The material image is merely a means of worshipping the God The consecrated image is the body, of which the invisible spirit is the soul The consecrated image cannot, apart from the spirit, be regarded as forming the Juridical person for when it becomes damaged and unfit for worship, and is to be replaced by another image, it must cease to be the Juridical person. Where shall the property remain during the interval between the dates of damage and of the restoration, except in the invisible Deity for the worship of which the property was dedicated ?

(*s*) Texts Nos 7-8 (*t*) Kali Kanta *v* Surendra, 41 C L J 128
(*u*) Purna *v* Gopal, 8 C L J 369, (Special Bench)
(*v*) Pramotha *v* Pradyumna, 52 C 809 33 C W N 25, 33 Babajirao *v*. Laxmandas, 28 B. 215, 223 5 Bom L R 932 , *See page* 878 *foot notes* (*k*) and (*l*)

Calcutta view

But a dfferent view has been unwarrantably deduced from the following observations of the Court in a case in which the present question was not in issue at all.

"We believe that according to Hindu notions when an idol has once been, so to say, consecrated by the appropriate ceremony performed, and *Mantra* pronounced, the deity of which the idol is the visible image, resides in it, and not in any substituted image, and the idol, so spiritualised, becomes what has been termed a Juridical person It does not by any means follow that because the idol now in question has passed into the possession of the defendant, together with the property dedicated to it, it has thereby fallen into the condition of a lost or broken idol which, by Hindu Law may be replaced' (*w*)

First image if fit for worship no second image can be consecrated,

In this case the property was dedicated for the worship of the God *Vishnu* by means of a consecrated image, the image originally consecrated for worship and the property were both sold in execution of a money-decree against the *sebayet*, the purchaser brought the image to his house and continued to conduct its worship, after sometime the *sebayet's* son consecrated another image and instituted the suit to recover the property, but not the image originally consecrated. It was contended on his behalf that the removal of the first image from its original temple destroyed its sanctity, and justified its replacement by the second image, and that at any rate the property should be appropriated to the worship of the second image also The first contention was held untenable, and with it the second contention also necessarily fell to the ground. No second image can be set up when the existing image continues fit for worship, the Deity being intended by the founder to be worshipped by means of only one image, and not simultaneously by two

Comment on Calcutta view

There is nothing in the above observations from which it can be inferred that the consecrated image which is the visible spiritualised symbol of the Deity, and not the Deity itself, is the Juridical person holding the property, that was not the question for consideration by the Court. On the contrary, it follows from the very fact that a consecrated image must be replaced by another, under certain circumstan-

(*w*) Doorga *v* Sheo, 7 C L R 278, 280-1

ces—that it is the Deity, and not the image, in which the property must be held to be vested as the Juridical person.

Former view.

Whether consecration before gift necessary But nevertheless from the above observations it had been concluded that the consecrated image was the deity and juridical person capable of holding property, and so it had been held that a bequest to a god to be established and consecrated by the executor after the testator's death was void, as being a gift to a person not in existence at the testator's death according to the Tagore case (x)

There seems to be a misapprehension and misconception of the ideas and intention of the Hindus making gifts of property for religious purposes to be carried out by the consecration of an image These rulings appear to be based on the assumption that the gift is made to the material image to be established after the donor's death, whereas in reality such gifts are made to please the invisible Deity believed to reside in, and spiritualise the consecrated image, properly speaking, no gift can be made to the Deity, for, how can a man make a gift of property to the God who has created him and the property which be an illusion or delusion he thinks himself to be the owner of, for a few days? Neither the invisible spirit nor the consecrated image can be deemed to become owner of property, by gift of property made to worship them (y) Besides, it seems to be overlooked that the rules against perpetuity and remoteness do not apply to gifts for religious and charitable purposes This is expressly stated in the Transfer of Property Act, *Section* 18, with respect to gifts *inter vivos*, (z) and the same principle is applicable to gifts by Wills which are deemed as gifts on the last moment of the lives of Hindus (a)

The validity of such gifts had all along been recognised, as appears from some of the cases (b) It is doubtful whether it is a legitimate and proper use of what is a mere fiction for explaining certain legal incidents The dedicated property may as well be deemed vested in the *Sebayet* as trustee, the donor never declares the person in whom the property is to be vested all that he intends is, that the rents and profits of the dedicated property must be appropriated to the worship The fiction is introduced by lawyers and judges for convenience, but it is not absolutely necessary that the property must be deemed as vested in the Deity or in a fictional person

(x) Upendra v Hem, 25 C 405 2 C W N 205, Rajomoyee v Troylkho 29 C. 260, Nogendra Nandini v Benoy, 30 C 521 7 C W N 121
(y) Bhupati v Ram Lal, 37 C 128, 153 F B 14 C W N 18, 37 10 C L J 355 3 I C 642
(z) Old Sec 17 is Sec 18 now
(a) Parbati v Ram, 31 C 895 8 C W N 653
(b) 1 Knapp 245 ' Sonatun v Juggut 8 M I A 66, Ashutosh v Doorga, 5 C 438. 6 I A 182, Jairam v Kuverbai, 9 B 491, and Gokool v Issu 14 C. 222.

Besides the idea that their Gods are deemed born like human beings, is most repugnant and abhorrent to Hindus who have knowledge of their Shastras

Present view

The difficulty has now been removed by the decision of a *Full Bench of the* Calcutta High Court, holding that where a testator directed his executors and trustees to spend the surplus income of his estate, left after certain payments, in the worship of the Goddess Kali, after having consecrated an image of the Goddess,—the gift was perfectly valid, the principle of the Tagore case being inapplicable to such gifts; for neither the consecrated image nor the Deity manifested in it can become owner of property according to Hindu law. (*c*)

Property given to person for worship of image not existing, valid

When, however, the possession of the subject matter of the gift was given over to a person, the gift to an image not in existence at the date of execution, (*d*) or to an idol periodically consecrated and destroyed, is valid (*e*)

Void gifts

When gift void—But a dedication not to any particular deity, (*f*) or to one to be subsequently installed, without mentioning the particular deity to whom the property was dedicated, (*g*) or one containing vague direction, (*h*) was void for uncertainty.

Sec. 5—MATTS & SATTRAS

Sub-Sec 1 MATTS

Dasnami mohunts

Mathas, mutts or mattams—There are many *Maths* or monasteries in all parts of India and specially in the Deccan that were founded by the disciples and followers of the great religious teacher *Sankara-Acharya*, (*i*) the *Mohunts* of which are called after the names of the ten disciples of the four most favourite pupils of his namely, *Giri*, *Sagar*, *Parvat*, *Puri*, *Saraswati*, *Bharati*, *Tirtha*, *Asram*, *Ban* and *Aranya*, and hence the *Mutts* are called *Dasnamis*

(*c*) Bhupati *v* Ram Lal, 37 C 128 (F B) 10 C L J 355 14 C W N 18 31 C 642, Mohar *v* Het, 32 A 337 7 A L J 295 5 I C 584
(*d*) Chaturbhuj *v* Chaturjit, 33 A 253 A L J 34 8 I C 832
(*e*) Bhupati *v* Ram Lal *Supra*, Asita *v* Nirode, 20 C W N 901, 919 35 I C 127 (P C decision in 24 C W N 794)
(*f*) Chandi *v* Haribola, 46 C 951 23 C W N 645 29 C L J 366; 51 I C 215.
(*g*) Phundan *v* Arya, 33 A. 793 8 A L J 944 11 I C 260
(*h*) Sarat *v* Pratap, 40 C 232 21 I C 194
(*i*) *See* Sheo Ghulam *v* Shiam, 50 A 485 1928 A 257.

The Madras High Court (*j*) describes the origin of *Mattams* which appear to be the same as Mathas or Mutts thus.—

Madras on origin of Matts.

A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mystry of the order, and instructs in its religious tenets Such of these disciples as intend to become religious teachers, renounce their connection with their family and all claims to the family wealth, and, as it were, affiliated themselves to the spiritual teacher whose school they have entered Pious persons endow the school with property which is vested in the preceptor for the time being, and a home for the school is erected and the *Mottam* constituted"

"The object of these *Mutts* is generally the promotion of religious knowledge, the imparting of spiritual instruction to the disciples and followers of the *Mutts*, and maintenance and strengthening of the doctrines and tenets of particular schools of philosophy" (*k*)

Mutts are of three descriptions—namely, *Maurasi*, *Panchayati* and *Hakimi* In the *Maurasi Mutts* the office of the chief *mohunt*, devolves upon the disciple of the existing *mohunt*, who, moreover, usually nominates him as his successor, In the *Panchayati mutts* the office is elective, the presiding *mohunt* being selected by an assembly of *mohunts*. In the *Hakimi mutts* the appointment of presiding *mohunt* is vested in the ruling power or in the party who has endowed the temple. (*l*)

3 kinds of Mutts Maurasi, Panchayati, Hakimi

Mutts of the above description are distinguished from temples in which property is dedicated for the worship of a God primarily for spiritual purposes, and the worshippers are beneficiaries in a spiritual sense, the endowment is indirectly beneficial to the servants of the temple as well as to the objects of charity, as the income cannot but ultimately go for the benefit of human beings, for the God consumes or wants nothing

Mutts compared with temples

The common object of both is the spiritual welfare of man. This is explained in a very learned judgment of Chief Justice Sir Subrahmania Ayyar in which it is observed—

Object of both spiritual

(*j*) Sammantha v Sellappa, 2 M 175, 179
(*k*) Vidyapurna v Vidyanidhi, 27 M 435 14 M L J 105
(*l*) Ramanuj v I Deb, 6 Mac Sel Rep 262, 268, (New Ed) pp 328, 336
Achyuatanada v Jagannath 21 C L J 9 27 I C 739

"The two classes of institutions, v z, temples and *Mutts* are thus supplementary in the Hindu Ecclesiastic system, both conducing to spiritual welfare, the one by affording opportunities for prayer and worship, the other by facilitating spiritual instruction and the acquisition of religious knowledge—the presiding element being the deity or idol in the one, the learned and pious ascetic in the other" (*m*)

It is, however, submitted with great deference that the Deity is the presiding element in both, there being no *mutt* without its Deity the worship is prominent in both, but religious knowledge is added to it in one of them.

Present condition of Bengal Maths

Maths in Bengal.—*Maths* both *Saiva* and *Vaishnava* are found in many parts of Bengal It is worthy of remark that almost all the *Dasnami matts* in Bengal were founded by Brahmanas who came from the North-west Provinces, and not by Brahmanas domiciled in Bengal And the persons that are now connected with these *maths* either as *mohunts* or *chelas* are fresh arrivals from the North-West

But these have lost their original character of being school of religious teaching and have now become rather secular The heads of these institutions are not pious teachers of religion, such as their founders had been, and all the religious teaching they impart to their disciples is an aphoristic prayer secretly communicated to each of them The *mohunts* and the *chelas* are generally not learned persons but are ignorant of the Shastras and even illiterate, having no access to their religious books They observe celibacy in so far that they have no wives with them, for, as their early life is not known it cannot be said that all of them are unmarried Some leave their homes in disgust, while others appear to have fled from their country after having committed heinous crimes Religion, however is not the object for which people resort to these places Those that hope to be maintained by the *mohunt* and especially his own relations become his *chelas*, Acquisition of property by fair means or foul, appears to be the principal object of their care And the endowed property is generally misappropriated The intention of the donors may be more usefully carried out by appropriating the large property so endowed, to the dissemination of knowledge of the Sanskrit language and Hindu theology

Followers of Chaitanya

Vaishnava Mutts—But most of the *Vaishnava mutts* or religious establishments in Bengal, Behar and Orissa were founded by Bengali Brahmanas and Kaysthas who were disciples and followers of *Chaitanya*, the great founder of *Vaishnavism* in Bengal.

(*m*) Vidyapurna *v.* Vidyanidhi, 27 M 435, 454 14 M L J 105

There are religious establishments called *Maths* or *Sattras*, especially those belonging to the *Vaisnavas* of which the *Mohunta* or head may marry, or rather may live with his wife while holding that office. (*n*) It should, however be observed that marriage is not a disqualification in any case. A married man renouncing the world and adopting a holy order may become a *Sannyasi* and then he may become the head of a monastery of ascetics or monks.

Sub-Sec ii—SATTRAS

Sattras.—*Sattras* are religious and charitable establishments like *mutts* the instinctive idea conveyed by the term being the distribution of food and drink. These are invariably founded in holy places such as Benares, Brindaban etc. The primary meaning of the word *Sattra* is Protector of Existence. The charitable institutions affording food and shelter to travellers, religious mendicants and pilgrims were absolutely necessary in this country where Hotels were unknown.

Sec 6 - MAHANTAS

Mohunta —The Mohants or the heads of these institutions are called *Dasnamis*. namely (1) *Giri*, (2) *Sagar*, (3) *Parvat*, (4) *Puri*, (5) *Saraswati*, (6) *Bharati*, (7) *Tirtha*, (8) *Asram*, (9) *Ban* and (10) *Aranya*. The several institutions are called by one or the other names of the ten disciples of the four most favourite pupils of *Sankara-Acharya* and the heads of the institutions are named accordingly. They are Saivas and worship the *Lingam* or *Phallic* Symbol established in the temples connected with the *Maths* the most ancient of which are called *Paramparagata* or come down in the course of succession through many generations. The *Sannyasis* attached to them often adopt infants as their *chelas* or pupils or religious sons, who are intended to be initiated as *Sannyasis* observing celibacy. The natural fathers give their sons to be so adopted by them, when the adopting *Sannyasis* are possessed of considerable property to be inherited by the sons by becoming their *chelas* or spiritual sons and heirs. (*o*)

(*n*) Adwaita Das *v* Lalit, 33 C W N 967 1930 C 57

(*o*) Gossain Ramdahan *v* Gossain Damu, 14 C.W N 191 2 I C 385.

It should, however, be observed that it is not only those who intend to become religious teachers but it is also those who intend to devote their undivided attention to their spiritual advancement during the rest of their life, that renounce their connection with their family and family property, and become affiliated to the preceptor.

Women.

Woman as Mahanta —A woman can be the *Mohant* of the *Dharmsala Sain Bhagat* in Lahore, (*p*)

Various names of the trustee

Mohants and Math property —The property belonging to the *maths* is regarded as *Debutter* belonging to the deity established by the founder The trustee or manager is called *Mohunt, Sebayet, Sevak, Adhikari, Parichara k, Dharmakarta* or the like.

The position of the head of Mutt —With respect to the property of the generality of *Mattams*, the Madras High Court observes, "The property is in fact attached to the office (of the head of the institution) and passes by inheritance to no one who does not fill the office It is in a certain sense trust property, it is devoted to the maintenance of the establishment, but the superior has large dominion over it", and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution Acting for the whole institution he may contract debts for purposes connected with his *Mattam*, and debts so contracted might be recovered from the *mattam* property and would devolve as a liability on his successor to the extent of the assets received by him. Their Lordships add that there may be *mattams* of which the property may be held on different conditions and subject to different incidents (*q*) The head of a *Mutt* cannot be held as a life-tenant or a trustee The question must be determined in each case upon the condition on which the endowment was made or which may be inferred from the custom

Trustee.

(*p*) Bishambar *v* Phulgari, 11 L 673

(*q*) Sammantha *v* Sellappa 2 M 175, 179, *See* Giyana *v* Kandasami, 10 M 375

of the institution, (*r*) in the absence of any written grant. It has been held that a debt incurred by the head of a *Mutt* is not binding upon his successor, unless it was necessary for the maintenance of the *Mutt* (*s*)

Madras view on temples and Mutts

Whether he is trustee —A distinction is drawn by the Madras High Court between Temples and the aforesaid *Mutts*, in the former of which the endowed properties are deemed vested in the presiding God treated as a juristic person, the management being vested in a trustee , while the property of a *Mutt* is vested in the head of the institution as holder of the office as a *corporation sole* , he may be appointed also a trustee of a temple or *Devasthanam* and its endowed property, as when such an endowment is attached to a *Mutt*, then he is bound to apply the entire income to the purposes of the temple and would be accountable as its trustee (*t*)

The property and the income of the endowed property are to be used in accordance with the direction contained in the deed of endowment , but where no such deed is forthcoming, the rules acccording to which they are to be dealt with inorder to carry out the intention of the original endower, can only be gathered from the practice proved by evidence to have been followed in the particular case. (*u*)

P C view

In the recent case of *Vidya Varuthi v. Balusami* (*v*) the Privy Council, on a review of all the important decisions on the position of a *Mohunt* or the head of a *Mutt* with respect to its property, has held that "In no case was the property conveyed to or vested in him nor is he a 'trustee' in the English sense of the term, although in view of the obligations

(*r*) Kailasam *v* Nataraja, 33 M 265 F B 19 M L J 778 5 I C 4, Kumaraswamy *v* Lakshmana, 53 M 608 1930 M 549, Rangacharya *v*. Guru, 1928 A 689

(*s*) Vidvapurna *v* Vidyanidhi, 27 M 435 · 14 M L.J 105

(*t*) Vidyapurna *v* Vidyanidhi, 27 M 435 14 M L J 105, Babajirao *v* Laxmandas, 28 B 215 5 Bom L R 932

(*u*) Ram Parkash *v* Anand, 43 C 707, 716 43 I A 73, 78 20 C W N 802 24 C L J 116 31 M L J 1 18 Bom L R 490 14 A L J 621 33 I C 583, Palaniappa *v* Sreemath, 40 M 709 44 I A 147 21 C W N 729 25 C L J 153 33 M L J 1 15 A L J 485 19 Bom L R 567 1 P L.W. 697 39 I C 722 *see also* Vidya *v* Balusami, 25 C W N 537, 556, *see foot note* (*v*) following

(*v*) 44 M 831 41 M L J 346 48 I A 302 25 C W N 537, 547, 550 24 Bom. L R 629 : 65 I C 161 20 A L J 497 : 1922 P C. 123

and duties resting on him, he is answerable as a trustee in the general sense for mal-administration." (w) Their Lordships also observed that a Hindu may convey in trust, a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law, when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term. The position of a *Dharmakarta*, therefore, is literally and no more than the manager of a charity, and his rights, apart from the question of personal support, are never higher than that of a trustee (x) It is observed that the position of *Mutadhipati*, the head of a *Mutt* is analogous to that of a widow, but there is danger in pressing the analogy too far (y)

High Court view

Limit Act amendment.

The matter has now been practically settled by the Legislature by the addition of the following paragraph to section 10 of the Indian Limitation Act "For the purposes of this section, any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowments shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee there of." (y1)

Sec. 7—ENDOWED PROPERTY

Sub-Sec 1—NATURE OF PROPERTY

Different kinds of endowed property—There are usually three descriptions of such property

1—Vested in diety as juridical person,

(1) Property of a temple as *Devasthanam* which is vested in the ideal juridical or juristic person, *viz.*, the God to which it is dedicated, of which the *Sebayet* is a mere manager who is to carry out the specific purposes of the endowment, *i. e.* the daily worship and the periodical ceremonies and festivals purposes defined and settled by usages and custom.

(w) *See* Sri Sri Gopal *v* Radha, 41 C L J 393, 418 88 I C 616 1925 C 996

(x) Srinivasa *v* Evalappa, 45 M 565 49 I A 237 27 C W N 317, 326 36 C L J 524 21 A L J 253 24 Bom L R 1214 43 M L J 536 68 I C 1; 1922 P C 325

(y) Arunachelam *v* Velappa, 28 M L J 410, *see* Kunjamani *v* Nikunja, 20 C W N 314 22 C L J 404 32 I C 823 (y1) Act I of 1929

(2) Property of *mattams* which is vested in the preceptor or head of the institution, as a *corporation sole*, who has at his disposal the income derived from the endowments of the *mutt* as well as from money-offerings of its disciples and followers, the large surplus of which left after carrying out the defined and specific but limited purposes of the *mutt* requiring the expenditure of a small part of the income, may be expended by him, at his will and pleasure, it being his *moral* obligation to devote the surplus to the religious and charitable objects and in the encouragemet and promotion of religious learning, as he is expected to do (;)

ii—Vested in the head as corporation sole,

(3) Property held by a *mutt* or other charitable institution as a judicial person and managed by its head as a trustee, thus, it is observed by the Chief Justice of Bombay,

iii—Vested in Mutt as juridical person,

"A *math*, like an idol, is in Hindu law a judicial person capable of of acquiring, holding and vindicating legal rights, though of necessity it can only act in relation to those rights, through the medium of some human agency" (*a*)

(4) There may be another description of property It is not illegal if the founder of a public temple create a trust to the effect that the temple shall be maintained out of the offerings to the idol and the balance should go to himself and his family, provided, it did not offend the rule against perpetuities. (*b*)

iv—Vested in trustee

Holder's rights—"The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over.

P C view.

(;) *But see* Prayag *v* Tirumala, 30 M 138: 34 I A 78 11 C W N 442 17 M L J 236 9 Bom L R 588

(*a*) Babajirao *v* Laxmondes, 28 B 215, 223 5 Bom L R 932

(*b*) Kmuaraswamy *v* Lakshmana, 53 M 608 1930 M. 549.

But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession * * * The general trustee is only a representative of the idol who is a juridical personage, and who is the true owner, and there is nothing illegally incongruous in that personage having other subordinate representatives who have the right to manage certain special portions of the property, and pay over the income so collected to the endowment, and even to some degree to control its use" (c)

Personal presents are his

Mohunt's right to income of Mutt.—The money-offering, if made to the *mohunt* personally, may belong to him absolutely, (d) but if he is *expected* by the donor, to spend the surplus income of the endowment for charitable and educational purposes, then although he may be at liberty to choose any one or more of those purposes, on which he may spend the whole of the surplus, yet he must be held to be under legal obligation to fulfil the *expectation* A Hindu granting and entrusting to a pious man, property as an endowment for religious and charitable purposes, cannot be presumed to give him the general power of appointing the income or the surplus income of endowed property to any object he pleases, but must be taken to grant him the special power of appointing the surplus, if any, left after carrying out the defined and specified purposes, to objects *ejusdem generis*, in other words, to "objects of religious charity and in the encouragement and promotion of religious learning,"—and to intend that he must whether as a trustee or otherwise, be accountable in law for the due exercise of the power. Accordingly, it is held by the Privy Council that the surplus income should be invested for the benefit of the *mutt* or temple, and the Court

To spend for purposes of the institution,

P C view on surplus

(c) Ambalavana v Meenakshi, 43 M 665, 672 · 39 M.L.J. 50, 56 P.C.
(d) See foot note (g) below.

may be moved for settling a scheme for its protection and expenditure. (*e*)

Temples—Temples, are oftener than not, combined with *mutts* or asylums of ascetics for religious instruction and other persons, and with other charitale institutions, as is clear from the original texts cited above

Temples usually attached to the institutions

A temple is said to be जीर्ण *i e.* dilapidated when it is not reduced to ruins and सर्वांग विनाश means not partial but general, and the books on sacerdotal architecture are not mandatory. The *dharmakarta* has a discretion in the manner of repair to be made of the temple when there is no want of good faith. (*f*)

Repair of temples

Personal property of mohunt.—The personal property of the head as well as of other members of a *mutt* is also to be taken into consideration, as distinguished from the endowments. The offering made to a *Mohunt* is not the property of the trust (*g*) but belongs to him Though the self-acquired property of a *Mohunt* might have devolved in the spiritual line for several generations, it cannot be presumed that it was a trust property, and in the absence of any evidence to the contrary it must be assumed to belong to the *Mohunt* as owner. (*h*)

What are personal properties

But the person alleging that any property left by a *Mohunt* is such a property or that the property had been acquired out of such offerings or his official perquisites or with funds which belonged exclusively to the *Mohunt*, is to prove it (*i*) Where the discoverable origin of property show it to be trust property, the *onus* is on the trustee to show by the clearest and most unimpeachable evidence that it came legitimately to him as his personal property. (*j*)

Onus

Dedication how effected —*See ante* page 861.

(*e*) Prayag *v* Tirumala, 30 M. 138 34 I A. 78 11 C W N 442 17 M L J 9 Bom L.R 588
(*f*) Panchapagesa *v* Sinna, 1929 M 128
(*g*) Kumudban *v* Tripura, 35 C L J 188 60 I C 464
(*h*) Sheo Ghulam *v* Shiam, 50 A 485 1928 A 257
(*i*) *See* Kamla *v* Basdeo, 25 C W N 217 P C 7 C I J 434 (1920) M.W N. 553 28 M L.T 404 58 I C 900
(*j*) Srinivasa *v* Evalappa, 45 M 565, 575 49 I A 237 27 C W N 317 36 C L J 524 21 A L J 250 24 Bom L R. 1214 43 M.L J 536. 68 I C 1 1922 P C 325.

Sub-Sec ii—GOD AND MUTT OWNER

Property vested in juridical person

God and mutt owner—It has already been shown that amongst Hindus of the present day, *Dharma, i e*, religious duty or act is identical with charity, and charitable institutions established by orthodox Hindus are invariably connected with images of Gods consecrated either by themselves or by their ancestors The property intended for charitable purposes is formally dedicated to the Deity by a deed of endowment containing directions for the application of the income to religious and charitable purposes which are specified or indicated The property is vested in the God deemed to be a juridical or juristic person, (*k*) and as such capable of holding property, and this appears to be the true legal view when the dedication is of the completest kind (*l*)

Sub-Sec iii—FAMILY DEITY

i—When no property endowed

Dedication to family Gods.—Every respectable Hindu family has its family god In most cases there is no property dedicated to it, the worship is voluntarily conducted by the descendants of the founder. If any member refuses to bear the expenses of his *pala* or turn of worship, in such a case it has been held that he cannot be compelled to do so, the obligation being a moral one (*m*)

member not liable to contribute

ii—When property charged for worship

In some cases, the worship of an idol is made a charge upon certain property that is not entirely dedicated (*n*) Such property is heritable and transferable, subject to the charge. (*o*) But the mere fact that the rents of a property have been applied for a considerable period to the worship of a god, is not sufficient proof of dedication (*p*)

iii—When absolutely dedicated.

When any property is entirely dedicated for the worship of a Deity and no person has any beneficial interest in the property, it becomes absolute or complete *Debutter*

(*k*) Vidya Varuthi *v* Balusami, 44 M 831 48 I A 302 41 M L J 346 2 C W N 537 24 Bom L R 829 65 I C 161 and this approved in Ram Charan *v* Gobind, 56 C 894 33 C W N 346

(*l*) Prosunna *v* Golab, 2 I A 145, Jagadindra *v* Hemanta, 32 C 129 31 I A 203 8 C W N 809 1 A L J 585 7 Bom L R 765

(*m*) Sam *v* Huro, 5 W R 29

(*n*) In this connection *see* Gopal *v* Purna, 49 C 459 49 I A 100 27 C W N 174 36 C L J 57 20 A L J 625 24 Bom L R 937 43 M L J 116 67 I C 561 1922 P C 253, Ranchhod *v* Bai, 1926 B 309, Barboni *v* Panicharik, 1930 C 526

(*o*) Ashutosh *v* Doorga, 5 C 438 6 I A 182, Surja *v*. Har, 39 A 311.

(*p*) Konwar Doorga *v* Ram, 2 C 341 4 I A 52 *See* foot note (*a*) *infra*.

Signs of the nature of Debutter

Determination of nature of Debutter.—An endowment of property for religious and charitable purposes may be absolute and complete, subject to payment of temporary charges, and subject to a provision for remuneration of the trustee, in such cases, the corpus cannot, in whole or part, be liable to attachment for the trustee's personal debts, by reason of the surplus left after due performance of the trusts, being held by him for his own benefit as remuneration (*q*) An endowment for religious and charitable purposes may be created by a Will to take effect after the determination of a life-estate (*r*) It has been held that mere execution of a document dedicating property to a family god, is not dedication in the absence of any act following it, showing that the executant did divest himself of the property (*s*)

It should be observed that in order to constitute any property *Debutter*, it is necessary to prove that the property was dedicated, and that the rents and profits of the same have all along been appropriated to the worship. (*t*) The treatment of the property by the donor and his successors is the test whether the endowment is real and *bona fide*, or nominal and colourable, made for defrauding creditors, (*u*) but it is not unusual to describe them as 'ancestral' or as 'our debutter properties' or to describe the interest of *sebayets* according to the share they have in secular property. (*v*) The question whether an absolute *Debutter* is created or there is merely a charge in favour of the *Deb Seva* depends upon the terms of the deed and the circumstances of each case, (*w*) In cases of complete dedication, the grantor

dedication, user, treatment, terms of deed,

(*q*) Bishen Chand *v* Nadir, 15 C 329 15 I A 1

(*r*) Gopind *v* Gomti, 30 A 288 5 A L J 256

(*s*) Watson *v* Ram, 18 C 10 17 I A 110 *See* foot-note (*a*) *infra*

(*t*) Muddun *v.* Komul, 8 W R 42, 2 Hay 490,

(*u*) Madhub *v.* Sarat, 15 C W N 126 6 I C 26, Kulada *v* Kali, 42 C 536 20 C L J 312 19 C W N 542 24 I C 899, Gungi *v* Brindaban, 3 W R 142, Ram *v.* Ranjit, 27 C 242 4 C W N 405, Bhekdhari *v* Sri Ramchandraji, 10 P 388

(*v*) Gopal *v* Radha, 41 C L J 396 88 I C 616 1925 C 996

(*w*) Chandi Charan *v* Dulal, 54 C 30 44 C L J 479 30 C.W.N. 930. 1926 C. 1083, Bhekdhari *v.* Sri Ramchandraji, 10 P 388.

circumstances.

must divest himself of every interest in the property. (x) A reservation of a moderate portion of the income of the estate endowed for the remuneration of the manager will not invalidate the endowment either as a whole or to the extent of the income so reserved. (y) So a provision for residence of the *Sebayet* in a part of the endowed property set apart for the accommodation of the idol is perfectly valid and reasonable provision. (z) In the absence of proof of dedication, mere appropriation for some time, of a portion of the profits to the worship, (a) or the release of the land by Government on the ground of such appropriation, (b) or mere purchase of the property in the name of the God, (c) or the mere execution of a deed of dedication, (d) is not sufficient proof of dedication.

Letter of administration—Where a woman bequeathed one of the legacies of a specified amount to the family priest and directed that the residue would be devoted to the maintenance and the worship of the idol established by the ancestors of her husband, the person entitled to the Letters of Administration is the *Sebayet* and not the priest. (e)

Management

Management of family Debutter—The powers of a manager of the property dedicated absolutely for the worship of a family God are the same as those of the manager of the property of a *matt* The law on the subject is explained as follows,—"According to Indian common law relating to Hindu religious institutions * * * the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with

(x) Bhekdhari v Sri Ramchandraji, 10 P 388

(y) Jadu v Thakur, 39 A 553 44 I A 187 21 C W N 953 26 C L J 309 19 Bom L R 687 42 I C 225

(z) Gnanendra v Surendra, C W N 1026 P C 61 I C 323, Chandi Charan v. Dulal, 54 C 30 44 C L J 479 30 C W N 930 1926 C 1083

(a) Ram v Sreehure, 18 W R 399 *see* foot-note (p) above

(b) Nimaya v Jogendra, 21 W R 365

(c) Brojo Soondery v Luchmee, 11 W R 13, affirmed by P C, in 20 W R 95

(d) Watson v Ram, 18 C 10 17 I A. 110, Thakurji v Sukhdeo 42 A 395 F B *see foot-note (s) above*

(e) Kali Krishna v Makhan, 50 C 233 36 C L J 441 27 C W N 411 72 I C 681, 1923 C 16

reference to such endowments, but they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. The revenue thereof may alone be pledged for the necessities of the institution. *Maharannee Shibessouree Debbya* v. *Mothooranath Acharje*, (*f*) *Narayan* v. *Chintaman* (*g*) and *Collector of Thanna* v. *Hari Sitaram*, (*h*) are direct authorities in support of this statement of the law. Nor do I think that *Prasanna Kumari Debya* v. *Gilabchand Baboo* (*i*) is to be understood as recognising any wider powers in the managers of such institutions" (*j*) The Privy Council has held that in the absence of justifying cause, a *Mohant* or a *Sebayet* cannot create a tenure to endure beyond his life. (*k*) Then their Lordships go on to observe that the necessary expense can, and should, be fully met from the income of the endowments, by reducing, if necessary, the scale thereof, as has already been stated (*l*) In fact no valid endowment can be created by an instrument whereby the power of alienation is vested in so-called *Sebayet*. (*m*)

Lease Mortgage

P C view on alienation

Expenses to be curtailed

Where there is an unconditional gift to charity with a direction for accumulation indefinitely, the trustee or the *Sebayet* is not fettered by such direction nor is he liable to spend the whole of the income each year. (*n*)

Accumulation

When a dedication is made with the object of defeating the claims of the creditors and is nominal and colourable the endowment is invalid (*o*)

Colourable endowment.

Accretions. – In almost all public or private religious institutions various persons after their foundation made additional endowments at various times, sometimes with

Accretion

(*f*) 13 M I A 270 13 W R P C 18 (*g*) 5 B 393
(*h*) 6 B 546, 552 (*i*) 2 I A 145
(*j*) Nallayappa v Ambalavama, 27 M 465, 472 3 (F B) 4 M L J 81
(*k*) Nainapilli v Ramanathan, 47 M 337 28 C W N 809, Vidya Varuthi v Balusami, 44 M 831 48 I A 302 26 C W N 537, 24 Bom L R 629 41 M L J 346 65 I C 161
(*l*) Ante p 768-9. (*m*) Hara v Basunta, 9 C W N 154
(*n*) Sarojini v Gunendra, 23 C L J 241 33 I C 102
(*o*) Kalimata v Nagendra, 44 C L J 522 Ram Chandra v Ranjit, 27 C 242

with condition

certain conditions attached and sometimes without any condition. These contributions by other persons are accretions to the original foundations. (*p*) But the question is how far the conditions are binding on those who are the managers of the existing institutions according to the original endowment, particularly conditions relating to devolution of the existing order of managership or to the managership to the accretions. (*This question has been elaborately discussed in Sec. II "Succession," sub-section 2 below*).

about devolution

Sec. 8—MANAGEMENT

Manager's position

possession,

protection,

suits,

Manager.—"It is only in an ideal sense that property can be said to belong to an idol, and the possession and a management of it, must, in the nature of things, be entrusted to some person as Sevait, or manager." (*q*) "And this carries with it the right to bring whatever suits are necessary for the protection of the property, every such right of suit is vested in the Sevait, not in the idol" (*r*) He is considered as the legal representative of the prior manager. (*s*)

The above observations with respect to a God apply also to a *Math* deemed a juridical person for holding property. But this doctrine does not apply to a temple in which an idol is located. (*t*) And "when property is vested in a *Math*, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is in the manager, but it is the established practice that the suit would be brought in that form "(*u*) And the manager has in relation to such a suit a distinct capacity; he is therein stronger to himself in the personal and private capacity in a Court of Law.

(*p*) Brojendra v Lalit, 45 C L J 41, 53 1927 C 252 Appeal from 53 C 251, Ananda v Broja, 50 C 292 35 C L J 356 74 I C 793, 1923 C 142

(*q*) Prosunno Kumari v Golab, 2 I A 145, 152

(*r*) Jagadindra (Maharaja) v Rani, 31 I A 203, 210 8 C W N 809, *see* Bidhu v Kulada, 56 C 877 Sri Sri Gopal v Radha, 41 C L J 395 88 I C 616 1925 C 996, Rangacharya v Guru, 1928 A 689, Gopalji v Krishna, 1929 A 887, Naurangi v Ram 9 P 885 1930 P 455

(*s*) Moti v Satyanand, 1930 A 348

(*t*) Thakardwara v Ishar, 1928 L 375

(*u*) Babajirao v Laxmandas, 28 B 215, 223 5 Bom L R 940, Thakardwara v Ishar, 1928 L 375

Manager of infant's estate

"It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol, and for the benefit and preservation of its property, at least, to as great a degree as the manager of an infant heir" (*v*) But the Calcutta High Court has held that Order 32, Rule 6 of the Civil Procedure Code has no application in a case of a Sebayet and a Court cannot order him to furnish security for withdrawing surplus sale proceeds of Debutter property at a Revenue sale (*w*) The remedy suggested in this case to prevent waste may be too late in many cases.

He a trustee

Manager's legal position—The managers of these endowments are deemed to be in the position of trustees as regards their property and in the position of holders of an office or dignity as regards their services and duties. (*x*) The Privy Council, in the case of *Ram Prokash Das* v *Anand Das,* has explained the position and rights of a *Mohunt* of an *Asthal* or *Mutt* It is said that the property of a *Mutt* or *Asthal* is generally held by the *Mohunt* as its owner in trust for the institution, (*y*) still the property in some cases may be held on different conditions and subject to different incidents But in a later case the Privy Council has held that in no case was the property conveyed to or vested in the head of the *Mutt,* nor is he a trustee in the English sense of the word. "Whatever property he holds" their Lordships held, "for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage." (*z*)

P C view,

(*v*) Prasanna Kumari *v* Gulab 2 I A 145, 152
(*w*) Newal Kishore *v* Secretary, 1926 C 187
(*x*) Ramanatham *v* Murugappa, 29 M 283, 33 I A 139, 144 10 C W N 825 4 C L J 189 16 M L J 205 3 A L J 707-8 Bom L R 498
(*y*) 43 C 707 43 I A 73 20 C W N 802 24 C L J 116; 31 M L J 1 14 A L J 621 18 Bom L R 490 33 I C 583, this view affirmed by the Privy Council in Arunachellam *v* Venkata, 43 M 253, 268 46 I A 204 24 C W N 249; 37 M L J 460 17 A L J 1097 22 Bom L R. 457; 53 I C 288; Basudeo *v* Jugalkishwar, 22 C W N 841 28 C L J 476 35 M L J 5 16 A L J 601 20 Bom L R 1088, 5 P L W 57 15 I C 818.
(*z*) Vidya Varuthi *v* Balusami, 44 M 831 48 I A 302; 41 M L J 346 26 C W N 537 24 Bom L R 629 65 I C 161; 20 A L J 497, 1922 P C 123, Gangi Reddi *v* Tammi, 50 M 421 54 I A 139 *See* Nandkishordas *v*. Kala, 1926 N 351.

Madras

The distinction drawn by the Madras High Court in favour of the head or preceptor *Mattam*, seems to owe its origin to the false analogy of a *Corporation sole* Assuming that the defined and specified purposes of a Mutt are very limited, and that a large part of the income derived from the endowments and the money offerings of disciples, is at the disposal of the head of the Mutt, which he is *expected* to spend ,not at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning, it is difficult to understand why his obligation to devote the surplus income to such religious and charitable objects should be one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion, and he is in no way, whether as a trustee or otherwise, accountable for it in law (a)

Maladministration.

Liability of Manager—The manager is answerable for maladministration as a trustee in the general sense, though he is not an express trustee in the English sense. (b)

Account

Limitation.

His liability to render account shall never be barred by statute of limitation, (c) as, for the purposes of Section 10 of the Limitation Act he is deemed as a trustee. (d) But one trustee cannot take his stand on general law and claim accounts from his co-trustee for his own protection and for the preservation of the trust, unless it is so provided. (e)

Discretion,

subject to custom,

Manager's powers—He has ample discretion in the application, of the funds of the *Mutt*, but always subject to certain obligations and duties governed by customs and usages. (f) In the absence of lack of good faith, the manager has a discretion in deciding whether a temple requires renovation and there is no legal principle enabling the Court to review the discretion. (g)

debt,

He cannot, as a matter of course, borrow money, but he can, in cases of necessity, exercise his discretion to borrow money. (h)

(a) Vidyapurna v Vidyanidhi, 27 M. 435, 455 14 M L J 105

(b) Nellappa v Punnanvanav, 50 M 567 : 1927 M. 614

(c) Act IX of 1908, Section 10

(d) Amending Act I of 1929, Section 2

(e) Rungacharya v Guru, 1928 A, 689, Narayanan v Moothi, 1930 M. 295.

(f) Vidya Varuthi v Balusami, 44 M 831 48 I A 302 41 M L J 346 25 C.W N 537 24 Bom L R 629 20 A L J 497 65 I C. 161 . 1922 P C 123, this view reapproved in Vibhudapriya v Lakshmindra, 50 M. 497 54 I A. 228 31 C W N 1021 45 C L J 613 . 1927 P C. 131

(g) Panchapagesa v Sinna, 1929 M 118

(h) Packiria v Subbiah, 1928 M. 1059.

The rules, prescribing the pass system on payment of fixed fees for entrance into the sanctuary of the temple of *Shri Ranchhodraiji* at *Dakore*, are illegal and *ultra vires*. (*i*) In another dispute, relating to the same endowment, about the right of worshipping in the temple, it has been held, that a right to worship at a temple is not an absolutely unrestricted right, but must be subject to reasonable regulations Their Lordships also stated that every Hindu has a right to enter a Hindu temple and obtain the sight of the deity and perform his act of worship, from a distance, in the main body of the temple, without payment of any fees, but in case of inner sanctuary or the Holy of the Holies the access is not equally free (*j*) A trustee of a religious institution has no power to alter the purpose for which it was founded, accordingly it has been held that he cannot permit a temple dedicated to the worship of the God Siva, to be entered into for worship by a low caste who originally used to manufacture spirituous liquor from the juice of a palmyra palm, and was on that account excluded from the temple by custom (*k*)

imposing fee for entrance to temple at Dakore,

entrance by low Castes into temples,

The majority of the members of a religious institution have no powers to adopt a resolution and give effect to it, if its effect is to alter the fundamental objects of the body unless such a power is specially reserved. (*l*)

altering objects,

The *Mohunt* or the *Sebayet* cannot enter into a compromise in a dispute between himself and another relating to the trusteeship of the *Mutt*, for the benefit of himself and of his rival. (*m*) The trustees cannot combine together to defeat the interest of the deity by fraud or mutual consent and any decree thus obtained is not binding on the deity (*n*)

compromise by two trustees

Extinction of sebayet's right—A *Sebayet* has not vested interest in the *debutter* property, he is merely a mana-

(*i*) Asharam *v* Manager, 44 B. 150

(*j*) Shankarlal *v* Dakor, 1925 B 179

(*k*) Sankaralinga *v* Raja, 31 M 236 35 I A 176 18 M L J 387 12 C.W N. 946 8 C L J 230 10 Bom L R 781

(*l*) Venkatesa *v*. Srinivasa, 53 M 737

(*m*) Kailasam *v* Nataraja 32 M L J 271 40 I C 627 (after remand from 33 M 265).

(*n*) Rangacharya *v*. Guru, 1928 A. 689.

ger of the deity and ceases to be a *sebayet* when he ceases to manage the property and carry on the worship. (*o*)

Management of family debutter—*See* Sec. 7 Sub-sec. iii.

Removal of Manager—*See* Sec. 10, Sub-sec. ii, below.

Sec 9—ALIENATION

Sub-Sec i—DEBTS

Debts:

Debts.—"Notwithstanding that property dedicated to religious purposes is, as a rule, inalienable, it is competent for the *Sevait*, in the capacity of *Sevait* and manager of the estate to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them" (*p*) Where a debt is found to be not binding on the *Mutt* property, a plaintiff is not, entitled to a decree to recover his money unless he shows that the late head of the *Mutt* who borrowed the money left some personal assets (*q*) It is, however, worthy of special remark, that the *Sevayet* of a religious and charitable institution is bound to keep the expenditure within the income left after setting apart out of what is sufficient for meeting the necessary occasional expenses. And if debts have to be contracted for an unexpected necessity, the same ought to be paid off by savings from the income, secured by means of reduction of the scale of expenses, for, the expenses for worship may be reduced to a nominal figure, and the expenses for charities admit of reduction and even of temporary suspension, so that the corpus of the endowed property may be saved and the institution maintained The corpus must not be transferred, and the necessity ought to be met, if possible, by pledging the

for worship, repair, litigation

Expenditure to be confined within income

(*o*) Bhuban *v* Narendra, 35 C W N 478

(*p*) Prosunno Kumari *v* Gulab, 2 I A 145, 151.

(*q*) *See* Sundarappiar *v* Chokkalinga, 86 I C 291 · 1925 M. 1059.

revenue only, or by unsecured debts, to be paid off, by reduction of expenditure. (*r*)

Sub Sec. ii—ALIENATION OF PROPERTY

Alienation—The Sebayet or manager has no legal property which in contemplation of law belongs to the God, or Math or religious and charitable establishments, but he has only the title of manager of the endowment. Without real necessity or reasonably accredited necessity for the purpose of the trust, an alienation is void and the alienor himself is not estopped from recovering back the property. (*s*)

Legal necessity

He cannot alienate the endowed property but can create derivative tenures if beneficial to the estate. (*t*) But in the absence of legal necessity, he cannot grant a permanent Mokarari lease, (*u*) though the rent fixed was adequate at the time, it would be a breach of duty in the trustee (*v*) to deprive the endowment of the benefit of enhancement of rent, and the lease cannot enure beyond the grantor's life. (*w*) It is void against his successor, (*x*) But such lease, after the manner of widow's alienation, is good for the life-time of the grantor and his successor may ratify it, (*y*) so as to validate it for his life, (*z*) but the Calcutta High Court is of opinion that such a lease being void, the question of ratification does not arise. (*a*) A lease which grants heritable and transferable rights without the rent being fixed in perpetuity, is held to be void by the same High Court. (*b*)

alienation, lease for grantor's life, successor's ratification

(*r*) Nallayappa *v* Ambalavana, 27 M 465, 472-473 14 M L J 81 (After the opinion of F B by the Division Bench)
(*s*) Sivaswami *v* Thirumudi, 1930 M 405
(*t*) Shibesouree *v* Mothoora, 13 M I A 270 13 W R P C 18, Rampadarath *v* Basde, 63 I C 231 (Pat)
(*u*) Balaswamy *v* Venkataswami, 40 M 745 32 M L J 24 40 I C 531, Naina *v* Ramanathan, 33 M L J 84 41 I C 788, Satya *v* Kartik, 16 C W. N 418 15 C L J 227 13 I C 595
(*v*) Monohar Das *v* Tarini, 34 C W N 135 1929 C 612
(*w*) Abhiram *v* Shyama, 36 C 1003 36 I A 148, 165 14 C W N 1 10 C L J 284 6 A L J 857 : 11 Bom L R 1234 19 M L J 530 4 I C 449, Palaniappa *v* Sreemath, 40 M 709 44 I A 147, 157 21 C W N 729 25 C L J 153. 15 A L J 485 19 Bom L R 567 33 M L J 1 1 P L W 697 39 I C 722
(*x*) Monohar Das *v* Tarini, 34 C W N 135 1929 C 612
(*y*) *See* Vidya Varuthi *v* Balusami, 44 M 831 48 I A 302 26 C W N 537, 557 24 Bom L R 629 41 M L J 346 65 I C. 161 (Successor by accepting rent deemed to have created a new tenancy).
(*z*) Muthusamier *v* Sreemethanithi, 38 M. 356 : 25 M L J 393 19 I C 694, Behary Lal *v* Muralidhar, 1926 C 287
(*a*) *See foot note (x) above*
(*b*) Bhabani *v* Suchitra, 51 C L J 25 1930 C 270

Receiver's power to grant lease.

A Receiver has no power to grant a lease of *debutter* property without the sanction of the Court. (*c*)

Mohunt same as manager of infant's estate.—His powers are similar in some respects to those of a manager of an infant's estate (*d*) The principles of *Hanooman Presad Pandey's* case apply to transfers made by him. (*e*) The Judicial Committee in a recent case (*f*) has stated the powers of alienation of the manager thus "Except in a case of such unavoidable necessity the *sebayet*, the managers or the trustees of a temple, or the *mohunt* of a *mutt* have no power to sell or mortgage the endowed property in their custody and obviously they have no right to impair the endowed property by creating or granting, in favour of any one, rights of a permanent occupancy in the endowed property."

P C on manager's powers of alienation

Legal necessity

preservation of estate, worship, litigation,

epairs of temple,

Legal necessity *—He may tansfer for legal necessity (*g*) which, in this connection, means the preservation of the estate, keeping up the worship, (*h*) defending litigation or his own position as *Sebayet*, (*i*) repairs of the temple (*j*) and other property, restoration of the image, and so forth, (*k*) but not the purchase of a house to be used as a granary. (*l*) The term *benefit of the estate* in case of a transfer of endowed property by a mohunt is to be construed in a sense almost synonymous with necessity. (*m*)

(*c*) Sirish *v* Debendra, 50 C L J 333 1929 C 828

(*d*) Prosunno *v* Golab, 2 I A 145 23 W R P C 253, Ramprassanna *v* Secretary, 40 C 895 19 C W N. 652 22 I C 272, Nataraja *v* Karutha, 21 M L J 129 9 I C 150, Sahu Ram *v* Bhup, 39 A 437 44 I A 126 21 C W N 698, 702 26 C L J 1 39 I C 280 33 M L J 14 19 Bom L R 498 1 Pat L W 557, Ragho *v* Zaga, 53 B 419, 422 1929 B 251, *see ante p* 380

(*e*) Sheo Shankar *v* Ram, 24 C 77, Behari Lal *v* Muralidhar, 1926 C 287

(*f*) Nainapillai *v* Ramanathan, 47 M 337 51 I A 83 28 C W N 809 46 M L J 546 22 A L J 130 82 I C 226 1924 P C 65

* In this connection *see* Ch V, Sec 6, sub-sec iii, page 335 N

(*g*) Lakshindrathirtha *v* Raghavendra, 43 M 795 39 M L J 174 59 I C 287

(*h*) Nataraja *v* Karutha, 21 M L J 129

(*i*) Peary *v* Narendra, 37 C 229 37 I A 27 11 C L J 220 14 C W N 261, 7 A L J 125 12 Bom L R 257 20 M L J 171 5 I C 404

(*j*) Doorga *v* Ram, 2 C 341 4 I A 52

(*l*) Palaniappa *v* Sreemath, 40 M 709 44 I A 147 21 C W N. 729 26 C L J 153 33 M L J 1 15 A L J 485 19 Bom L R 567 1 P L W. 697 39 I C 722, (what was meant in this case has been explained by the Board again in Vibhudapriya *v* Lakshindra 50 M 497 54 I A 228 31 C W N 1021 45 C L J 613 1927 P C 131, Prosunna *v* Saroda, 22 C 989, Prosunna *v* Golab, 2 I A 145 23 W R 253

(*l*) Sundarappier *v* Chokkalinga, 86 I C 291 1925 M 1059

(*m*) Monohar *v* Tarini, 34 C W N 135 1929 C 612, in this connection *see p* 386 "Benefit of the estate"

P C on how debt to be paid;

The Privy Council, in the case of *Niladri Sahu* v *Chaturbhuj Das*, (*n*) in which the *Sebayet* of the temple raised funds for the erection of annexes to the temple by borrowing a sum amounting to about Rs. 9,000, repayable with interest at the rate of two per cent. per mensem and then in order to repay the above sum with interest which had accumulated to Rs. 25,000 raised the amount by mortgage of certain *Debutter* properties, the interest being stipulated at one per cent per mensem, has held, relying on an earlier decision of the Board, (*o*) that the debt should be paid by the *Sebayet* personally or else realised from the profits of the *debutter* property to be collected by a Receiver to be appointed by the Court. The same Board has held that money borrowed for the purpose of performing necessary duties relating to the *Mutt*, such as the recognized custom of feeding Brahmins and repairing the dining hall which was falling to pieces, were justifiable debts and binding on the *Mutt*; and when the income was not sufficient to meet the expenses of the *Mutt* and to pay off the debt, a Receiver was directed to be appointed. (*p*) So the corpus should not be allowed to be transferred, when the necessity can be met by other arrangements (*q*) But the Patna High Court explained that in *Niladri Sahu's* case referred to above, the Privy Council did not lay down as a general principle that in every case of mortgage by *Sebayet* or *Mohunt*, the Court is to pass a decree for realising the debt out of the rents and profits only, and held that the Court may direct the sale of such property for discharging a debt for which the property was charged (*r*)

appointment of Receiver,

Patna on P. C. view,

P C view is the proper Hindu feeling

In the cases of *Niladri Sahu* and *Vibhudapriya*, their Lordships of the Judicial Committee have, it seems, laid

(*n*) 6 P 139 : 31 C W N 221 44 C L J 494

(*o*) Prosunno *v* Golab, 2 I A 145 23 W R 253

(*p*) Vibhudapriya *v* Lakshmindra, 50 M 497 54 I A. 228 31 C W N 1021 45 C L J 613 1927 P C. 131

(*q*) *See* Nallayappa *v* Ambalavana, 27 M 465, 472-3 [after the opinion of F B by the Division Bench]

(*r*) Mahabir Das *v* Jamuna, 8 P 48

down as a general rule to be applied to all cases, that the debts binding on the *Mutt* or such institutions, should be paid out of the income of the institution by appointing a Receiver. The principle is in accordance with the spirit of Hindu law and the intention of persons who have made the endowments.

will protect endowments.

If this rule of law be generally applied to all cases, creditors will not so easily advance money to the trustees and thus the trustees will be obliged to confine the expenditure within the income. The trust properties will thus be saved from partial or complete destruction. In lending money to the managers of religious institutions, it is not enough that the purposes were necessary, but the creditor must also show that he made enquiries and satisfied himself that the loan was justified by the state of the finance (*s*)

Presumption of necessity

Although the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity, yet long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the grant was made under justifying causes. (*t*)

Alienation in excess of necessity —*See* page *395*.

Purchaser s remedy when alienation set aside —*See* page *396*.

Gift—No one has any power to make a gift of any portion of the property belonging to a trust. (*u*) But a gift of an image and its property of a private endowment, with concurrence of the whole family, to another family for carrying on the worship, is valid (*v*)·

Sub-Sec iii—ALIENATION OF SEBAYET'S RIGHTS

An assignment of the right of management is beyond the legal competence of a trustee under the common law of

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(*s*) Venkatacharyulu *v* Ramkrishna, 1930 M 439

(*t*) Bawa Magniram *v* Sheth, 46 B 481 49 I A 54 26 C W N 473 35 C L J 421 20 A L J 371 24 Bom L R 584 66 I C 162, *see* Ramrup *v* Lal, 67 I C 401 3 P L I 352

(*u*) Biram Das *v* Mangal, 1929 L 868

(*v*) Khetter *v*, Hari, 17 C 557, *see* Rajishwar *v* Gopeshwar, 34 C 828 11 C W N 782 on appeal from 35 C 226, Nirad *v*, Shibadas, 36 C 975, 977 13 C W N 1084 3 I C 76, *see p* 861

India, and the assignment being of a trusteeship for the pecuniary advantage of a trustee, cannot be validated by any proof of custom. (*w*) The sale of the right of management and of the endowed property was held null and void, in the absence of a custom allowing them. (*x*) There are decided cases (*y*) from which it appears that the turn of worship can be mortgaged.

Transfer void

unless allowed by custom,

In the Privy Council case (*z*) the sale in execution of a mortgage decree was set aside on the ground that the transferee was a non-Brahmin and as such could not perform the duties of a *Sebayet*. In one of the Calcutta cases (*a*) the mortgage in question was before the passing of the Transfer of Property Act and the decision rested on other grounds In the other case (*b*) the question of limitation was only decided. In none of these three cases the question of transferability was distinctly raised and decided save and except in the Privy Council case where the question of transferability to a non-Brahmin was in issue It seems probable that there were customs for such transfer and hence the parties did not question it.

P C view

perhaps based on custom

It may be contended that there is a difference between the duty of *Sebayet* and the emoluments of the office, and hence, the former may not be transferable whereas the latter may be. But the Calcutta High Court has held that there would scarcely be much contention for the office, *qua* office, unless the question of emoluments were also involved. (*c*)

Difference between office and emoluments

The office of a *Sebayet* is inalienable by Will, in the absence of any local usage, family custom, necessity, or clear benefit (*d*)

Office inalienable by Will.

(*w*) Rajah Varma *v* Ravi, 1 M 235 4 I A 76
(*x*) Ghanasambanda *v* Velu, 23 M 271 27 I A 69 4 C W N 329 10 M L. J 29 2 Bom L R 597
(*y*) Jati *v* Mukunda, 39 C 227 16 C W N 129 14 C L J 369 11 I C 884; Narasingha *v* Pralhadman, *supra*, *see also* Jalandhar *v* Jharula, 42 C 244 41 I A 267 18 C W N 1029 20 C L J 360 27 M L J 100 12 A L J 1176 16 Bom L R 845 24 I C 501
(*z*) Jalandhur *v* Jharula, *supra* (*a*) Jati *v* Mukund, *supra*
(*b*) Narasingha *v* Pralhadman, *supra*
(*c*) Mallika *v* Ratanmani, 1 C W N 493
(*d*) Rajeshwar *v* Gopeshwar, 35 C 226 12 C W N 323 7 C L J 15 on appeal from 34 C 828

Calcutta view inalienable,

The Calcutta High Court holds that the office cannot be transferred *inter vivos* even to a co-*sebayet* or to one next in succession. (*e*) But the transfer *inter vivos* of a turn of worship or *pala* to a *sebayet* or to one who is next in order of succession, may be justified in the special circumstances of the case, (*f*) as also on proof of custom (*g*)

Bombay, Madras

The Bombay (*h*) and Madras (*i*) High Courts hold that such transfers are valid. The Madras High Court also holds that such a transfer in favour of one only of three persons entitled to become the next *sebayet* is not valid. (*j*)

Right to receive fee transferable

The right to receive remuneration or fees for the performance of certain services, namely, the right to *Parsaipan* in Nimar which is similar to a *pala* or turn of worship can be subject of transfer. (*k*)

Kalighat shrine

In the famous *Kalighat* shrine of Calcutta the turn of worship is heritable, divisible and transferable by custom not only to a co-*sebayet* but to the members of families to whom a *sebayet* can give his daughter in marriage. (*l*) In this case it has been held that foreclosure as a remedy of the mortgagee is applicable to mortgage of turn of worship,

transfer to non-Brahmon,

where by custom, the right of performing the puja and receiving the offerings were shared by a number of Brahman Pandas only, the transfer of the office though valid by custom is invalid when done in favour of non-Brahman. (*m*)

transfer to stranger

The Sebyet's right to worship or to surplus profits is not transferable to a stranger, (*n*) nor in execution of a decree against the *sebayet*. (*o*)

(*e*) Gobinda *v* Debendra, 12 C W N 98, Panchanan *v* Surendra, 50 C.L J 382 1930 C 180, Nagendra *v* Rabindra, 53 C 132 30 C W N 389

(*f*) Niradmohini *v* Shibadas, 36 C 975, 13 C W N 1084

(*g*) Mahamaya *v* Haridas, 42 C 455 20 C L J 183 19 C W N 208 27 I.C 400, Jagdeo *v* Ram Saran 6 P 245 1927 P 7, Radharani *v* Doyal, 33 C L J 141

(*h*) Manchharam *v* Pranshankar, 6 B 298

(*i*) Narayana *v* Ranga, 15 M 183 2 M L J 19

(*j*) *Ibid* (*k*) Kaluram *v* Nagulal, 1929 N 81

(*l*) Mahamaya *v* Haridas, *supra*

(*m*) Jogdeo *v* Ram Saran, *supra*

(*n*) Rajam *v*. Singarammal, 36 M L J 355, Ukoor *v* Chunder, 3 W R 152.

(*o*) Juggurnath *v* Kishen, 7 W R 266, Heeranath *v*. Burm, 15 W R 375 and 17 W R 316

Sub Sec iv—ALIENATION OF OFFICE

Office of priest not saleable

Alination of office of a priest.—The office is not saleable.(o1) The office of priest (*purohit*) is not an immoveable property, (p) hence, it has been held that the right to office cannot be mortgaged or leased. (q) There would scarcely be much contention for the office, *qua* office, unless the question of emoluments were also involved. (r) When the right to receive offerings made at a temple is independant of an obligation to render services involing qualification of a personal nature, such a right is transferable. (s) The offerings to a deity to be made by worshippers in future, is a mere possibility as contemplated in clause (*a*) of Section 6 of Property Act and as such cannot be transferred. (t)

Sub-Sec v-CHALLENGING ALIENATION

Challenging improper alienation—When a Mitakshara joint family is the *sebayet* of an endowment, the male member becomes entitled to be a *sebayet* from birth, and may call into question an improper alienation by his father and uncle. (u)

Who can challenge alienation—*See* Sec. 10 Sub-Sec. i.

Sub Sec vi—ALIENATION HOW EFFECTED

Registration.—A turn of worship is not an interest in immoveable property and hence it is not necessary that a sale of the right should be by a registered instrument. (v)

Sec 10—JUDICIAL PROEEDINGS

Sub-Sec i—SUITS RELATING TO ENDOWMENTS

A disciple of Mutt,

Who can bring suit.—The disciples of a *Mutt* have sufficient interest as contemplated in Order 1, Rule 8 of

(o1) Sripati v Krishna 41 C L J 22 82 I C 840 1925 C 442

(p) Sundarambai v Yagavanagu rukkal, 38 M 850 26 M L J 315 23 I C 72 Narasinha v Anantha, 4 M 391, Rangasami v Ranga, 16 M 146, Eshan v Monmohini, 4 C 683, Narasingha v Prolhadman, 46 C 455 22 C W N 994

(q) Sripaka v Muthura, 26 M L J 482 24 I C 204, Mallika v Ratanmani, 1 C.W N 493

(r) Mallika v Ratanmani, *supra*

(s) Balmukand v Tulu, 50 A 394

(t) Pancha v Bindeshri, 43 C 28 : 19 C W N 580 28 I C 678 on review from 37 I.C 960 (P)

(u) Ram Chandra v Ram Krishna, 33 C 507

(v) Jagdeo v. Ram Saran, 6 P 245 : 1927 P 7

the Code of Civil Procedure, *(w)* to maintain a representative suit not only for a declaration that an alienation made by the head of a *Mutt* is invalid but also a decree directing that the possession be restored to the head in possession of the *Mutt* *(x)*

Sebayet

Similarly a *co-sebayet* or one who is entitled to become the *sebayet* after the present incumbent may set aside an alienation of the office or the endowed property when illegally made *(y)* The founder or his heirs may invoke the assistance of the court for proper administration of the *debutter* property *(z)* One of the heirs may even maintain such a suit. *(a)*

Right to sue vested in trustee.

In an ideal sense the property can be said to belong to a deity and the right to sue is vested in the trustee *(b)* and is to be conducted by him on behalf of the deity *(c)*

Onus

The *onus* as to the existence of justifying necessity for alienation of property by the head of the *Mutt* is on the alienee. *(d)*

§ 3, Act XX of 1863

The words "any public officer" in Section 3 of the Religious Endowments Act (Act XX of 1863) means a public officer under the Government and hence the committee constituted under the Act cannot claim superintendence over a temple, the nomination of the trustees whereof is vested in foreign Government *(e)*

Act XIV of 1920.

Any person having an interest in any express or constructive trust for a public purpose of a charitable or religious nature, may apply to the District Judge or to the High Court in the exercise of its Ordinary Original Civil Jurisdiction

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(w) Act v of 1908
(x) Chidambaranatha *v* Nallasiva, 41 M 124 33 M L J 357 42 I C 366; Narasimha *v* Pitchayya, 38 M L J 226
(y) Giris *v* Upendra, 35 C W N 768, 771 *see post p* 903
(z) Monohar *v* Peary, 24 C W N 478 30 C. L J 177, 188 54 I C 6
(a) Rabindra *v* Chandi, 53 C. L J 621
(b) Prosunno *v* Golab 2 I A 145, Jagadindra *v* Rani 31 I A 203 8 C W N 809, Bidhu *v* Kulidi 46 C 877, Sri Sri Gopal *v* Radha, 41 C L J 396 88 I C 616 1925 C 996, Rangacharya *v* Guru 1928 A 689, Gopalji *v* Krishna 1929 A 887
(c) Gopalji *v* Krishna, *supra*
(d) Murugesam *v* Manickavasaka, 40 M 402 21 C W N 761 25 C L J 589 32 M L J 369 15 A L J 281 19 Bom L R 456 : 39 I C. 659, Lakshmindrathirtha *v* Raghavendra 43 M 795 : 39 M L J 174 : 59 I C 287, Jagarnath *v* Bibi 13 I C 85 (C), Surja *v* Ekadahia, 39 I C 522 (C)
(e) Raghavendra *v* Vobiah, 52 M 945

for an order directing the trustee to furnish certain informations relating to the trust estate or an order directing the examination and auditing of account for a period not exceeding three years prior to the date of the application. (*f*) Any two or more persons having an interest in the trust with the consent of the Advocate General or any petitioner without his consent, [if the trustee failed to comply with the above order under Act XIV of 1920, (*g*)] may institute a suit under Section 92 of Civil Procedure Code for removing the trustee and for other reliefs. (*h*)

Invoking Sec 92 C P. C

In regard to the application of Section 92 of the Civil Procedure Code, the Privy Council (*i*) approved of the principle of law laid down by the Madras High Court, (*j*) namely, that the object of Section 92 was to prevent people interfering in administration of charitable trusts merely in the interests of others and without any real *interest* of their own their Lordships, however, have held that descendants, although in female lines of the founder of a *chatram* possess an interest in the proper administration of the trust sufficient to enable them to maintain a suit under this Section. It applies when there is a breach of some express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary but it has no application to suits where the plaintiff claims; possession of the endowed property as the duly appointed trustee and the defendant is a trespasser, or in other words, when the plaintiff claims a right to succeed to the office of trustee. (*k*)

by non-Hindu

A non-Hindu cannot invoke the provisions of this Section even if he confers some offerings to the *Mohunt*. (*l*)

(*f*) The Charitable and Religious Trusts Act (Act XIV of 1920) Sections 3, 5 and 6
(*g*) Section 6, Act XIV of 1920
(*h*) Nelliappa *v* Punnaivanam, 50 M 567 1927 M 614
(*i*) Vidyanath *v* Swaminatha, 47 M, 884 51 I A, 282 29 C W N 154: 40 C L J 454 47 M L J 361 22 A L J 983 26 Bom L R 1121 82 I C 804 1924 P C 221
(*j*) Ramchandra *v* Parameswaram, 42 M 360,368
(*k*) Ganga Charan *v* Ram, 50 A 165: 1928 A 23, Puttu Lal *v* Daya, 44 A 721
(*l*) Basant Das *v* Hem, 7 L 275

Settling scheme.

Like the Courts of Equity in England, the Civil Courts in India have jurisdiction over trusts so as to settle schemes (*m*) where a family has a right to worship with some emoluments attached to it, the Court may direct worship by turns for certain number of days and to receive the offerings by each member during his turn of worship. (*n*)

In settling scheme for the future management of a temple, the Court's power is largely a matter of discretion but unless it is proved that it was improperly exercised the Court of appeal will not interfere (*o*)

The scheme should be a means of progress even if it involves some departure from established practice. (*p*) In settling the scheme the institutional trust must be respected, but the sect and body of worshippers for whose benefit it was set up have the protection of the Court against their property being the subject of abuse, speculation and waste. (*q*)

Where a scheme was framed by the District Judge and confirmed by the High Court, the scheme if required to be modified is to be done by the High Court (*r*)

Act XX of 1863, Sec 10

The Court can set aside an election of a member of a temple committee, if the election took place on the old electoral rolls without complying with the requisition of a member for the revision of the rolls on the authority of the managing member alone and not on the authority of the committee as required under Section 10 of the Religious Endowments Act. (*s*)

(*m*) Prayag *v* Tirumala 30 M 138 34 I A 78 11 C W N 442 17 M L J 236 9 Bom L R 588, Jeranchod *v* Dakore 41 C L J 628 30 C W N 459 49 M L J 25 23 A L J 555 27 Bom L R 872, 87 I C 313 1925 P C 155

(*n*) Sadanand *v* Indra, 1930 A 383

(*o*) Sevak *v* Gopal, 16 C L J 640 P C

(*p*) Shankarlal *v* Dakor, 1926 B 179

(*q*) Ram Parkash *v* Anand, 43 C 707 43 I A 73 20 C W N 802 24 C L J 116 18 Bom L R 490 33 I C 583, this approved in Acharyashri Sripati *v* Barot 33 C W N 352 P C

(*r*) Umeshananda *v* Ravaneswar, 16 C L J 431 17 C W N 841 : 17 I C 969, Shankarlal *v* Dakor, 1925 B 179

(*s*) Section 10, Act XX of 1863, Singaram *v* Srinivasa, 50 M 726, Tiruvengada *v* Ranga, 6 M 114

Receiver—The Court has a power to appoint a Receiver when it finds necessary, particularly, when the income is not sufficient to meet the customary expenses and to pay off the legitimate debts, binding on the institution. (*t*)

When appointed

Sub-Sec ii—REMOVAL OF MANAGERS ETC

Removal and appointment of manager etc—If a *sebayet* or trustee of a *public* endowment becomes guilty of a breach of trust, the Advocate General, or, with his written consent two or more persons directly interested in such trust, may institute a suit in the High Court or the District Court for the removal of the trustee according to Section 92 of the Civil Procedure Code.

Under Sec 92 C P C,

Such suit can be instituted without the consent of the Advocate General under Section 6 of the Charitable and Religious Trusts Act (Act XIV of 1920) if the trustee failed to comply with the order directing the trustee to furnish the plaintiff with certain information or directing that the accounts of the trust be examined or audited.

Act XIV of 1920.

Like the Courts of Equity in England, the Civil Courts in India have jurisdiction over trusts so as to settle schemes (*u*) or to deal with managers of public Hindu temples and charities, and members of committees, remove them from their position as managers (*v*) or members, appoint a committee to supervise and control managers, and appoint a new manager or member. But the Court cannot interfere with the appointment and dismissal of any priest made by a *jajman* (*w*)

Civil Courts' jurisdiction to remove trustee etc

A manager mistaking his true legal position and arrogating to himself the position of owner, is not liable to be removed by reason only of such error of judgment. (*x*) But the temple committee has no direct control over the servants

Mistake if cause for removal

(*t*) Niladri *v* Chaturbhuj, 6 P 139 31 C W N 221 44 C L J. 494; Vibhudapriya *v* Lakshmindra, 50 M 497 54 I A 228 31 C W N 1021 · 45 C L J 613 1927 P C 131.

(*u*) Prayag *v*, Tirumala, 30 M 138 34 I A 78 11 C W N. 442 17 M. L J 236 9 Bom L R 588, Jeranchod *v* Dakore, 41 C L. J 628 P C *supra*

(*v*) *See* Ram *v* Anand, 43 C 707 43 I. A 73 20 C W N 802 24 C L J 116 31 M L J 1 18 Bom L R 490 14 A L J 621 33 I C 583

(*w*) Dinanath *v* Ganesh 8 P 677 1929 P 103.

(*x*) Annaji *v* Narayan, 21 B 556, Damodar *v* Bhat, 22 B 493, Tiruvengada *v* Srinivasa, 22 M 361

Trustee can, remove *pujari*.

of the temple such as the *pujaris* so as to suspend any one of them; it can act only through the trustee. (*y*) The latter however, cannot, dismiss arbitrarily. (*z*)

Interested person can sue under Act XX of

Section 14 of Act XX of 1863, however, provides that any interested person may bring a suit in the District Court against a trustee guilty of misfeasance or neglect of duty or of breach of trust, for the specific performance of any act, or for damage, or for the removal of the trustee. But it is necessary that the plaintiff, before he brings such a suit, should obtain the leave of the District Judge, by presenting a preliminary application

but Committee may without leave,

But Section 14 does not apply to a Committee appointed under Act XX of 1863, who may, therefore sue without previous leave, their manager or superintendent for damages for misappropriation, and for injunction, (*a*) they may dismiss or suspend the superintendent for good and sufficient cause, (*b*) or join any other person with the manager who must obey. (*c*) Nor does that Section apply to a suit by a trustee against an ex-trustee (*d*)

in cases to which Reg XIX, 1810 apply

It has been held that Act XX of 1863 applies to endowments to which the provisions of Reg XIX of 1810 were applicable All religious establishments, for the maintenance of which, land had been granted either by the Government or by individuals, were subject to that Regulation, whether or not the Board of Revenue took them under its management (*e*) In the latter case the endowment was created subsequently to 1810 A. D.

Act XX of 1863 does not apply to private deities, but Court has jurisdiction

Act XX of 1863 does not apply to private deities. (*f*) But the trustees of private endowments are equally with those of public ones, subject to the jurisdiction of the Courts, and are liable to be removed for misconduct.

(*y*) Muniyan *v* Payyan, 1928 M 854

(*z*) *See* Tiruvambala *v* Manikkavachaka, 40 M 177 30 M L J 274 34 I C 57.

(*a*) Puddulabh *v* Ramgopal, 9 C 133

(*b*) Chinna *v*. Subaraya, 3 M H C R 334, Seshadri *v* Nataraja, 21 M 179

(*c*) Virasami *v* Subba, 6 M 54 58, Sheik Davud *v* Hussein, 17 M 212· 4 M L J 48

(*d*) Virasami *v* Subba, 6 M 54

(*e*) Dhurrum *v* Kissen, 7 C 767, Jan *v* Atawur, 9 C. L R 433

(*f*) Protap *v* Brojonath, 19 C 275, Sathappayyar *v* Periasami, 14 M. 1.

Trust Act does not apply to Hindus

The provisions of the Indian Trust Act (g) do not apply to Hindu charitable trusts. (h) But its provisons may be looked upon as a guide. (i)

Application of Trustees Act

The Indian Trustees Act (j) is applicable to a trust in which the settlor, the trustees and the *cestuis que trustent* are all Hindus, provided such trust does not violate any provisions of Hindu law. (k)

P C on grounds of removal of Sebayet

In the case of *Peary Mohan* v. *Monohar* (l) the Privy Council has stated that :—"The grounds for removing a *sebayet* from his office may not be identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest which together make up the office of *Sebayet* may well prevent the closeness of the analogy, but as part of the office it is indisputable that there are duties wich must be performed, that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal." The Privy Council in this case has distinguished the *sebayet's* duties from his interest and seems to have removed the *sebayet* from the *obligations* of his office. It is doubtful whether a *sebayet* of a private endowment can be deprived of his interest without any express direction of the founder or any law empowering the Court to do so, unless such interest of the *sebayet* is held to be the remuneration for the performance of the obligations. *See post pp.* 919-927.

Marriage of Mohant —Whether marriage of a Mohant is sufficient ground for his removal *see ante pp.* 870-871 and *post* Sec. 11, Sub-Sec. 1 "Issue of marriage" in page 912.

(g) Act II of 1882, Rangacharya *v* Guru, 1928 A 689
(h) Vidya Varuthi *v* Balusami, 42 I A 302, Gopu *v* Sami, 28 M 517 15 M L J 466, Narasinha *v* Venkatalingum 50 M 687 F B 103 I C 302 1927 M 636
(i) 73 I C 711, Subramania *v* Prayag, 33 I. C 677
(j) Act XXVII of 1866
(k) *In re* Nilmoney, 32 C 143 9 C W N 179
(l) 48 C 1019 48 I A 258. 26 C W N 133 34 C L J 86 19 A L J 773 23 Bom L R 913 41 M L J 68, 2 P L J. 725 62 I. C. 76: 1922 P. C. 235.

Unchastity—The unchastity of a woman is held to be not a ground for her removal from the office of Sebayetship.(*m*)

Sub-Sec iii—SUITS FOR ACCOUNTS

In public trust 3 years account may be demanded

Any person iterested in any express or constructive trust for a public purpose of a charitable and religious nature, may under the provisions of the Charitable and Religious Trusts Act. (*n*) apply for the auditing of accounts for a period not exceeding three years prior to the date of the application.

Limitation

The liability of the manager of a religious or charitable institution is never barred by statute of limitation (*o*) as for the purposes of section 10 of the Limitation Act he is deemed as a trustee. (*p*)

Account by trustee from co-trustee

But one trustee cannot claim accounts from his co-trustee. (*q*)

Sub-Sec iv—PROBATE—LETTERS OF ADMINISTRATION

Probate, Letters of Administration cannot be obtained.

Who can apply—A *Mohunt* is not the owner of the property of a *Mutt*, and hence a person claiming to be his successor on his death cannot apply under Act V of 1881 (now repealed by Act XXXIX of 1925) for Probate or Letters of Administration in respect of the *Mutt* property. (*r*)

The Sebayet is not the beneficiary of *debutter* property and as such cannot apply for Letters of Administration under Act V of 1881 (*see* Act XXXIX of 1925) in respect of such property (*s*) Nor can a creditor apply for it on the death of the sebayet. (*t*)

Sub Sec v—SUITS RELATING TO CERTAIN RIGHTS

Exclusive right of *purohit* if enforceable,

The exclusive right claimed by a priest (*purohit*) to officiate at ceremonies of a family, because his ancestors had before him performed similar ceremonies, is observed to be not enforceable at law. (*u*)

(*m*) Abdul *v* Umakanta, 24 I C 266 (C)
(*n*) Sec 6 of Act XIV of 1920
(*o*) Act IX of 1908. (*p*) Act I of 1929.
(*q*) Rungacharya *v* Guru, 1928 A 689, Narayanan V Mootha, 1930 M 295
(*r*) Jib Lal *v* Jaga, 16 C W N 798 (1898) 16 I C 453, Parsania *v* Hari, 17 C L J 65 16 I C 588, Jagadindra *v* Madhusudan, 20 C L J 307 27 I C 24
(*s*) Prosonno *v* Ram, 17 C L J 66 17 I C 155, *see foot note* (*r*) above
(*t*) Gulabbhai *v* Sohangdasji, 52 B 431 1928 B 183.
(*u*) Gour Moni *v* Chairman, 14 C. W. N. 1057. 12 C. L J 74; Saripaka *v.* Muthura, 26 M. L J. 482

The right to hold the office of imparting *upadesam* and of receiving emoluments is enforceable in a Court of Law. (*v*) So also a suit to enforce one's right to *jajman brithi* (*w*) or *brit Mahabrahmani* (*x*) is enforceable in a Court of Law. A suit to enforce an agreement to pay a certain sum in case of success to another in consideration of the latter's offering *puja* or prayer is not against public policy. (*y*)

so of imparting *upadesam*,

right to *jajman brithi*,

to money for offering *puja*

A *jajman* has a right to appoint and dismiss any priest he chooses, and a Court of Justice is incompetent to deal with the question as to the competency or otherwise of the priest as the power of dismissal rests entirely upon the conscience, faith and judgment of the *jajman*. (*z*)

Court's power to examine appointment of priest

Suits for declaration by persons claiming to be entitled to religious offices, such as, the right to supervise the *puja* and to prepare and offer certain offerings in a certain village, (*a*) to chant holy songs in a *Satra* at a certain village, (*b*) or to officiate as *sebayet* at the worship performed by votaries at the foot of a certain tree, (*c*) are cognizable by Civil Courts though no fees are attached to these offices except the voluntary offerings made by the votaries. In all these cases, the offices were attached to certain places as distinguished from absolutely personal offices.

Exclusive right of offering *puja*,

The Madras High Court holds that no such suit is maintainable unless no fees or emoluments are attached to the office. (*d*)

Madras,

But the Bombay High Court holds that where the office is attached to a shrine, a suit is maintainable (*e*) but no suit is maintainable where the office is merely personal (*f*)

Bombay

(*v*) Manickavachaga *v* Puramasivan, 33 C W N 382 P C
(*w*) Ram Chandra *v* Channu, 45 A 445 1923 A 350, Lokya *v* Sulli, 43 A 35, Narayan Lall *v* Chullan, 15 C L J 376, Ghelabai *v* Hargowan, 36 B 94. 12 I C 928 13 Bom L R 1171
(*x*) Gaya Din *v* Gur, 1929 O 257
(*y*) Balasundara *v* Md Osman, 53 M 29 34 C W N. lxxxiv
(*z*) Dinanath *v* Ganesh, 8 P 677 1929 P. 103
(*a*) Debendra *v* Satya, 54 C 614
(*b*) Mamat Ram *v* Bapu, 15 C 159
(*c*) Dino Nath *v* Pratab, 27 C 30
(*d*) Rangachariar *v* Parthasarathy, 1927 M 131, Tholappala Charlu *v* Venkata, 19 M 62, Subbaraya *v*. Vedantachariar 28 M 23
(*e*) Limbabin Krishna *v* Ramabin, 13 B 548, Gursangaya *v* Tamana, 16 B. 281.
(*f*) Sankarabin *v* Hanma, 2 B 470.

Proof to enforce rights

But in order to establish such rights as, of administering purohitam (religious rights and ceremonies) to certain classes of pilgrims who, resort to the shrine of the great pagoda and other temples in the island of Rameswaram, (*g*) or of rendering services of a sweeper in a *dharmsala* or *temple*, (*h*) or of collecting and receiving offerings by turns, (*i*) the claimant must prove either a contract or grant or else some uninterrupted usage as raises the presumption of a lost grant.

Procession with music along highway

Playing Music—The plaintiffs, a new sect or body of worshippers who invade a locality already occupied by another religious body, are not entitled to prevent the defendants from playing music in the temple or in the procession in carrying on their customary worship. (*j*) There is a right in every body to take out a religious procession with appropriate observances along a highway. (*k*)

Sub Sec vi—PARTIES TO SUITS

Who can bring suits,—*see ante p.* 893.

nay be parties to suits,

Parties.—It is already stated that the right to sue for the protection of the trust property is vested in the *sebayet* (*l*) So in a suit regarding the right to worship and possession of the deity installed by the ancestor of the contesting parties, the idol or the female members are not necessary parties. (*m*) But in a suit in which the removal of the deity from one place to another is questioned, the idol as well as the worshippers, male or female are interested, and hence the idol and worshippers are necessary parties to such a suit. (*n*) With respect to private religious trusts, it is not expected that the *sebayet* will bring a suit against himself for mismanagement, therefore, a deity may file a suit by a disinterested next friend appointed by the Court. (*o*)

(*g*) Ramaswamy *v* Venkata, 9 M I A 344 2 W R 21, Krishna *v* Anant, M H C R 330

(*h*) Kushya *v* Mangla, 12 A L J 267 22 I C 957, Lachman *v* Bhagan, 1928 A. 389

(*i*) Ochi *v* Ulfat, 20 A 234 (1898) A W N 23

(*j*) Hussain *v* Krishnan, 53 M. 761.

(*k*) Jalil Khan *v* Ram Nath, 53 A 484

(*l*) *See pp* 893-894

(*m*) Upendra *v* Baikuntha, 33 C W N 96.

(*n*) Pradyumna *v* Pramatha, 52 C 809 52 I A 245 30 C W N 25 41 C L J. 551. 49 M L J 30 27 Bom. L R 1064 23 A L J 537, 87 I C. 305. 1925 P.C. 139.

(*o*) Sarat *v* Dwarka, 58 C 619

legal representatives

The succeeding manager is to be considered the legal representative of the prior manager. (*p*)

Suits re property charged for worship

A suit by one of the *sebayets* for his share of the rent is maintainable with respect to property which is subject to the charge for the worship of the deity and which is enjoyed separately by the *sebayet*. (*q*)

Sub-Sec vii—RES JUDICATA

When operate,

Res Judicata.—A decree properly obtained against a *sebayet* or the head of a *Mutt* is binding on his successor, and may operate as *res judicata*. (*r*) In a suit between members of a family, the plaint described the plaintiffs and the defendants as *sebayets* of a deity and certain property as *debutter* property, a finding in that suit that the property was not proved to be a *debutter*, does not operate as *res judicata* in a latter suit, in which the plantiffs are the same but another family idol is represented by a *sebayet* who was one of the defendants in the earlier suit and the prayer is for declaration that the property is *debutter*. (*s*)

Sub Sec viii—ADVERSE POSSESSION

Adverse possession—The possession of a co-trustee must be considered to be the possession of all the trustees and no adverse possession can be set up against any of the trustees. (*t*) In order to claim right by adverse possession there must be ouster or an equivalent of an ouster. (*u*)

by donor against Sebayet,

The donor himself may acquire right by adverse possession when he exercises the right to the knowledge of the *sebayet* who alone held the property on behalf of the deity. (*v*)

Sub Sec ix—LIMITATION

Limitation—When an alienation of the office or of the endowed property has been illegally made, it may be set aside by a co-*sebayet* or by one entitled to become the *sebayet* after the present incumbent. (*w*) The successive *sebayets* form

(*p*) Moti v Satyanand, 1930 A 348
(*q*) Barboni v Paricharak 1930 C 526
(*r*) Manika v Balagopala, 29 M 553 16 M L J 415, Ranjit v Basanta, 9 C L J 597 12 C W N 739
(*s*) Radha Benode v Gopal, 54 C 770 P C
(*t*) Durai v Duraiswami, 1927 M 948
(*u*) Panchanan v Surendra, 50 C L J 382 1930 C 180
(*v*) Dasami v Param 51 A 621
(*w*) Girish v Upendra, 35 C W N 768, 771

a continuing representation of the God's property, (*x*) but they have not successive life estates, so that no new cause of action arises after the defendant takes possession of the office adversely to the plaintiff. Article 124 of the Limitation Act (*y*) applies in such suits; there is no distinction between the office and property. (*z*)

Art 124.

The Privy Council in the case of *Vidya Varuthi v. Balusami* (*a*) held that Section 10 of the Limitation Act did not apply to religious endowments as the property did not vest in the managers. The Calcutta High Court entertained a similar view. (*b*) The new amendment (*c*) of Section 10 of the Limitation Act has made provisions of this Section applicable to such managers.

Sec 10,

So after the amendment of Section 10 of the Limitation Act, no suit against the manager or his legal representative or assigns, for the purpose of following such property, or proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time when the transfer was not for valuable consideration.

Hence in cases of gratuitous transfers by managers of endowments, suits for following the property in the hands of the transferee shall not be barred by any length of time (*d*)

Suits by *Mohunts* to recover possession of endowed property from persons whom permanent *Mukari Pottah* had been granted by their predecessors, were not governed by Article 134 of Schedule ii of the Limitation Act (Act XV of 1877), the words "purchased for a valuable consideration" being held to mean absolute transfer of ownership for a price,

Art. 134

(*x*) Ranjit *v* Basanta, 9 C L J 597 12 C.W N 739

(*y*) *See post p* 908

(*z*) Gnanasambanda *v* Velu, 23 M 271 27 I A. 69 10 M L J. 29 · 4 C.W N 329 2 Bom L R 597

(*a*) 44 M 831 48 I A 302 26 C W N 537 24 Bom L R 829 41 M L J. 346 65 I C 161, Calcutta High Court held a similar view

(*b*) Gongaprosad *v* Kuladanand, 30 C W N 415, 425

(*c*) Act I of 1929, see Act *post p* 908

(*d*) Venkatachala *v* Sriranga, 38 M 1064, Chellikulam *v* Sriranga, 26 M L J 537, Sri Ram *v* Matwala, 1923 L 219 71 I C 577

but by Section 10 of that Act. (*e*) In the Act IX of 1908 the word "purchased" has been substituted by "transferred" with the object of including permanent leases in transaction of the character contemplated in the article, but their Lordships of the Privy Council in the case of *Vidya Varuthi* (*f*) still held in a suit of like nature that Article 134 of Act IX of 1908 did apply as it refers to cases of specific trust. But by the addition of Article 134B (*g*) in the Act, the limitation for suits to recover possession of immoveable property comprised in the endowment which has been transferred by previous manager for a valuable consideration is twelve years from the death, resignation or removal of the transferor. Hence all transfers other than gratuitous transfers are covered by this Article.

Amendment, Sec 10,

P C held old view,

so amendment of Art. 134 B

The Privy Council (*h*) stated that according to the well-settled law of India, apart from the question of necessity, a *Mohunt* was incompetent to create any interest in respect of *Mutt* property to endure beyond his life, and consequently, in the case of *Vidya Vàruthi* it had been held that an unauthorised lease by a *Mohunt* could be challenged by his successor's successor whose rights never became adverse till the death of his predecessors-in-office who must be deemed to have, by receiving rents for the tenancy created by his predecessor-in-office, created a new tenancy to last during his life.

P C view on successive Mohunt's right to challenge permanent lease

But the words "the death, resignation, or removal of the *transferor*" (*i*) of Article 134 B indicate when the time begins to run and show that time will not begin afresh on the death, resignation or removal of each holder of the office,

changed by legislation.

(*e*) Ishwar *v* Ram, 38 C 525 38 I A 76 15 C W N 417 14 C L J 238 8 A L J 528 13 Bom L R 421 21 M L J 1145 10 I C 683, Abhiram *v* Shyma, 36 C 1003 36 I A 148 14 C W N 1 10 C L J 284 6 A L. J 857 11 Bom L R 1234 19 M L J 530 4 I C 449

(*f*) 44 M 831 48 I A 302 25 C W N 537, 549, 550 24 Bom L R 829 41 M L J 346 65 I C 161

(*g*) *See* Amending Act I of 1929, *see* Act *post p* 908

(*h*) Vidya Varuthi *v* Balusami, *see above*, Nainapillai *v* Ramanathan, 47 M 337 51 I A 83 28 C W N 809, 816 46 M L J 546. 22 A L J 130: 82 I C 225 1924 P C 65

(*i*) Not in italic in the original,

but from the death, resignation and removal of the person who originally transferred the property.

Gift in lieu of services

A gift of a portion of temple property in lieu of services to be rendered for the endowment, is a transfer for valuable consideration within the meaning of Article 134 (*j*) and hence of the newly added Articles.

Arts 134, 144

An auction purchaser can set up limitation under Articles 134 or 144 (*k*) and consequently under the Articles newly added by the amending Act I of 1929 (*l*)

P C on settlement of claims by rival Mohunts,

The Privy Council in the case of *Damodar Das* v. *Lakhan* (*m*) held, that limitation as against the successor-in-office began to run from the date of a compromise deed by which a dispute between two *Chelas* for the office of two *Mutts* of one idol was settled by taking one of the two *Mutts* by each of the *Chelas*, in-as-much as the possession of one of the *Chelas* was adverse to the right of the idol and of the other *Chela* when he took possession of the property by virtue of the deed The dispute by the rival claimants for the office and property of the endowment and settlement of it by division of property, each taking a portion, cannot be called a transfer for valuable consideration Because one of them must have been the rightful claimant and other had no shadow of title and the settlement of such a claim could not have been explained as a settlement of doubtful claims so as to give it even a colour of *valuable consideration.* So the provision of Section 10 of the Limitation Act will not apply on account of the amending Act I of 1929, and the claims of the successor-in-office to the property shall never be barred by any length of time. But if the compromise be construed to be a transaction for valuable consideration, a proposition of not so easy a solution, then the new Article 134 B will apply and the limitation will be twelve years from the death, resignation or removal of the transferor.

and application of Art. 134 B

(*j*) Ramacharya *v* Srinivasacharya, 20 Bom L R 441 46 I C 19

(*k*) Pandaram *v* Mustafa, 46 M 751 50 I A 295 28 C W N 493 40 C L J 2, 45 M L J 588 21 A L J 730 25 Bom L R 1275 74 I C 492 1923 P C 175

(*l*) *See* Act *post p* 908

(*m*) 37 C 885 37 I A 147 14 C W N. 889 12 C L J 110 20 M L J 624 7 A L J 791 12 Bom L R 632 7 I C 240, *but see* the view in Madhu *v* Radhika, 17 C.W N 873

In a suit to set aside transfer of immoveable property by manager of religious and charitable institution or by person other than the successor-in-office, the limitation is twelve years from the date when the transfer becomes known to the plaintiff; (n) but for transfers made before the new amendment, Article 144 shall apply. (o)

Art 144 when apply

A suit to set aside a sale of moveable property belonging to an endowment, made by the manager thereof for valuablee consideration, the limitation is three years from the date when the sale becomes known to the plaintiff. (p) But limitation for a similar suit by the manager for recovery of moveable property comprised in an endowment sold by the previous manager for valuable consideration is twelve years from the death, resignation or removal of the seller (q)

Suit to set aside sale of moveables and

A transfer of moveable property otherwise than by sale, therefore, will be governed by section 10 of the Limitation Act (r) and the suit will not be barred by limitation.

other than sales

A suit in the name of the image for recovery of money wrongfully diverted by the manager thereof for his own use, is not within the meaning of Section 10 of the Limitation Act, but is a suit for money payable by the defendant for money received by the defendant for the plaintiff's use, as it cannot be said to be property vested in the defendant in trust for specific purpose (s) But after the amendment of the Limitation Act, the suit comes within the purview of Section 10.

Suit to recover money diverted

The following are the relevant Sections and Articles of the Limitation Act as amended up to 1930 —

Section 10 Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time

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(n) Article 134 A of Limitation Act, *see post p* 908

(o) Naurangi v Ram, 9 P 885 1930 P 455

(p) Article 48 B, *see post p* 908.

(q) Article 134 C, *see post p* 908

(r) *See* below *p* 908

(s) Jaiste v. Thakur 50 A 265

For the purpose of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the e thereof

Art 48 B. To set aside sale of moveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration	Three years	When the sale becomes known to the plaintiff
Art 124 For possession of an hereditary office	Twelve years	When the defendant takes possession of the office adversely to the plaintiff Explanation —An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed
134A To set aside a transfer of immoveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration	Twelve years	When the transfer becomes known to the plaintiff
134B By the manager of a Hindu, Muhammadan or Buddhist religious and charitable endowment, to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration	Twelve years	The death, resignation or removal of the transferror
134C By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration	Twelve years	The death, resignation or removal of the seller.

These amendments have no retrospective effect. (*t*)

Sub-Sec 2—OATH BEFORE DEITY

Affirmation substituted for oath

Oath—The taking of an oath was found to be highly objectionable to Hindus and Muhammadans and hence, Act V of 1840 was passed for the purpose of prohibiting the administration of oaths to persons belonging to those com-

(*t*) Naurangi v Ram, 1930 P 455

munities and a form of affirmation being substituted for an oath, (*u*)

Statement of fact made before deity

Statement before deity—A plaintiff in a suit having offered to accept a statement of fact if made by the defendant before a family deity and the defendant having accepted it, made a statement before the deity, and a commissioner appointed by the Court recorded the statement without administering an oath or reciting any formula by way of invocation or having done anything which in the ordinary sense of the words amounted to the making of an oath or affirmation. The statement made by the defendant in the above circumstance is binding on the plaintiff. (*v*)

when binding

Sec. 11—SUCCESSION

Sub-Sec 1—SUCCESSION TO MATTS

Yajnavalkya's order of *mohunt*

Succession to Managership of Mutts—The rule of succession to the office of a *mohunt* or a head of a *Muth* is founded and moulded on the above text of Yajnavalkya (*w*) which provides that a virtuous pupil, a religious brother residing together, and the preceptor are respectively successors to the property left by an ascetic (*yati*), a hermit (*vana-prastha*) and a life-long student (*brahmachari*)

yati *vana-prastha*, *brahmachari*,

These latter were all *Sannyasis*, the distinction being due to the different circumstances under which they had become so. If the distinction be thrown out of consideration, then the succession of a *chela*, a *gurubhai* and a *guru* resembles the succession of a pupil, a religious brother and the preceptor to the property of the said persons. (*x*)

of other than *mohunt*

If a *Sannyasi* attached to a *Mutt*, other than the *mohunt*, dies leaving property it would go to his *chela*, *guru* or *gurubhai* on the analogy of the said text, as well as on the analogy of succession of son, father and brother, a chela or adopted pupil is alike to an adopted son, the spiritual relationship is substituted for the natural one.

(*u*) Indar Prosad *v* Jogmohan, 54 I C 301, 315

(*v*) *Ibid*

(*w*) Text No 24

(*x*) In this connection *see* Nandkishordas *v*. Kala, 1926 N. 351.

Adoption of *chela*

Among the *Gharbhuri Ghsais* the question of his widow adopting a *chela* was raised in the Bombay High Court, but the custom was not proved. (*y*)

Usage re : succession

The succession to the office is moulded on the same analogy, the *chela* is primarily entitled, (*z*) but his succession is regulated by the usage of the *math* (*a*) which cannot be altered by a custom of recent origin or by a Will of the trustee. (*b*)

Nomination

The nomination or ordination of a junior *Pandarasannadhi* (or the head of a *Mutt*) in some cases, is the customary mode of providing for the line of succession in the *Mutt* by its head , and he can nominate his *chela's chela* in preference to his junior *chela* , (*c*) but he has not the power of dismissing him arbitrarily but may do so on good cause. (*d*) In some cases the present *mohunt* is considered to have the power of nominating one of his *chelas* or his fellow-disciples or *gurubhais* as his successor, (*e*) by will , (*f*) the choice often falls on his own relation, if any, amongst them The appointment of one's wife is held valid, in Dharmsala Sain Bhagat of Lahore. (*g*) But such nomination must be made in a *bonafide* exercise of the power to appoint a successor. (*h*)

Selection by neighbouring mohunts

In others, the successor is elected by the neighbouring *mohunts* by the opinion of the majority assembled for the pur-

(*y*) Hirabharthi *v* Bai juvar, 1929 B 35
(*z*) Ramdas *v* Baldevdas, 39 B 168 16 Bom L R 757 26 I C 607, Sambasivam *v* Secretary, 44 M 704 41 M L J 109 63 I C 659 (*Sudra*)
(*a*) Ram Prakash *v* Anand 43 C 707 43 I A 73 20 C W N 802 24 C L J 116 31 M L J 1 14 A L J (21 18 Bom L.R 490 33 I C 583, Narayani *v* Ittuli, 39 I C 890 (m), Mohesh *v* Gossain, 23 C W N 401 51 I C 884, Ramji *v* Lachhu, 7 C W N 145, Goshain Sheo *v* Shiam, 50 A 485 1928 A 257, Dewa Das *v* Shew, 1929 P 531
(*b*) Pratapa *v* Simji, 1927 M 50
(*c*) Dewa Das *v* Shew, 1929 P 531
(*d*) Tiruvambala *v* Manikkavachaka, 40 M 177 30 M L J 274 34 I C 57
(*e*) *See* Mohesh *v* Gossain, 23 C W N 401, Ram Charan *v* Gobinda, 56 C 894 33 C W N 346 1929 P C 65, reversing Gobinda *v* Ram, 52 C 748 29 C.W N 931 89 I C 804 1925 C 1107
(*f*) Ram Charan *v* Gobinda, *supra*, in this connection *see* Basdeva *v* Shantanand, 50 C L J 513 P C
(*g*) Bishambar *v* Phulgari, 11 L 673 1930 L 715
(*h*) Nataraja *v* Kailasam, 44 M 283 48 I A 1 : 25 C W.N 145 39 M L.J 98. 18 A L J 1041 57 I.C 564

pose(*i*) or by the heads of the *Mutts*(*j*) of that class of *sannyasis*, or selected by the ruling power from amongst the *chelas* of the deceased *mohunt*, but the burden of proof lies on the person who sets up his right to nominate the successor of a *mohunt* alleging the *Mutt* in question as a subordinate *gadi* to his. (*k*)

by ruling power.

Onus re exercise of such right.

In some again, the office devolves on the senior *chela* of the last *mohunt*. The particular usage is to be proved in each case. (*l*) According to the usage of some *Mutts*, either nomination by the late *Mohunt*, or election by neighbouring *Mohunts* is necessary for the succession of a *chela* (*m*)

Senior *chela*

Nomination by late *mohant*.

In a contest at the election of the *Daloi*, the head priest of the Madhub temple at Hajo in Kamrup, it is held that not only the Burdeories whose names were in the list prepared for the purpose but also those whose names were not in the list can take part in the election It is also observed that the English common law of parliamentary elections should not be applied to regulate the election of temple trustees in India, though the principles which underlie that law may be invoked if they appear to the Court to be in conformity with the rules of justice, equity and good conscience. (*n*)

Procedure of election of *daloi* in *Kamrup*

The right to the headship to the *Mutts* of West Coast generally depends on the length of time a person has been a *sannyasin* and not on the nomination by the ruling power nor on the selection by the disciples (*o*)

Office devolve on one longest time a *sannyasin*

There is, however, a distinction between the succession of a *chela* to the estate of his *guru*, and his succession to the trusteeship of the property of a *Mutt*, of which the *guru* was the *mohunt* or Superior, and as such used to exercise authority over the congregation of *Sannyasis*. The successor should be a person who must command respect of all the members of the establishment. Hence his qualification for

How successor to be chosen

(*i*) Lahar Puri *v* Puran, 37 A 298 42 I A 115 19 C W N 718 21 C L J 499 29 M L J 75 17 Bom L R 475 29 I C 724 (*Dasnami*)
(*j*) Ramdas *v* Baldevdasji, 39 B 168, 173 16 Bom L R 757 26 I C. 607
(*k*) Jwala *v* Pir, 1930 P C 245
(*l*) Greedharee *v* Nundokissore, 11 M I A 405 8 W R P C 25
(*m*) Madho *v* Kamta, 1 A 539
(*n*) Raghunath *v* Jiban, 27 C W N 312
(*o*) Narayana *v* Ittuli, 39 I C 893

becoming the head, should be evidenced either by the nomination of the late *mohunt*, or by election by members of the fraternity of neighbouring *mohunts* of the some sect, or by both. The *chela* would be entitled if not disqualified.

Succession to *guru's* personal property

But the *chela* being the heir to his *guru's* personal property, neither nomination nor election can affect his right of succession. It may by usage devolve on the succeeding *mohunt* as the latter's personal property, but it cannot devolve on the natural heirs of the deceased *mohunt*. (*p*)

Founder's heirs can create new line, when

It is competent to an heir of the founder of a shrine, in whom the trusteeship has vested owing to the failure of the line of the original trustees, to create a new line of trustees. (*q*)

Issue of marriage when can hold office

Issue of marriage —In the Punjab "it is only as the result of a somewhat modern innovation that the practice of allowing a *sannyasi* to marry and have a family has come into existence." But there must be very clear proof to show that by the simple process of marrying and having a family, the head of an endowed institution can convert the endowment into a semi-private establishment so as to enable the sons of the wedlock to occupy his office superseding the claims of his *chela*, either nominated by the *mohunt* himself or elected to that office by the brother-hood. (*r*)

Altring order

An ascetic being a mere life-tenant cannot alter the succession to the trust by an act of his own (*s*)

Sub Sec ii—SUCCESSION TO PRIVATE ENDOWMENTS

Right of founder or heir to direct mode of succession

Succession of sebayet of private endowment.—The donor or founder and his descendants have the right to appoint the manager or *sebayet* (*t*) and to direct the mode of succession to the office of the *sebayet*. A person may appoint himself as the first *sebayet* and reserve to himself the power of appointing his successor which, however, is not exhausted after being exercised once but it entitles him to make repeated nominations (*u*)

(*p*) Goshain Sheo *v* Shiam, 50 A 485 1928 A 257, *but see contra*, Inder *v* Fatch, 1 L 540 59 I C 784

(*q*) Gauranga *v* Sudevi, 40 M 612 32 M L J 597 41 I C. 589, Baldeo *v* Gobinda, 36 A 161, 165. 12 A L J 179 23 I C 18

(*r*) Sant *v* Ram, 6 I C 643 41 P W R 1910

(*s*) Ramji *v* Lachhu, 7 C W N 145, 148

(*t*) Sheo *v* Aya, 29 A 663 4 A L J 565 (*u*) Ishri *v* Ram, 1930 A. 629

The donor of *debutter* property, without an express reservation of power cannot alter the order of succession contrary to the terms of the deed ; (*v*) but in a subsequent case it has been held that the power of making any change in the order of succession of *Sebayets* should be presumed to exist unless expressly given up, but after the death of the endower the rules of succession are unalterable by his successor. (*w*)

Altering order of succession.

If the deed of endowment is not forthcoming, or contains no such direction, the devolution of the trust depends upon the usages of such institution, if any. (*x*) In the absence of any evidence that there has been some usage, course of dealing or some circumstances to show a different mode of devolution, it passes to the heirs of the donor or founder where the *Sebayetship* has not been otherwise disposed of (*y*) and if it is not inconsistent with or opposed to the purpose, the founder had in view in establishing the worship. (*z*)

Usage and in its absence;

A person may be appointed *Sebayet* with a power of appointing his successor : if he dies without exercising the power, the office reverts to the donor or his heirs, and so also when the succession directed by him fails (*a*)

power of appointment.

It has been held, by applying the principles of law of succession laid down in *Tagore* v. *Tagore*, that a mode of succession of *Sebayets* contrary to the ordinary law of succession, cannot be directed in the endowment and hence such direction, so far as the persons not in existence at the death of the testator are concerned, fails, and the *Sebayetship*

Mode of succession contrary to ordinary law of inheritance

***Tagore* v *Tagore*.**

(*v*) Gaurikumari *v* Indra Kumar, 50 C 197 26 C W N 920 : 70 I.C 175 1923 C 30

(*w*) Sreepati *v* Krishna, 41 C L J 22, 27 82 I C 840 1925 C 442

(*x*) Bhagaban Ramanuj *v* Ram, 22 C 843 22 I A 94, Ayiswaryanandaji *v* Sivaji, 49 M 116 49 M L.J 568 1926 M 84

(*y*) Jagadindra *v* Hemanta, 32 C 129 31 I A 203 8 C W N 809 1 A.L.J 585 7 Bom L R 785, Sripati *v* Krishna, 41 C L J 22 82 I C 840 1925 C 442, Raj Krishna *v* Bipin, 40 C 251 17 C L J 189 : 18 I C 961, Madhab *v* Sarat, 15 C W N 126 6 I C 26, Kunjamani *v* Nikunja, 20 C W N 314 22 C L J 404 32 I C 823, Horidasi *v*. Secretary, 5 C 228, Gossami *v* Ramanlalji, 17 C 3 16 I A 137, Ananda *v* Braja, 50 C 292 : 36 C L J 356 74 I C 793 1923 C 142, Sam Devi *v* Ram, 1926 L 273

(*z*) Mohan *v* Gordhan, 35 A 283 40 I A 97 17 C L J 612, 17 C W N 741 : 15 Bom L R 606 19 I C 337

(*a*) Peet *v* Chutter, 13 W R. 396, Ranjit *v* Jagannath, 12 C 375, Jagannath *v* Ranjit, 25 C. 354, Gopal *v* Kartick, 29 C 716, Sheoratan *v* Ram, 18 A 227, Asutosh *v* Benode, 34 C W.N 177, 181

Promotha v Anukul,

reverts to the heirs of the founders. (*b*) But the same High Court in a judgment, delivered a few days before the aforesaid decision in the case of *Sripati* v. *Krishna* (*c*) observes a contrary view, consonant to the Hindu feelings and sentiments. In majority of such deeds of endowments some sort of devolution of *Sebayetship* otherwise than the ordinary rule of succession is usually prescribed. Mr. Justice Page dissented from their Lordships who decided the case of *Sreepati Chatterjee,* holding that it is opposed alike to principle and authority. One of the precedents cited by his Lordship was the case of *Gossamee Sree Greedhareeje* (*d*) decided by their Lordships of the Judicial Committee. But it seems their Lordships held a contrary view so far as this question is concerned. The Court of appeal from the decision of Mr. Justice Page (*e*) has very carefully confined its judgment to the facts of the case and did not express any opinion on the principle laid down in *Sreepati* v. *Krishna* (*f*) namely, the rule prohibiting a Hindu from creating a special line of succession unknown to Hindu law, does not apply to the case of the appointment of a *sebayet* of a family deity. In a later case the Calcutta High Court refrained from expressing any opinion on this rule; (*g*) but a Full Bench in its attempt to settle it has unsettled various settled law. (*h*)

Sripati v. Krishna,

Brojendra v. Lalit

Asutosh v Benode

Trusteeship with power of appointment

A trusteeship with power to appoint a successor is an estate recognized by law, and the assignment of trusteeship by one becoming trustee by prescription, to a person entitled to be *Sebayet* according to the founder's rule,—is valid by way of an exception to the general rule against transfer of trusteeship. (*i*)

Accretion

It is already observed, (*j*) that subsequent contribution to an existing endowment is to be deemed as an accretion. So the question is whether the subsequent contributor

(*b*) Promotho *v* Anukul, 29 C W N. 17 40 C L J 564, upheld by F B *See post pp* 919 927
(*c*) 41 C L J 22, 27 82 I C 840. 1925 C 442 set aside by F B *See pp* 915-927
(*d*) *See foot note* (*l*) below (*e*) *See foot note* (*l*) below
(*f*) 41 C L J 22 82 I C 840 1925 C 442
(*g*) Asutosh *v* Benode, 34 C W N 177, 187 51 C L J 80 1930 C 495
(*h*) *See post pp* 919-927
(*i*) Annasami *v* Ramakrishna, 24 M 219 11 M.L J 1
(*j*) *See ante pp* 881-882

can lay down an order of succession of *Sebayets* additional to the one already directed by the original founder, at least, with respect to the properties endowed by the later contributor. It may seem that for proper and better management of the endowment, it is desirable that there should be one order of devolution of *Sebayets*, instead of as many different lines of *Sebayets* as there were endowers from time to time, who contributed the original endowment subsequent to its creation. But in some cases the arrangement or direction of different or rather modified modes of devolution of the office may seem to be reasonable and convenient for the proper administration of the endowed property, particularly when additional properties are contributed by different persons at different times and situate at different places.

with new order of succession.

In many instances of large private Hindu religious institution it is found that the original founder of the endowment merely consecrated the deity, without making any provision for its habitation and for meeting the expenses of the worship of the deity, nor indicating any line of succession of *Sebayets*; and it generally happens that a long time after it, some one who by law, or by express direction, becomes a *Sebayet*, makes endowment of property by a deed in which he lays down a different order of devolution with or without affecting the rights and privileges of *Sebayets*, if any, already existing. It seems unreasonable that the endowment shall be valid, but not the condition about devolution of *Sebayets* laid down in the deed. The Privy Council in a similar case of *Gossamee Sree Greedhareejee* v *Rumanlolljee*, (*k*) has held that if the gift is taken by the *Thakoor*, or those who speak for him on earth and the condition insisted on, it must be observed.

Subsequent gift with direction of new devolution,

P C view,

The Calcutta High Court, (*l*) in a case in which an attempt was made by a *Sebayet* who was not the original founder and who contributed to the original endowment, to alter the existing line of *Sebayets* of the family deity, has held, "that while it was open to *Gopal Chandra Seal*, who

Brojendra v. *Lalit*

(*k*) 16 I A 137, 147 17 C. 3, 22
(*l*) Brojendra v. Lalit, 45 C.L.J 41, 53. 1927 C. 262 appeal from 53 C. 251.

was *Sebayet* but not the founder of certain ancestral idols, to endow property for the use and benefit of the said idols, he could not in any way alter the line of *Sebayets* as laid down by the founder of the idols, nor affect in any way the dispositions created by the original founder." His Lordship, Sir Charu Chandra Ghose Kt, in the above mentioned case, has very rightly laid down that any interference, by any person other than the founder, with the order of devolution of *Sebayetship* is invalid. (*m*)

Mr. Justice Page has very clearly laid down the law on the subject namely, "apart from an usage or consensus of opinion among those interested in the worship of the idols in favour of such a course, a *Sebayet* is impotent of his own will and pleasure to alter the line of *Sebayets* laid down by the founder or by the common law, of India." But the question is how and at what point of time "a consensus of opinion among those interested in the worship of the idols in favour of such a course" is to be taken into consideration. It seems that his Lordship by the words "those interested in the worship" meant, *Sebayets*. The "consensus of opinion" is to be considered in regard to the point of time when the subsequent endowment was made It was at that time, for the deity or those who speak for him on earth, to elect, *i.e.*, either to accept the grant with the condition attached, or to refuse to accept it. Having accepted the gift, it is unreasonable to urge that the endowment is valid, but the condition as to new line of *Sebayets* is void. This is the proper view of the law as indicated by the Privy Council in the above mentioned case.

Asutosh v Benode

But in a Division Bench of the same High Court, (*n*) in a case in which the sole *Sebayet* for the time being, though himself made additional gifts and accepted them for the deity, their Lordships accepted the observation of the trial judge, that "the donor, cannot be treated as having on behalf

(*m*) This view re-affirmed by Rankin C J and C C. Ghose J in Asutosh v. Benode, 34 C W N 177, 184 51 C L J 80 1930 C 495

(*n*) Asutosh *v* Benode, 34 C.W N 177, 184 . 51 C L.J. 80 : 1930 C. 495.

of the idol accepted by the new endowment with the conditions laid down by himself."

Gift with conditions if beneficial to deity

It cannot be urged that the addition of properties to the existing endowment was not for the benefit of the idol. So the question left is whether the condition regarding the devolution of the *Sebayetship* which as in the present case, gives greater advantage to a particular branch of *Sebayets*, without affecting the rights of the other branch, is or is not for the benefit of the idol. So far as the deity is concerned, the condition must be admitted to be beneficial to the deity otherwise the gift of additional property dissociated from the condition will be void and the deity will be deprived of the benefit of these properties. The *Sebayets*, who trace their rights from the original founder lose nothing, but the other branch of the *Sebayets* get some greater advantage by subsequent gifts to the endowment and consequently the idol.

if repugnant to Hindu feelings

A gift with a condition of devolution of *Sebayets* with respect to subsequent additions which does not bring in strangers in the line of *Sebayets* contrary to one laid down by or traced from the original founder seems to be consistent with the views of the Hindus.

Sir George Claus Rankin who delivered the judgement in the above mentioned case, (o) stated that in law or in right reason, the plaintiff cannot claim any right in the additional property dedicated by the subsequent donor and at the same time repudiate the conditions attached by this donor to his gift. So the learned Chief Justice (Sir C. C Ghose J. agreeing) directed that all reference to the after-acquired property be expunged from the decree declaring the plaintiffs claim as *Sebayet* to the properties of the idol.

Question kept open.

Their Lordships did not, however, express any opinion whether the *Sebayets* who trace their descent from *Kalidas* who made the subsequent additions with conditions attached, are bound by the acts of their predecessor or the property loses its *debutter* character.

(o) 34 C.W N. 177 at p 186 and 188

Conclusion from cases

The reasonable conclusion consistent with Hindu feelings, therefore, that can be drawn from the various decisions on the point, is that when a *Sebayet*, after the original founder, makes any gift to a deity with a condition directing a new mode of devolution of *Sebayets* but not bringing in strangers in line of *Sebayets* indicated by or traced from the original founder, the gift if accepted by the sole sebayet or sebayets for the time being will vest the property in the deity with the conditions. But these properties will be managed by those sebayets only who fall in the line indicated by the new donor. Just as one *Sebayet* during the course of his management or worship may perform it in a more lavish scale out of his own personal funds than the others, so the favoured branch of *Sebayets* may similarly perform the management and worship in a better standard than the other branch.

Besides, as is indicated above, it is for the benefit of the deity that such endowment should be held valid, otherwise, one will be reluctant to make endowment of property to the already existing family deity. In large number of cases, at their consecration, the family deities did not possess any endowed property. The cost of worship of the deities were met by members of the family from their own pocket out of free will But in course of time, endowments are made from time to time by the heir or heirs of the original founder.

Their Lordships, however, in the case of *Asutosh* v. *Benode* have made it distinctly clear that the new line of *Sebayets* cannot be said to be trustees for the management of the property and for payment of the income to those who are the *Sebayets* under the original dedication. (*p*)

Onus

In order to establish one's right to Sebayetship to a hereditary endowment it is not necessary to prove that he is one of the heirs of the founder himself, (*q*) it is sufficient if he is the heir of the holder of the office. (*r*)

(*p*) 34 C W N 177 at *p* 187

(*q*) Kunjamani *v* Nikunja, 22 C L.J 404, 408

(*r*) Panchanan *v* Surendra, 50 C.L J 382, 386. 1930 C 180

A woman is not disqualified—from succeeding to a hereditary religious office on account of her sex, (*t*) for she can have the duties of such office performed by proxy.

IS SEBAYETSHIP A PROPERTY ?

Monohar v Bhupendra—A recent Full Bench of the Calcutta High Court (*u*) has held that a *sebayet's* interest in the endowment is a *property* and, therefore, on the application of the rule in *Tagore's* case, no mode of devolution of this office unknown or repugnant to the ordinary law of inheritance in Hindu law can be created.

This decision, it is submitted with greatest deference, is incomplete and opposed to Hindu law as well as to general principles of law and will lead to anomalous consequences.

Decision incomplete.—It is a matter of great regret that the important aspect of the case, namely, whether a mode of devolution of the sebayetship through the eldest member of the family, or in other words through some one of the heirs to the exclusion of the other heirs, is unknown or repugnant to Hindu law, has been merely answered in the affirmative without assigning any reason, although the answers to the questions referred to the Full Bench hinge on it. There are clear provisions in Hindu law allowing such devolution, particularly in Bengal and Mithila schools. In explaining the passage of Dayabhaga referred to below, (*v*) Raghunandana lays down .

याज्यं क्षेत्रमिति परस्परं न विभाज्यम् इति भाव.। देवता चेति, तेन याज्ञयामस्यापि न विभाग. तर्हि कस्य स:, नच मास क्रमेण सर्व्वेषामिति वाच्य विभाज्यतापातात् चेत् ज्येष्ठस्य स' सर्व्वद्रव्याच यद्वरमिति वचनात्, तद्विकृयोपजीविनाच तद्विभाज्यमेवति मिताक्षराखरस. (*w*)

"Place for sacrifice (or for worship) is not to be mutually partitioned is the idea ; (nor) the deity (image) as also

(*t*) Annaya v Ammakka, 41 M 886 F B 35 M L J 196 47 I.C 341, Mahamaya v Haridas, 42 C 455, 475 20 C L J 183 27 I C 400 (Kalighat temple), Raja Rajeswari v Subramania, 40 M. 105 30 M L J 222 32 I C 975, Pankajammal v Secretary, 40 M 1108, Meenakshi v. Somasundaram, 44 M 205 39 M L J 403 59 I C 464

(*u*) Judgment is not reported at the date when this is printed

(*v*) *See foot note* (*w*) below

(*w*) *See* Dayabhaga, edited by Bharat Chandra Siromoni with six Commentaries with the consent of Prosonna Coomar Tagore page 218, Ed, 1863.

the *Salgrama* is to be partitioned. Then to whom it belongs? It cannot be said to belong to all in turns of months as it then falls into the category of divisible things. It belongs to the eldest on the dictum that best of all things (is his); but the sale proceed (of *salgrama* by those whose) vocation, is to sell (*salgrama*), is to be divided on the import of the Mitakshara." (*x*)

So also *Harita* who has been quoted in the Vivada-Ratnakara, (*y*) ordains; "when a division takes place, a bull from a herd of kine, and a single chattel, or the best (portion) and *the Deity*, and the house, *should be given to the eldest*; * * *."

So the devolution of the right to the office of sebayet through the eldest member of the family is neither unknown nor repugnant to Hindu law; on the other hand, Raghunandana whose authority in Bengal is next to Jimutabahana, (*z*) and the *Smriti-kar*, *Harita* impliedly **direct that the devolution of the office of the manager of the deity should be through the eldest co-parcener**

Opposed to texts.—The *Mitakshara* does not mention the right of *sebayet* as property. Where it discusses about things that are exempted from partition, it quotes (*a*) Manu which runs thus: "A dress, a vehicle, ornaments, cooked food, water, and female (slaves), property destined for pious uses or sacrifices and a pasture-ground, they declare to be indivisible" (*b*)

(*x*) Mit 1, IV, 18—with reference to Indivisible properties, the Mitakshara says that the horse which the father used to ride is to be disposed of as directed in regard to his clothes "If the horses *or the like* be numerous, they must be distributed among the co-heirs *who live by the sale of them*" From this an analogy has been drawn by Raghunandana regarding the sale of *Salgramas* by those who live by the sale of them and the division of such sale-proceeds

Salgramas and Banalingas are not consecrated

(*y*) *See* Translation by Babu (subsequently Justice) Digambar Chattopadhyaya, and the author *p* 11, Ed 1899, the Italics are not in the original

(*z*) *See ante pp* 37-38, C20

(*a*) Mitakshara, Ch I, Sec IV 16, 23-24

(*b*) Manu, Ch. IX, 219, translation by G Buhler, Sacred Books of the East, Vol XXV, Ed 1885 page 379

Gautama, (*c*) *Visnu* (*d*) and *Katyayana* (*e*) like Manu hold that the property set apart for pious purposes or for sacrifices are impartible things.

Brihaspati, however, says that "property *obtained* for pious purpose shall be divided in equal shares." (*f*) This seems to refer to property which a member or the members of the family obtained by performing a sacrifice or the like, that is, the gift or grant that was made was to him or to them personally

The *Viramitrodaya* also holds that "religious fund and charitable works * * * to be not liable to partition." (*g*)

The *Dayabhaga* deals with the question of proprietary right, partition and partible and impartible properties at great length, but no where mentions the right of a *sebayet* as a property. The Dayabhaga quotes *Vyasa,* who says, that place of sacrifice shall not be partitioned (*h*) Jimutavahana explains it to mean "the spot, where sacrifices are performed ; or else an idol." (*i*) As an idol cannot be partitioned, everything belonging to the idol is also indivisible.

It follows, therefore, that the image with all its belongings is to be managed by a single person, that is, to the exclusion of other heirs of the founder, so that it may be preserved for ever. This is the true Hindu view. From what is stated above(2) it appears that it was never contemplated to be held by all in turns

Opposed to general principles of law—The result of the Full Bench decision, therefore, is that in an *absolute gift in favour of a deity* with a direction as to the mode of devolution of *sebayetship*, there accrues a sort of proprietary

(*c*) Gautama "46 Water, (property destined for) pious uses or sacrifices, and prepared food shall not be divided ", Ch XXVIII. 46, translation by G Bühler, Sacred Books of the East Vol I

(*d*) Vishnu, 18, 44

(*e*) *See* Vivada-Ratnakara, *p* 30, author's translation.

(*f*) Brihaspati, XXV, 83, *see* page 382, translation by Julius Jully, Sacred Books of the East, Vol XXXIII, Ed. (1889)

(*g*) *See* author's translation page 249

(*h*) Dayabhaga, Ch VI, Sec. 2, Cl 25 (*i*) *Ibid*, Cl 25

(2) *See foot note* (*x*) above.

right of the *sebayet* also. So the endowment will become *partly debutter* and *partly secular*, the proprietary rights of the deity and *sebayet* being indefinite, co-extensive and indivisible (as the founder never willingly gives any interest definitely to the *sebayet*) will become a secular property charged with the performance of the worship.

It cannot be urged that an absolute gift to a deity is only possible where the gift is made *absolutely* to the deity without indicating the order of devolution of *sebayets*, as there must be a *sebayet* for the management of the endowment and the so called proprietary right will then, according to the Full Bench, automatically grow and attach to the office.

Moreover, if this proprietary right of a *sebayet* is held to stand independently of the *debutter* property, then the significance of the word *property* will be too wide, not recognized in civil law. A right *qua* right unattached to any material thing is not *property*, unless the immaterial things fall within the category of incorporeal properties which are the products of human skill and labour such as copy right, patent right, the right to good-will or the like.

It is, therefore, a right to the management of the endowment just as an ordinary manager of an estate has in the estate he manages. One has as much proprietary interest in the estate of the deity as the other has in the estate of a human being.

The right of disposal by a *sebayet* of a certain class of offerings is not even his property. Whatever is offered to the deity is god's property including cash and jewels or fruits and eatables, but the latter kind of property being by nature perishable is distributed in the usual course after worship among those present or enjoyed by the *sebayet* and his family. These are called *prosad* or broken-food left by the deity and partaken of by the devotees with great reverence. The right to appropriate these offerings cannot be called his proprietary right as the same may be claimed by all the members of the family other than the *sebayet* who have got

a right to enjoy them however small the quantity may be.

Appropriation of the endowed property or the income thereof without the same being applied for the purposes of the institution is a breach of trust, although it may be largely practised by the *sebayets* generally. The use of the offerings left after the worship or the misappropriation indicated above cannot convert it into a proprietary interest.

It cannot be said that though this right of a *sebayet* is a *property*, it is to be so deemed only in a restricted sense, that is, for the purpose of determining its mode of devolution only and no other incidents of *property* will be attached to it. If it is once interpreted by a Court to be a *property*, all the elements of property, so far as its nature permits, must be present in it and, consequently, it will be divisible among co-*sebayets* and alienable. Neither of these is allowed by law and various decisions of the Privy Council and those of the High Courts, on these questions, therefore, must after the Full Bench decision be treated as wrong

Then, again, if, in such an *absolute gift* to a deity, there accrues a right in the manager, why will not a similar proprietary right grow in the guardian of an infant to whom an absolute gift of any property is made and accepted by the guardian?

It is a well known fact that all the members of the family of the founder, male or female, besides the *sebayet*, are entitled to worship as a matter of right and they according to the Privy Council are necessary parties in a litigation in which the convenience or inconvenience of performing the worship is involved. (*j*) Moreover they have a right to prevent the endowment being destroyed by the *sebayet*. If the *sebayet's* interest in the endowment be held to be *property* then every member of the family other than the *sebayet* may legitimately claim a similar right.

Opposed to case law.—The appointment of a *sebayet* by a Will, made by a deceased holder of the office, is not disposition of *property*, as he cannot dispose of the property of

(*j*) Pramatha *v* Pradyumna, *see foot note* (*q*) below

the endowment, nor is it a valid disposition of the office as it is not *property* within the meaning of the definition of "Will" given in the Indian Succession Act, and therefore such a will cannot be admitted to probate. (*k*)

The property endowed absolutely to the deity or to any public institution becomes the property of the god (*l*) or the institution and possessed by it as a juridical person, the founder's rights in the property being completely transferred to and vested in it. The *sebayet* or the *Mohunt* is merely a manager of the endowment. This is so held in innumerable cases by the Privy Council (*m*) and the High Courts (*n*) and only a few are referred here.

In the old case of the *Elder widow of Raja Chutter Sein*, (*o*) it has been held "Debutter lands are not hereditable property, the management of them, alone for religious purpose, devolves on the heirs of the person who made the endowment" The Privy Council has held a sebayet to be a "manager" or a "trustee" (*p*) or a "guardian". (*q*) In the case of *Vidya Varuthi* (*r*) in which the dispute was with respect to a public endowment, the Privy Council observed that the head of the *Mutt* holds the property for the idol or the institution as manager with certain beneficial interests regulated by custom and usage, *but in no case the property was conveyed to or vested in him* He is also held to be no better than the manager of an infant's estate (*s*)

(*k*) Chaitanya *v* Dayal, 32 C 1083, Jib Lal *v* Jaga, 16 C W N 789 16 I C 453, Jagadindra *v* Madhusudan, 20 C L J 307 27 I C 24, Prosonna *v* Ram, 17 C L J 66, Parsania *v.* Hari, 17 C L J 65 16 I C. 538

(*l*) *See ante pp.* 865,872

(*m*) Vidya Varuthi *v* Balusami, 48 I A 302, 315 26 C W N 537 547, 550, Pramatha *v* Pradyumna, 52 C 809 33 C W N 25, 33, 35

(*n*) Bhuban *v* Narendra, 35 C W N 478, Babajirao *v* Luxmandas, 28 B 215.

(*o*) 1 Sel Rep 239 1 Mac Sel Rep 180

(*p*) Shibessouree *v* Mothoora, 13 M I A 270, 13 W R P C 18, Ramanathan *v* Murugappa, 29 M 283 33 I A 139 10 C W N 825 4 C L J 189 16 M L J 265 3 A L J 707 8 Bom L R 498, Ram Prokesh *v* Anand, 43 C 1 14 A L J 621 18 Bom L R 490 33 I C 583, Aruna Chellam *v.* Venkata, 43 M 253, 46 I A 204 24 C W N 249 37 M L J 460 17 A L J. 109, Basudeo *v* Jugal Kishwar, 22 C W N 841 : 28 C.L J 476 · 35 M L J 5 16 A L J 601 20 Bom L R 1688

(*q*) Pramatha *v* Pradyumna, 52 C 809 52 I A 245 30 C W N 25 41 C L J 551 23 A L J 537 27 Bom L R 1064 49 M L J 30 : 1925 P C. 139 87 I C 305

(*r*) 44 M 831 48 I A 302 41 M L J 346 26 C W N. 537 : 24 Bom L.R. 629 20 A L J 497 65 I C 161

(*s*) Shibessouree *v* Mothoora, *supra*

Opposed to legislation.—For the purposes of Section 10 of the Limitation Act, the *sebayet*, by the new amendment, (*t*) is to be deemed as a trustee.

Privy Council decision on this endowment is shaken.—It is very significant that the Privy Council has, in connection with this very endowment, removed a *sebayet* from the office for committing breach of trust. (*u*) It was because the *sebayet* held an office and committed a breach of trust, the Court removed him from the office inspite of the fact that the Privy Council in that very case also held that the *sebayet* had some interest in the endowment. Had it been *his property*, the Court could not have deprived a person of his property for breach of trust committed with respect to his own property, inasmuch as a result of the Full Bench decision, he and the deity must be treated as co-owners of the endowment.

Strange consequence.—If this right be a *property*, a *sebayet* who gives up Hindu religion and embraces any other religious faith, shall still be able to cling to the office, as under Act XXI of 1850, no person, on account of change of religion, can be deprived of his property.

Tagore Case. (*v*)—The Privy Council in this case explained the *ordinary law* of inheritance to *property* only and this view is re-affirmed by the same Board. (*w*) The Privy Council in the *Tagore* case never meant to lay down a general proposition that there is only one order of succession and any rule that deviates from it is unknown or repugnant, to Hindu law. The Board was fully cognizant of the rules of succession to impartible estate, stridhana property, public charitable or religious endowment etc.

Old case-law—It was, held (*x*) that an idol was a

(*t*) Act I of 1929, Sec 2

(*u*) *See ante pp* 899, Peary *v* Monohar, 48 C 1019 48 I A 258 26 C W N 133 34 C L J 85 : 41 M L J 68 23 Bom L R 913 : A L J 773 62 J C. 76 1922 P C 235.

(*v*) I A Sup 47 18 W R 359

(*w*) Rajendra *v* Raghubans, 40 A 470 45 I A 134, 143 28 C L J 456

(*x*) Dwarkanath *v*. Jnnobee, 4 W R 79, Subba Raya Gurukal *v* Chellappa, 4 M 315, Nagiah *v* Mutha, 11 M L.J 215, 222

property for the purpose of giving jurisdiction to the Court in disputes relating to it, but the view has subsequently been, in effect, negatived. The Allahabad High Court (*y*) distinguished the old cases. The Privy Council (*z*) has held: "As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person."

In the various cases relating to *absolutely dedicated endowments* their Lordships referred to the *Sebayet's* privilege with respect to the endowment as "interest" or "right" and not "property," and they did so intentionally, to avoid various anomalous consequences, some of which are indicated above.

Ghansambanda v. Velu (*a*)—The only question for decision before the Privy Council in this case was a question of limitation. It was urged on behalf of the party wanting to avoid limitation that each successive *sebayet* or the holder of a *hereditary* office was to be deemed to hold a successive life estate, deriving his right by appointment from the founder. The Privy Council relying on its rule in *Tagore* case negatived this contention and held that no new rule of devolution, contrary to the ordinary mode of succession is allowed in a *hereditary office*. The Privy Council in this case dealt with the case of a *hereditary office* and the decision is perfectly sound. One cannot create successive life estates in a *hereditary office*, i. e., one cannot be permitted to say that it is both hereditary and successive life-estate, a contradiction in terms.

Neither in this case nor in the *Tagore* case, the Privy Council ever laid down that the succession to the office of

(*y*) Sri Raman Lalji v Sri Gopal, 19 A 428, Page 432-433

(*z*) Ramanathan v Murugappa, 29 M. 283 33 I A 139 on appeal from 27 M 193

(*a*) 23 M. 171 27 I A 69 4 C W N 329 10 M.L J 29 2 Bom. L.R. 597

sebayet through some one of the heirs to the exclusion of the other heirs of the founder, is unknown or repugnant to Hindu law Nor can such a devolution of the office be called heriditary inasmuch as it does not devolve on *all* the heirs.

Sub-Sec iii—SUCCESSION TO OFFICE OF GURU

Succession to the office of guru —In every Hindu family there is a *Guru* who is generally a Brahmin (*b*) and who is to impart religious teaching as the preceptor of the Veda to its members for their salvation. This office may be held by a person who belongs to other castes but he must not belong to a caste lower than that of the disciple. (*c*) Each member of a family gets his or her initiation in religious teaching individually from the *Guru* for which no fee is fixed , but the disciple pays voluntarily some fee or *pronami* as it is called, and makes presents also according to his or her ability. Whatever may be the social status or pecuniary position, a disciple pays some fee and presents, not only at the time of receiving initiation but on various occasions so long as the disciple lives.

guru generally a Brahmin

of other caste.

Fee

The *Guru* may be selected by the disciple himself but it has become a universal practice to confine the right to the office of a *Guru* to a particular family and the office devolves from the *Guru* to his male heirs in succession even through a female line. This practice is so rigidly adhered to that in many cases a *Guru* happens to be absolutely devoid of any education or may even be an infant. But an infant, old, a lame and an invalid person are expressly forbidden for the office. (*d*)

Selection

Women are generally excluded from this office But they are not ineligible for the office, particularly the mother. (*e*)

Woman

In case of there being more male heirs than one, different families of disciples are allotted to different heirs in a partition

Partition

(*b*) *See* Narada-panchratra , *see p* 88 *ante*

(*c*) *See* Narada-panchratra

(*d*) *See* Kulachuramani

(*e*) *See* Yagini-tantra and Baisampayann Sanghita.

among them and each becomes the *Guru* of the families so allotted to him.

gotra of a *sudra*.

The office of a *Guru* being, as stated above, generally hereditary, a *Sudra* disciple, who it is stated to have no *gotra*, of their own, is known by the name of the *gotra*, of his Brahmin *Guru*. (*f*) This explanation cannot possibly be correct, inasmuch as the *gotra* of a non-Brahmin will then from time to time vary when a family of *Guru* becomes extinct and a new *Guru* of a different *gotra* is selected. Besides the office may devolve on the death of the *Guru* to his daughter's son whose *gotra* must be different from that of the deceased and consequently the *gotra* of the disciple may accordingly undergo a change

Death of *guru*

In case of the death of the *Guru* his male heir is looked upon as the *Guru*, although a particular disciple did not get his religious instructions from him.

Right enforceable

This right to hold such office and of imparting *upadesam* and receiving emoluments is a right enforceable in a Court of law although no fixed emoluments are attached to the office. (*g*)

Succession by custom.

The succession to such office may be by nomination of the last holder and in case of lapse it may be by election by the members of the *Guru's* family. (*h*)

Sub-Sec iv—ACCELERATION OF SUCCESSION

A person by adopting the religious order and giving up the life of a house-holder according to proper religious rites (*i*) becomes civilly dead and accelerates the succession of the person standing next in order of succession after him. A widow can extinguish her life-estate by surrendering the whole estate in favour of all the reversioners. Similarly a *mohunt* or a *sebayet* can extinguish his estate so as to accelerate the succession of the person standing next in order after him. But in all these cases the acceleration must be of the whole estate and the extinction of the holder's right with

(*f*) *Ante, pp.* 88-89 *ante*
(*g*) Manickavachaga v Puramasivan, 33 C W N 382 P. C
(*h*) *Ibid*
(*i*) For adoption of religious order *see ante pp* 852-854

respect to the property or office must be complete with respect to the entire estate.

Just as a person can give up the life of a house-holder and adopt the life of a *Sannyasin* and thereby accelerate the succession, so also a *Sannyasin* by again adopting the life of a house-holder accelerates the succession to the property and office he held as a *Sannyasin* of the person who stands next in the order of succession.

Transfer

A *sebayet*, threrefore, can transfer his rights to a co-*sebayet* or to one who is next in the turn of succession, (j) so that the succession may be deemed to be accelerated. But the transfer must be in favour of all the *sebayets*. (k)

Sec. 12—PARTITION

Office or property cannot be partitioned.

Of property or office of head of a Mutt.—The office of the head of a *mutt* or its property cannot be subject of partition. (l) Without determining the point, their Lordships of the Judicial Committee observd that the essence of the law governing the *Mutts* lies in the following of custom or usage, *prima facie* such separation would be improper, unless there are special circumstances justifying it (m) Their Lordships further explained their own decision in *Sethuramaswamiar*, referred to above, as a case in which the office was hereditary, the *mohunt* being a member of an undivided family, and held to be enjoyed by the office-holder without partition with the other members of the family.

Partition of office of sebayet,

Partition of office of sebayet of family deity.—The office of a *sebayet* is not divisible where there are more *sebayets* or trustees than one, inasmuch as they hold as joint-tenants. (n) But if they have a pecuniary interest such as a right

(j) Giris v Upendra, 35 C W N 768, 772, Radharani v Dayal, 33 C L.J 141 Mancharam v Pranshankar, 6 B 298

(k) *See* Giris v Upendra, *supra*, Narayana v Ranga, 15 M 183 2 M. L J 19

(l) Sethuramaswamiar v Merloswamiar, 41 M 296 45 I A 1 22 C W N 457 27 C L J 231, Gobinda v Ram, 52 C 748 29 C W.N. 931 89 I C 804 1925 C 1107, reversed by P C *see below*

(m) Ram Charan v Gobinda, 56 C 894 33 C W N 346, 351 1929 P C 65, reversing Gobinda v Ram, *supra*

(n) Raman v. Gopal, 19 A 428 17 A W N 103.

by turns

to the votive offerings, then they may come to a *quasi*-partition, that is, to an arrangement whereby each of the *sebayet* may, by turns, become the sole manager for a definite term. (o) But by custom (p) or by terms of family arrangement (q) worship by turns, as well as delegation of a turn by one to another co-*sebayet* is valid.

Senior member of Mit family.

The senior member of a Mitakshara joint family is entitled to exercise the right of management of the endowment until partition ; the other members cannot claim to exercise the right by rotation. (r)

Partition of britti or fees paid by jajmans—The right to receive *Brit* or *Brit Jajmani* (s) or *Brit Mahabramani* (t) or fee or emolument from a class of *Jajman* is a property and hence heritable and divisible.

Partition of Jajmanka—The *Jajmanka* and other books of the *Pandas* are capable of partition (u)

Partition of idols—Where there are several idols, the partition of them and even sale of them, among *sebayets* may be valid by custom though it is generally prohibited (v)

(o) Ram v Taruck, 19 W R 28, Limba v Rama, 13 B 548, Mitta v Nirunjan 22 W R 437

(p) Mahamaya v Haridas, 42 C 455 20 C L J 183 19 C W N 208 27 I C 400, Khetter v Hari, 17 C 557

(q) Ramanathan v Murugappa, 29 M 283 33 I A 139 10 C W N 825 4 C L J 189 16 M L J 265 3 A L J 707 8 Bom L R 408

(r) Thandavaraya v Shunmugam, 32 M 167 19 M L J 59

(s) Ram Chander v Channu, 45 A 445 1923 A 350, Lokya v Sulli, 43 A 35, Narayan Lall v Chullan, 15 C L J 376, Ghelabhai v Hargowan, 36 B 94 12 I C 928 13 Bom L R 1171

(t) Gaya Din v Gur, 1929 O 257

(u) Rajrani v Gomti, 7 P 820 1928 P 466

(v) Khetter v Hari, 17 C 557

CHAPTER XV.

IMPARTIBLE ESTATES.

Sec. 1—ORIGINAL TEXTS

१। ज्येष्ठ एव तु गृह्णीयात् पित्र्यं धनम् अशेषतः ।

शेषास्तम् उपजीवेयु-र्यथैव पितरं तथा ॥ मनु, ९, १०५ ।

1. Or the eldest brother alone may take the paternal wealth in its entirety; and the others may live under him, as they lived under their father.—Manu, 9, 105.

Eldest brother to take.

२। सदृशस्त्रीषु जातानां पुत्राणाम् अविशेषतः ।

न मातृतो ज्यैष्ठ्यम् अस्ति जन्मतो ज्यैष्ठ्यम् उच्यते ॥ मनु ९, १२५ ।

2. As between sons born of wives equal in class, there being no ground for distinction, there can be no seniority in right of the mother; but the seniority is ordained to be according to birth —Manu, 9, 125.

Sons by different wives

Sec. 2—HISTORY OF IMPARTIBLE ESTATES

Origin of impartible estates

Origin of impartible estates.—There are many valuable estates consisting of large tracts of land, the succession to which is not governed by the ordinary law of inheritance, prevalent in the locality, but is regulated by the custom of primogeniture, according to which they are descendible to, and held by a single member of the family at a time, the other members being entitled to maintenance only.

These impartible estates appear to have originated in three different ways namely :—

i-Independent chiefs, now reduced to zemindars

(1) Most of them appear to have originally been *Rajes* or principalities, or territories of independent chiefs of feudatories exercising powers of an autocrat, who have gradually been in course of time reduced by the paramount power, to the position of ordinary Zemindars. But there is no presumption that all Zemindaries are necessarily impartible. (*a*)

ii-Grants for hereditary public offices

(2) In some of them, a share of the rents and profits of the landed property formed the emoluments of public hereditary offices which could be held by only a single member of the family and so was descendible to a single heir by primo-

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(*a*) *See* Surjabai *v.* Gangaram, 1930 N 35

geniture. The Crown has power to grant or to transfer lands, and by its grant, or on the transfer to limit, in any way it pleases, the descent of such lands, but a subject cannot. o no such right in a estate can now be created by a private individual (*b*)

iii Family custom

(3) While the rest appear to have owed their origin to family arrangements followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family, by a single member at a time, in a certain order of succession, the other members being entitled to maintenance only without any power of interference with the management. (*c*) But where a custom had originated in a family for certain reasons, the custom does not cease to exist because the reasons are non-existent. (*d*)

Collection of revenue in ancient India

According to the ancient law of the country, the ruling power was entitled to a certain share of the produce yielded by every *bigha* of cultivated land, for the purpose of convenience in collecting the same, the country was divided into a large number of fiscal districts, each of which was under the charge of an officer of government, whose principal duty was, to collect the king's share of the produce or the land-revenue or the land-tax, as well as other taxes levied on tradesmen and the like. Like other occupations in India, the office of the tax-collectors became hereditary, and their remuneration consisted of a certain percentage of the net collections made by them. In course of time, the value of the king's share of the produce collected in each of the fiscal districts became well-known, and these revenue-officers were required to pay a certain amount of money, being the approximate value of the king's share after deducting therefrom

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(*b*) Rajendra *v* Baghubans 40 A 470, 480 45 I A 134 23 C W N 101 : 28 C L J 456 20 Bom L R 1075 48 I C 213, re-affirmed in Shiva Prosad *v* Prayag, 56 C L J 92, 110 30 C W N 1046

(*c*) Text No 1, Rao Kishore *v* Gahenabai, 15 N L R 176 (P C) 24 C W N. 601, 609 17 A L J 1077 22 Bom L R 507 37 M L J 562 53 I C 630

(*d*) Narendra *v* Nagendro, 50 C L J 267. 1929 C 577, Rao Kishore *v.* Gehenabai, *ante.*

the collection charges and their own remuneration, which amount was liable to variation owing to circumstances justifying an increase or diminution thereof, and was fixed upon an estimate of the aggregate of the rents payable by the ryots or tenants, of which, after deducting the expenses of collection, ten-elevenths were usually considered as the right of the Government, and remaining one-eleventh as the remuneration of the Malguzar or Revenue-Collector.

Effect of Permanent Settlement

Regulations affecting impartible estates.—By the Permanent Settlement of 1793, these hereditary tax-collectors in Bengal, Behar and Orissa or Midnapur, were converted into proprietors of the fiscal districts or Pergunahs, in other words, the British Administration transferred its right to the king's share of the produce of the lands in the fiscal districts, to the hereditary tax-collectors generally known by the name of Zemindars in Bengal, subject to the condition of paying to the Government a certain amount of annual land-revenue declared fixed and unalterable for ever

Changed its character

According to a custom originating in considerations of financial convenience, these herediatry offices were impartible and descendible by primogeniture to the eldest sons of the holders thereof, after their death. But their character was changed by the Permanent Settlement, and they were converted from offices into tenures in land.

& descent

While concluding the Permanent Settlement with the Zemindars, and thereby conferring proprietory right on them in respect of lands settled with them in perpetuity, the British Administration thought it desirable to take away the character of impartibility of their original status in relation to the lands, of which they had been Malguzars or tax-gatherers only, and not proprietors.

Regulation XI of 1798.

In order that there might not be any doubt on the subject, Regulation XI of 1793 A. D. was passed, which refers to the previous custom of impartibility, and declares that, notwithstanding the same, these newly formed estates shall be descendible like other descriptions of property, to all the heirs of the deceased proprietor, according to the Hindu or

Mahomedan law of inheritance, and shall be liable to partition when devolving on two or more heirs. (*e*)

Preamble of Reg X of 1800

Subsequently in the year 1800 A. D., an execution to the above rule was declared by Regulation X of that year, the Preamble of which runs as follows,—"By Regulation XI of 1793, the estates of proprietors of land dying intestate are declared liable to be divided among heirs of the deceased, agreeably to the Hindu or Mahomedan laws. A custom, however, having been found to prevail in the Jungle Mehals of Midnapur and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established, and being founded in certain circumstances of local convenience which still exist, the Governor-General in Council has enacted the following rule, to be in force in the provinces of Bengal, Behar and Orissa, from the date of its promulgation"

Reg XI of 1793 does not supersede custom

The rule enacted is, that the Regulation XI of 1793 shall not be considered to supersede or affect any established usage obtaining in the said places, by which succession to landed estates has been considered to devolve to a single heir, to the exclusion of other heirs of the deceased and in the Mehals in question the local custom shall be continued in full force and the Courts of Justice be guided by it in the decision of all claims to the inheritance of the estates. (*f*)

Reg XI of 1816

Similar in effect is Regulation XI of 1816 which declared that certain tributary estates in the district of Cuttack shall not be subject to partition according to the Hindu law, but shall descend entire and undivided to a single heir according to local and family usage.

Impartible estate cannot be created

It cannot be created—In *Palani Ammal v. Muthuvenkatachala* (*g*) it is laid down that an impartible estate descending according to a rule of lineal primogeniture with rights of maintenance and other pivileges for the junior members can-

(*e*) Narendra *v* Nagendra, 50 C L J 267 1929 C. 577

(*f*) See Bhuiya, *v* Akshoy, 13 C L J 305

(*g*) 29 C.W N 846, 851 P C.

not be established in modern times. Impartible Zemindari is the creature of custom. (*h*)

Principalities and Zemindaries.

Distinction of Rajes from Zemindaries.—It should be observed that it is difficult now to distinguish between the different impartible estates as described above, more especially between the principalities and the Zemindaries, by reason of the holders of the latter, who are titular Rajas or Maharajas having assumed the insignia of royalty. There may be a custom of descent according to the law of primogeniture although the estate may not be what is technically called a *Raj*. (*i*)

Origin of impartible estates in Chota-Nagpore and Orissa

But still there are good grounds for considering that the impartible estates in the Jharkhand or Jungle Mehals of Chota-Nagpore and the neighbouring districts, and the Killajat, (*j*) Gurjat and the Dompara (*k*) states of Orissa, were originally principalities or small states or territories of independent chiefs and feudatories, who are real Rajas, and at one time used to exercise the powers of an autocrat within their respective dominions, some of them are still permitted to enjoy their former powers in certain matters, such as the Raja of Singbhum.

Titles of Raja's sons

In the Jungle Mehals there is a custom, according to which the Raja's sons have different titles in the order of their seniority, the eldest son is called the *Jubaraj*, the second *Hekim*, the third *Bara-Thakur*, the fourth, *Kumar* or *Cowar*, the fifth *Musib*, and the rest *Babu*—a term which is now the uual compellation in Bengali for respectable men.

Practices of real Rajas followed

The holders of these estates follow the practice of real Rājās or kings in a few matters; for instance, the Raja is not subject to the rule of impurity or mourning even on the death of his parents, (*l*) nor has he to perform the *srāddha* and the like religious cermony, which it is the duty of the Hekim, or a priest appointed in that behalf, to do.

Sec 3—EVIDENCE OF IMPARTIBILITY

Onus

Onus as to impartibility.—The onus lies on the party who alleges the existence of a custom different from the

(*h*) Rajkumar Babu *v* Janki, (Maharani), 24 C W N 857 P C
(*i*) Bhuiya *v* Akshoy 13 C L J 305
(*j*) Madhusudan *v* Kesto 8 P.932 1930 P 137
(*k*) Amarendra *v* Banamali, 10 P 1 1930 P 417 (*l*) Manu V 95, 97

ordinary law of inheritance, according to which the estate is to be held by a single member, and, as such, is not liable to partition ; (*m*) or it must be proved by him that it is from its nature impartible and descendible to a single person. (*n*) It must be proved that the custom of impartibility existed before the family acquired the property. (*o*) An impartible estate is a creature of custom, (*p*) and the custom should be proved to be ancient and invariable (*q*) by clear and unambiguous evidence, (*r*) and it depends on the facts of each case. (*s*)

Presumption

There is no presumption that all extensive Zemindaries are impartible (*t*)

Grant for office is partible

The grant of property to the holder of an office without stating that it was given for the maintenance of the office or to the grantee as such holder, the grant will be deemed to be a personal grant and will be ordinary partible property. (*u*)

Nimar Zemindary.

An impartible Zemindary of Nimar had a service attached to it which by lapse of time became merely fictitious. The release of these fictitious service by the crown did not render the estate partible. (*v*)

Hutwa Raj

The Zemindary of *Hunsapur* or the *Hutwa Raja* was, like similar extensive Zemindaries, impartible and descendible to the eldest male heir, for many generations before the Company's accession to the Dewany, when in consequence of the refusal of the holder thereof, to acknowledge the *quasi*-sovereign rights of the Company, he was driven to the jungles

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(*m*) Martand *v* Malhar, 55 C 403 P C 24 N L R 25 32 C W N 621 47 C L J 150, Merangi, Zemindar of *v* Sri Raja, 18 I A 45 14 M. 237 on appeal from 11 M 380, Mallikarjuno, *v* Durga 13 M 406 17 I A 134; Sarjabai *v* Gangram 1930 N 35

(*n*) Narasimha *v* Parthasarathy 37 M 199 41 I A 51 315 16 Bom L R 328

(*o*) Palani *v* Muthuvenkatachala, 29 C W N 846, 85 P C *see p* 934, Mathusami *v* Muthusami 27 I C 3 (M)

(*p*) Bishun *v* Janaki, 28 M L T 105 24 C W N 857 62 I C 289

(*q*) *See* Palani *v* Muthuvenkatachela *See pp* 28-29 *Supra*

(*r*) Ramalakshmi *v* Sivanantha, 14 M I A 570 I A Supp 1 17 W R 563 *see ante p* 19 Serumah *v* Palathan, 15 W R P C 47, Luchman *v*. Mohun, 16 W R 179, Hur Pershad *v*. Sheo, 3 I A 259 25 W R 55

(*s*) Keesari *v* Nyani 38 M L J 149

(*t*) Sarjabai *v* Gangaram, 1930 N 35

(*u*) Sethuramaswamiar *v* Meruswamiar, 34 M 470 20 M L J 108 4 I C 76 this portion of the Judgment affirmed by Privy Council 41 M 296, 302-3 45 I A 1 22 C W N 457 27 C L J 231 20 Bom L R 514 43 I C 806.

(*v*) Rao Kishore *v* Gehenabai, 15 N L R 176 P C. 24 C W N 691 37 M L J 562 17 A L J 177, 20 Bom L R 507 53 I C 630

and the Zemindary was confiscated in 1770 but subsequently at the time of the Decennial Settlement in 1790 the Zemindary was granted to a member of the junior branch of the same family, as a matter of favour · it was held that in the absence of any express intention of the grantor to alter the nature of the tenure, it must be presumed, according to the policy of the Decennial Settlement, that the subject of the grant was the old Zemindary with all its incidents including impartibility, and that the transaction was not so much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*. (w)

Reg X of 1793 does not affect Rajes and custom

It was further held in this case that Regulation X of 1793 does not affect the descent of the large Zemindaries held as *Raj*, or subject to *Kulàchar* or family custom. It was also held that the title *Rajah* is not absolutely essential to the tenure of an estate as *Raj* or impartible.

Effect of British settlement explained

In the case of *Sardar Muhammad* v. *Nawab Ghulam*, (x) it has been held that the effect of the British settlement was not to create a fresh estate, but continue to the chief the proprietorship of the villages with its previous incidents of impartibility and succession by special family custom in the line of primogeniture

If any impartible estate existed as such from before British rule, any settlement or regrant thereof by Government must, in the absence of evidence to the contrary, and unless inconsistent with the express terms of the new settlement, be presumed to continue as impartible. (y)

Existence of custom of primogeniture

In the case of *Chowdhry Chintamun* v. *Mt Nowlukho Konwari* (z) it is laid down that a custom of descent according to the law of primogeniture may exist by *Kulàchar*, although the estate may not be what is technically known

(w) Beer Pertab v Rajender, 12 M I A ·1 9 W R P C 15

(x) 30 I A 190

(y) Martand v Malhar, 55 C 403 P C 24 N L R 25 32 C W N 621 47 C L J 150

(z) 1 C 153 2 I A. 263 24 W R 255

either as a *Raj* in Northern India or a *Polliam* in the Deccan (*a*)

List of names under Oudh Estates Act,

The inclusion of the name in the third list under Section 8 of the Oudh Estates Act (1 of 1869), in which the names of *taluqdars* to whom *sanads* or grants have been made by the British Government up to certain time, declaring that succession to the estates comprised in the *sanads* or grants shall thereafter be regulated by the rule of primogeniture was conclusive in the absence of any evidence to show that the name was wrongly inserted (*b*)

evidentiary value

Effect of Govt grant

In some other cases, however, it has been held that there was nothing in the grant made by Government or in the circumstances attending it, showing that it was intended to create an impartible Zemindary, or to restore an old tenure with impartibility attached (*c*)

Nuzvid estate

The Zemindary of Nuzvid which seems to have been an impartible estate, was divided by the Government into two Zemindaries after confiscation and the smaller one was granted to a junior member of the family, who had not held any estate descendible by primogeniture, it was held that it did not become an impartible estate. (*d*)

Betia estate

The ancient *Betia Raj* also was divided after confiscation into two portions, the smaller one was granted to the collaterals entitled to maintenance, and the previous Raja's heir was reinstated to the larger portion constituting the present Betia Raj. It has been held that the new *Raj* became the separate self-acquired property of the grantee, though with the incidents of the tenure of the old estate as an impartible *Raj*, to which the last holder's widows were rightful heirs, there being neither his male issue nor collaterals descended from the grantee, nor proof of exclusion of women from succession, nor is the widow's succession inconsistent with the

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(*a*) *See* Shyamanand *v* Ramakanta, 32 C 6, Beer Partab *v* Rajender, *supra*

(*b*) Nand Rani *v* Indar, 45 C L J 282 P C

(*c*) Venkata, Raja *v*, Court of Wards, 2 M 128 7 I A 38, Merangi, Zemindar of *v* Sri Raja, 18 I A 45 14 M 237

(*d*) Venkata Raja *v* Court of Wards, 2 M 128 7 I A 38, Nidadavole estate is not impartible, Narasimha *v* Parthasarathy, 37 M 199 41 I A 51 25 M L J 386 12 A L J 315 23 I C 166 *supra*

custom of impartibility, (e) unless a custom excluding women from inheriting is proved (f)

Evidence when sufficient

Evidence of family usage, by which the eldest son successively for eight generations, succeeded to a Zemindary to the exclusion of other sons, was held to be sufficient to establish it to be impartible (g)

when not,

But the mere fact that an estate has not been partitioned for six or seven generations, will not make it impartible where previous partition is proved. (h)

instances of want of certainty

In a litigation challenging the eldest son's right, which ended in a compromise whereby the junior member got a share far in excess of what he would have got, had the estate been impartible,—it was held that the evidence failed to give the character of certainty to the alleged custom of primogeniture. (i) The history of this family showed that under both the Mogul and the Maharatta rule the office of Chaudhuri was held by one member of the family, who held *nankar* lands as part of his remuneration. But though the office was generally heritable, its grant was revocable and the succession to it was not necessarily heritable, so it did not afford clear and unambiguous evidence of a custom of succession to land.

Chaudhuri

The term *Chaudhuri* or *Chatur-dhurin* means, holder of four-fold burden or duty, and implies an officer to whom four duties were entrusted, namely Military, Police, Judicial and Fiscal, under Indian rule in fact, the predecessors of the Zemindars were not only collectors of revenue, but also administrators of civil justice, and superintendents of police, and had to render, whenever required, military service to the ruling power, for which they had to maintain certain number of troops, both cavalry and infantry, but under the British Administration, they were at first relieved of the last two duties, and at about the time of Decennial Settlement they were exonerated from the duty of superintending the police, as well as that of collecting revenue derived from other sources than land

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(e) Ram v Janaki, 29 I A 178

(f) Tara Kumari v Chaturvuj, 42 I A 192 42 C 11,9, 19 C W N 1119 30 I C 833 29 M L J 371 13 A L J 1034 17 Bom L R 1012

(g) Rawut Urjun Sing v Rawut, Ghunsiam Sing, 5 M I A 169

(h) Thakur Durriao Sing v Thakur Davi Sing 1 I A 1, 13 B L R 165 *see* Narendra v Nagendra, 50 C L J 267 1929 C 577

(i) Rama Kanta v Shamanand, 36 C 590 36 I A 49 13 C W N 581 9 C L J 497 6 A L J 364 11 Bom L R, 530. 19 M L J 239 1 I C 754

Panchis Sawal, evidentiary value.

The *Panchis Sawal*, or the collection of answers to *twenty* questions put to the holder of *Rajes* called *gurs* and *killas*, is a record of great authority for the purpose of proving customs of descent in respect to estates referred to in it (j)

Evidence as to change of nature.

In order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention, expressed or implied, on behalf of the junior members of the family to give up their chance of succession to the impartible estate. (k) But evidence as to separate food and absence of joint worship is of very little weight in Southern India. (l)

Extinction

Extinction of impartible estate—The dis-continuance and abandonment of the custom by the concurrent will of the family or from accidental causes may put an end to impartibility (m)

Sec 4—HOLDER'S RIGHTS

Joint family survivorship

Impartibility and Jointness—Although the impartible estate cannot be held by more than one person, and is possessed exclusively by one member at a time, yet it may be the joint property of the members of a joint family governed by the Mitàksharà, so as to pass by survivorship

Thus it is, observed by the Judicial Committee,—

"A *Pollam*, is in the nature of a Raj, it may belong to an undivided family, but it is not the subject of partition, it can be held by only one member of the family at a time, who is styled the *Polligar*, the other members of the family being entitled to a maintenance or allowance out of the estate" (n)

Similarly it is observed by their Lordships in the *Shivaganga case*,—

"Hence if the *Zemindar*, at the time of his death, and his nephews were members of an undivided Hindu family, and the *Zemindary*, though impartible was part of the common family property one of the nephews was entitled to succeed to it on the death of his uncle If, on the other hand, the *Zemindar* at the time of his death, was separate in estate from his brother's family, the

(j) Amarendra *v* Banamali, 10 P 1 : 1930 P 417, Madhusudan *v* Kestobasi, 8 P 932 1930 P 137

(k) Kanammal *v* Annadana, 51 M 189, 204, 32 C W N 983 : 1928 M 68

(l) *Ibid*

(m) *See supra p* 29, Rajkishen *v* Ramjoy I C 186, 195 · 19 W.R 8, 12, Narendra *v* Nagendra, 50 C L J 267 1929 C 577

(n) Naragunty *v* Vengama; 9 M I A 66, 86 1 W R P C 30.

Zemindary ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to his nephew, following the course of succession which the law prescribes for separate estates The propositions are incontestable " (*o*)

Joint family members, 3 rights i-joint enjoy it, rtition, irvivor- r

It should be observed that where property is held in coparcenary by a joint family under the Mitàksharà, there are ordinarily three rights vested in the coparceners, namely, the right of *joint enjoyment,* the right to *call for partition,* and the right to *survivorship.* Where impartible property is the subject of such ownership, the right of joint enjoyment of the members other than the holder thereof, is reduced to the right of maintenance receivable from the estate by virtue of the co-ownership, and the right of partition is, from the nature of the property incapable of existence But the right of survivorship founded on co-ownership, is not inconsistent with the nature of the property, and therefore remains unaffected. (*p*)

The holder of a joint but impartible estate, is a co-owner though entitled to the exclusive possession, and as such he appears to be under two duties to his co parceners, in virtue of their co-ownership, namely, the duty to provide them with maintenance, and the duty to preserve the *corpus* of the estate, which he alone, being one of several joint tenants, is incompetent to alienate except for justifiable causes (*q*)

In this respect there appeared to be a conflict between the different decisions of the Judicial Commitee

Tipperah case

In the Tipperah case of *Neelkisto Deb* v *Beerchunder Thakur* (*r*) the Lords of the Judicial Committee observe as follows —"Still when a *Raj* is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenary The truth is, the title to the Throne and the Royal lands is, as in this case, one and the same title, survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest for claims to an estate, in land and to rights in others over it, as to maintenance, for instance, are distinct and

(*o*) Katama Natchier, *v* Raja, 9 M I A 539, 589 ' W R P C 31

(*p*) *See* Shiva *v* Prayag, 36 C W N 1046 appeal from 1926 C 1

(*q*) Naraganti *v* Venkata, 4 M 250, Gopal *v* Raghunath 32 C. 158 9 C W N 330.

(*r*) 12 M I A 523, 540-541 . 12 W R 21 P C

inconsistent claims As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed and which passes by inheritance to a sole heir"

governed by Dayabhaga

This was a Bengal case governed by the Dâyabhâga, and so it is no authority in a case governed by the Mitakshara, according to which a son living jointly with his father, inherits even the latter's self-acquired property by survivorship and not by inheritance It would, no doubt, be a contradiction in terms, to call a separate ownership at once sole and joint ownership, but it would be begging the question to call the right of a single person to hold an impartible estate, a separate ownership

Joint ownership is not inconsistent

But it is not at all inconsistent with the principles of Hindu law that the right of the other members to maintenance out of the estate, should be referred to their joint ownership in the impartible estate, the inequality and disproportion between what is received by the holder of the estate, and what is paid to each of the other members, for his maintenance cannot and does not affect their co-ownership, as similar inequality obtains even in other circumstances For instance, take the case of a joint family consisting of eleven first cousins, of whom one is the son of one brother, and ten are the sons of another brother, here, on partition, the former would be entitled to half the estate, and each of the others to one-twentieth, yet there are co-ownership and survivorship among them The excess of what the holder of the estate gets over what any other member receives, is designed for the preservation of the dignity of the family and its head as well as for the improvement of the estate

Right by birth in impartible estate

The argument that a son does not acquire a right by birth to an impartible estate in the possession of the father, because the former cannot demand partition, is contrary to Hindu law, which recognizes co-ownership in property, the only ordinary legal incident of which, is the right to receive maintenance from that property And this co-ownership, which may be called imperfect or subordinate is recognized by Hindu law to account for the right of maintenance, which the wife and a son enjoy in the property of the husband and the father respectively The ignoring of the doctrine of Hindu law, has led to the serious misconception, namely, the denial of proprietary right by reason of the want of power to demand partition To an English lawyer, the traditional popular view of *joint* but *impartible* estates, taken by the Privy Council in the earlier cases (s) may appear inconsistent, if he does not take into consideration the conception of ownership in Hindu law with which the same is perfectly consistent even if the holder's power of alienating the impartible estate be recognized, in the same way as the father's power of alienation over his self-acquired property of which his son is co-owner (t)

P. C. view

Accordingly in other cases the Privy Council has given effect to survivorship (u)

(s) Naragunty v Vengama, 9 M I A 66, 88 and Katama Nachier v Rajah of Shivagunga, 9 M I A 539, 589 (t) See ante p 362

(u) Naragunty v Vengama, 9 M I A 66 1 W R P C 30, Chintamun v Nowlukho, 2 I A 263 I C 153, Rup v Baisni, 11 I A 149. 7 A 1, Heranath v Burm Narain Singh, 9 B L R 274 17 W. R 316 on appeal from

When a member of the family gets maintenance from the holder of an impartible estate out of its income or enjoys the rents and profits of any land granted in lieu of maintenance out of the estate, he is deemed to be under Hindu law joint in estate with the holder, so as to be entitled to get the estate by survivorship The mere fact of residing in a separate village granted to a junior member is not sufficient to indicate separation (*v*)

Privy Council view in earlier cases often ignored,

But the true principles of Hindu law, enunciated by the Judicial Committee in the earlier cases, upon which succession by survivorship depends and to which effect is given in the above rulings are often ignored, as for instance, it has been held in a later case that the interest of a member of the holder's family, during his life is only a *spes successionis*, which is not subject of partition, and that there cannot be separation between him and the holder (*w*) According to this view, it is absolutely impossibe to assign any cogent argument to support the exclusion of the holder's widow, daughter and daughter's son, by the male members of the family

even by Privy Council itself

But, apparently inconsistent with, and subversive of, the above principle, is the doctrine enunciated by the Privy Council, namely, that a son does not acquire by birth such right to an impartible ancestral estate in possession of the father, and does not become such co-owner, as to be entitled to prevent alienation by the latter, of an important and valuable portion of the estate. (*x*)

Present position of sons.

The effect of these decisions is that when an estate is impartible, the sons of the present holder have no *locus standi* to question the father's dispositions of the estate (*y*)

What ought to be

But it should be observed that there cannot be survivorship and one co-owner alone is not competent to alienate that which is the subject of joint tenancy and co-ownership The correct view seems to be, that the holder of the estate has no more interest in the estate than the other members, but by virtue of his position as the holder of the estate, he has the full control over the surplus income for his life

Privy Council view modified

It should, however, be especially noticed that the view that the members of a Mitâksharâ joint family other than the holder of an impartible estate, are co-owners with him of that estate,—though greatly modified, is not exploded by the recent decisions of the Privy Council, recognising the holder's power of alienation in the absence of special family custom to the contrary, for, then the impartible estate would have the same incidents as the father's self acquired property, both being *joint* though *alienable* by the predominant co-parcener

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15 W R 375, Jagendra Bhupati *v* Nityanand, 17 I A 128 18 C 151 on appeal from 11 C 702, Kachi *v* Kachi, 28 M 508 32 I A 261 15 M L J 312 2 C L J 231 10 C W N 95 2 A L J 845 7 Bom L.R 907, on appeal from 24 M 562, Shiva *v* Prayag, 36 C W N 1046

(*v*) Jagadamba *v* Wazir 2 Pat L J 239 38 I C 255, Shiva *v* Prayag 36 C W N 1046 56 C L J 92

(*w*) Laliteshwar *v* Rameswar, 36 C 481 13 C W N 838 2 I C 200

(*x*) Sartaj Kuari *v* Deoraj Kuari, 10 A 272 15 I A 51, Venkata *v* Court of Wards (Pitapur Zemindery), 22 M 383 26 I A 83 3 C W N 415

(*y*) Venkata *v* Bhashyakarlu, 22 M. 538 P C

Result of case-law

The result of these decisions, therefore, is that the sons of present holder of an impartible estate do not acquire right by birth and cannot demand partition nor question the alienation of the estate by the holder (z) and that in a Mitâksharâ family, according to the latest view of the Privy Council, (a) there is coparcenary between the holder and the other members to this extent that survivorship is not inconsistent with impartibility in order to determine the succession. (b) The senior member's right to take by survivorship is not a mere *spes successionis* but is capable of being renounced and surrendered (c)

Onus

When it is once established that the impartible estate was at one time the joint property of a family consisting of the descendants of the common ancestor of the defendant and the last holder, it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch, in this estate was determined so that it becomes the separate property of the last holder's branch (d)

Renounce or surrender

The test to be applied is whether the facts show a clear intention to renounce or to surrender all interest in the impartible property (e) There must be such direct or circumstantial evidence to show an intention, express or implied, on behalf of the junior members to give up their chance to succession. (f) The evidence as to separate food and the absence of joint worship are of very little weight in Southern India. (g)

Holder's rights of transfer

Alienation—The alienation of a portion of an impartible estate, by the holder thereof, would be contrary to the very nature and character of the tenure of such property, for, if such transfer were allowed, it could not be effectuated except by partitioning that which is *ex hypothesi* impartible If, therefore, it cannot be alienated in part, it would follow *a fortiori* that it cannot be alienated in its entirety Inalienability, therefore, appears to follow as the necessary logical consequence of impartibility The policy of the law, or of the grant, or of the family arrangement, by which an estate was

(z) Shiva v Prayag, 36 C W N 1046, *See foot notes (y)* above
(a) Shiva v Prayag, 36 C W N 1046, *See foot-note (c)* in p 949, *see* Udai v Jagat, 6 P 368 1928 P C 66
(b) *See foot-notes (u)* 942
(c) Shiva v Prayag, *supra*
(d) Konammal v Annadana, 51 M 189, 202 32 C W N 983 1928 P C 68
(e) *Ibid* (f) Ram Sunder v Collector, 52 A 793 (g) *Ibid*,

originally made impartible, cannot but be taken to intend the continuance of the *corpus* of the property intact, in the hands of the successive holders thereof The object of excluding all the members of the family from participation in the estate, cannot reasonably be taken to be any other than its preservation in entirety without diminution. To prevent the ordinary law of inheritance to take its course, by depriving all the other heirs of equal enjoyment for the purpose of making the estate indivisible, and at the same time, to allow the holder to destroy or divide the property according to the pleasure, and so to undo the whole scheme, would be two most incongruous and inconsistent things that cannot reasonably be reconciled The absolute power of alienation in the holder of such property, is not only contrary to the spirit of Hindu law, according to which immoveable property cannot, as a general rule, be alienated except for justifiable special causes, but it is also opposed to the doctrine of survivorship held to be applicable to these estates, in certain circumstances

is inconsistent with impartible estate.

Hence the view taken by the Madras High Court with respect to the position of the holder of the estate, in relation to it, appears to be in accordance with the Mitàksharà law, namely, that an ancestral impartible estate is the subject of co-ownership of all the brethren like ordinary property, and the holder is bound to preserve the *corpus* of the estate , and that the position of the holder of an impartible *Raj* is similar to that of a father with respect to ancestral property under the Mitàksharà (*h*) The Bengal High Court also took the same view in the case of *Rajah Ram Narayan* v *Pertum* (*i*) and held that all the incidents of joint property under the general Mitàksharà law must still remain, except in so far as the same is controlled by the special custom, which went to show only that the property was not partible

Madras view correct,

e Bengal

The utmost right of alienation, therefore, which the holder may be competent to exercise over the impartible estate, is the transfer of his life-interest in the estate, which consists of the privilege of appropriating its income during his life, after meeting all the legal liabilities attached to the same (*j*) The savings, and any property which he may acquire therewith, may be said to become his self-acquired and separate property, over which he may exercise absolute right, and which will pass on his death to his heirs under the ordinary law (*k*) Although the same may also be fairly contended to become accretions to the estate as in the case of accumulations and acquisitions made by a Hindu widow in Bengal,—and has been held to be so, in *Lakshmipathi* v *Kardasami*, (*l*) and *Ramasami* v *Sundara* (*m*)

Holder's right similar to Hindu widow's

It is already said, that a son does not acquire a right by birth to an ancestral impartible estate held by the father,

Present view of holder's power to transfer

(*h*) Naraganti v Venkata, 4 M 250, Gavuri v Ramandara, 6 M H C 93
(*i*) 20 W R 189
(*j*) Abdul v Appayasami, 31 I A 1 (*k*) Kotta v Bangari, 3 M 145
(*l*) 16 M 54, P C appeal 19 M 451 *see* post *p* 959
(*m*) 17 M 422, P C appeal in 22 M 515 26 I A 55

because he cannot demand its partition, and from this it is concluded that the Mitâkshara law of alienation is inconsistent with impartibility (*n*) and the holder of the estate is competent to alienate it, unless there be a custom against alienation proved to exist. (*o*) But a family cannot create a custom by not alienating the property for a number of years. (*p*)

It is worthy of special remark that the question relating to the holder's power of alienation arose, in most cases, in connection with permanent grants of portions of the estate, made either to the junior members for maintenance, or to the servants holding a hereditary office under the *Raj*, in lieu of salary. (*q*) These grants appear to be resumable in default of the grantee's male descendants in the male line who are entitled to maintenance, or competent to perform the duties of the office, respectively, so those are never intended to be absolute alienations. Such grants are within the competency of the holder with restricted power of alienation. These, however, are sought to be justified by the assumption of unlimited power.

Right to partition is not sole criterion of co-ownership.

But it should be observed that the right to call for partition, is only one of the incidents of joint ownership, hence the inference of absence of co-ownership, from the absence of the right to partition, does not appear to be logically correct. Besides, this is contrary to Hindu law which recognises co-ownership of persons who are not, however, on that account entitled to call for partition, for instance, take the case of the father's wife who is a co-owner, but who is not entitled to demand partition, but who is nevertheless entitled to maintenance by reason of her co-ownership, and is also entitled, by reason of her co-ownership, to a share when partition does, at the instance of a male co-parcener, actually take place, for, partition cannot create any new right, it is merely an adjustment, into specific portions of the joint property, of diverse existing rights over the whole thereof. It should moreover be remarked, that unless the right of sons by birth be recognised, there cannot be survivorship which has been held to apply to impartible estates. The two doctrines, namely, recognition of devolution by survivorship and denial of right by birth—are irreconcilable. But the recognition of the holder's power of alienation is not irreconcilable with his son's acquisition of right by birth. The difficulty must continue until it is set at rest by the Judicial Committee

(*n*) Madhusudan *v* Khestabasi, 8 P 932 : 1930 P 137

(*o*) Sartaj Kuari *v* Deoraj Kuari, 10 A 272, Udaya Aditya Raja *v* Jadab 8 C 199 8 I A 48, on appeal from 5 C 113 Kopil *v* Govt, 22 W R 17, Beresford *v* Ramsubha, 13 M 197, Narain *v* Lokenath, 7 C 461, Ramdas *v* Tekait Braja, 6 C W N 879, Pratap Chandra *v* Jagadish, (estate Dhalbhum) 54 C 955 54 I A 289 31 C W N 943 46 C L J 135 1927 P C 159 on appeal from 40 C L J 331 1925 C 116 (by Will) this followed Baijnath Kedar (Khaira estate) 32 C W N 48 47 C L J 134 P C

(*p*) *See ante* pp 934-935, "It cannot be created," Thirumalu v Venkatachelam, 1929 M 234

(*q*) Anund *v* Gurrood, 5 M I A 82 Kopilnath *v* Government, 22 W R 17 · Udaya Aditya *v* Jadab, 8 C 199, Narain *v* Lokenath, 7 C 461.

Privy Council

The pronouncement by the Judicial Committee—In many earlier cases it had been declared by the Privy Council, in language as clear as possible, that an impartible estate "*may belong to an undivided family*," and may be '*part of the common family property*," accordingly it was believed not only by laymen but also by judges and lawyers in thi country that the position of the holder of anim partible estate, was the same as that of the manager of joint family property and that impartibility was an incident of the tenure of the property. But it has now been held by the Judicial Committee in recent cases (*r*) that an impartible estate is not merely the joint property of the family, but that the same is to be deemed joint only for the purpose of ascertaining the heir and successor of the last holder and that impartibility does not mean that the property is to be perserved entire and undiminished, but it merely means that the estate is not divisible among the heirs of the holder who is absolute owner of the estate, and as such is competent to alienate it by deed or Will in any manner he pleases, unless the estate be proved to be inalienable by special family custom. (*s*) The case of *Venkata* v *Court of Wards* (*t*) in which a devise by the holder of an impartible estate to his illegitimate son was upheld, seems to have come as a surprise on the people of Madras, and a temporary local Act was passed declaring all impartible estates to be inalienable. It is difficult to say what evidence would amount to sufficient proof of such family custom. If tradition and popular belief be accepted as such proof, there is superabundance of the same against alienability of impartible estates.

Impartible estate how far joint

Meaning of impartibility.

Tradition

(*r*) Rama Rao *v* Rajah of Pitapur, 41 M 778 45 I A 148 : 35 M L J 392 23 C W N 173 28 C L J 428 20 Bom L R 1056 16 A L J 833 5 Pat L W 267 47 I C 354 appeal from 39 M 396, Tarakumari *v* Chaturbhuj, 42 I A 192, 201 : 42 C 1179 19 C W N 1119 30 I C 833 29 M L J 371 13 A L J 1034 17 Bom L R 1012, Pratab Chandra *v* Jugdish Chandra (Dhalbhum estate), 54 C 955 54 I A 289 31 C W N 943 46 C L J 136 1927 P C 159 on appeal from 40 C L J 331 1925 C 116

(*s*) Sartaj *v* Deoraj, 10 A 272 15 I A 51, 54, Venkata *v* Court of Wards, 22 M 383 26 I A 83, Durgadut *v* Rameshwar 36 I A 176 36 C 943 13 C W N 1013 10 C L J 233 11 Bom L R 901 6 A L J 847 4 I C 2, see Choto *v* Purna, 21 C L J 144 Avalappa *v*. Murugappa, 36 M 325 23 M L J. 658 *see foot note* (*o*) above.

(*t*) 22 M. 383. 26. I.A. 83 3 C.W.N. 415

Act II. of 1904 (Madras)

Madras legislation, law, custom and popular ideas.— The temporary Act has been replaced by a permanent enactment, in Madras, namely, "The Madras Impartible Estates Act" No II of 1904. It is founded by the Judicial Committee in the earlier cases, on the nature and character of such estates. It declares (section 4) that—"The proprietor of an impartible estate shall be incapable of alienating or binding by his debts, such estate or any part thereof beyond his own lifetime unless the alienation shall be made, or the debt incurred under circumstances which would entitle the managing member of a joint Hindu family, not being the father or grandfather of the other co-parceners, to make an alienation of the joint property, or incur a debt, binding on the shares of the other co-parceners independently of their consent."

accords with views expressed by P C,

The law herein laid down is the necessary logical consequence of the description of impartible estates given by the Judicial Committee, in many cases, namely —(u) "A Pollam, Raj it *may belong to an undivided family*, but it is not the subject of partition, it can be held by only one member of the family at a time, the other members being entitled to a maintenance or allowance out of the estate," (v) "the *Zemindari*, though *impartible* was *part of the common family property*" (w) "The estate was in its inception *part of the common family property*, though *impartible*," and the like

and with Mitakshara

The law as laid down in the Madras Act appears to be perfectly consistent with the Mitakshara law and also with recorded customs of such estates where available For instance, the *Panchis Sawal* (x) (or collection of answers to *twenty five questions* put to the holder of the *rajes* called *gurs* and *killas*) which embodies the customs of certain impartible estates of Orissa, shows that a Raja cannot alienate the *raj* when there are *principal heirs* see questions and answers, xvi and xvii By the expression *principal heirs* (—प्रधान उत्तराधिकारी) is indicated the co-parceners or the male members of the family taking by survivorship (y)

Popular notion of impartible estates

According to popular notion, an impartible estate is one that is to be preserved entire, undiminished and undivided it is deemed impartible in the sense of being incapable of severance into parts, and hence it is not liable to be held by more than one person at a time It is not deemed impartible on

(u) Naragunty v Vengama, 9 M I A 66, 86 1 W R P C 30

(v) Katama Natchiar v. Rajah of Shivagunga, 9 M I A 539 589 2 W R P.C 31

(w) Yanumula v Yanumula, 13 M I A 333, 337 13 W R P C. 21

(x) As to value of, *see* Amarendra v Banamali, 10 R P 1 1930 P 417 (Domepara estate), Modhusudan v Kestobasi, 8 P 932 1930 P 137

(y) Gopal v Raghunath, 32 C 158 9 C.W N 330

account of being incapable of inheritance by more than one heir On the contrary, it is believed to be the joint property of all the co-parceners each of whom acquired a right by birth to it, in the same way as to ordinary property, but not being liable to partition, it is held at a time by one member as representing the whole family, the other members being entitled to their necessary expenses out of the estate, by virtue of their right by birth , and the surplus left after defraying such expenses, is at the disposal of the holder of the estate during his life, in order to enable him to maintain the position and dignity of the family

Jointness,

Inalienability, therefore, follows as a necessary logical consequence of impartibility, the holder's position being that of a life-long manager and head of the family to which the estate belongs.

Inalienability,

In a Madras case (z) it has been held by the Judicial Committee, that it was the accepted law before 1889 when *Sartaj Kuari's* case was decided, that the holder of an impartible estate, who was himself a member of an undivided family could not alienate or incumber the *corpus* of estate so as to bind his co-parceners, except for justifiable special causes, and, therefore, an auction purchaser, in execution of a decree, of the holder's right, title and interest, became entitled only to the life-interest of the holder who was, at the time of sale, understood to have no more than such interest in the impartible estate, which the Court must be deemed to have intended to sell, and the purchaser to buy.

as laid down by

The judgment in the case of *Sartaj Kuari* v. *Deoraj* (*a*) was followed and applied to the *Pittapur Raj* in *Venkata* v. *Court of Wards*. (*b*) The Privy Council, in a subsequent appeal in connection with this Zemindary has laid down that "in an impartible zemindari there is no co-parcenary and consequently no person existed who as co-parcener could object to the alienation of the whole subject by the *de facto* and *de jure* holder" (*c*) or demand a partition of estate. (*d*)

Privy Council

Final decision of the Privy Council.—On a consideration of the various cases, the Privy Council has explained the law as to jointness, regarding (1) the right of partition, (2) the right to restrain alienation, (3) the right to maintenance and (4) the right of survivorship and held that of these only the *fourth* is not inconsistent with the custom of impartibility and joint-

final decision

(z) Abdula v Appayasami, 31 I A 1, 9 (*a*) 10 A 272 15 I A 51.

(*b*) 22 M 383 26 I A 83

(*c*) Rama Rao v Rajah of Pitapur 41 M 778 45 I A 148 35 M L J 392 23 C W N 173 28 C L J 428 20 Bom L R 156 16 A L J 833 47 I C 354.

(*d*) Tarakumari v. Chaturbhuj 42 I A 192, 201 42 C 1179, 1195 19 C W N. 1119 22 C L J. 498 30 I C 833 29 M.L.J 371 13 A L.J. 1034 17 Bom L.R, 1012

ness. *(e)* The law is thus explained "Impartibility is essentially a creature of custom In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The *first* of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The *second* is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's* case *(f)* and the first *Pittapur* case *(g)*, and so also the *third* as held in the second *Pittapur case* *(h)* To this extent the general law of the Mitàksharà has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of *survivorship* is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in *Baijnath's* case.*(h1)* To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitàksharà law applicable to such property."

Holder's debt,

Debts of deceased holder—It has already been shown that the holder of an impartible estate has been held by the highest tribunal to be competent to alienate the estate by a deed or by a Will. Now if the principle, enunciated by the Judicial Committee in the *Pitapur* case, namely, that the holder of an impartible estate can devise it to an illegitimate son of his, by excluding his adopted son, the legal heir, be carried out to its apparently logical consequences, then the legatee cannot be permitted to enjoy the estate without paying off the testator's debts out of the estate And accordingly it has been held that if the debts of the deceased holder be a charge on the estate in the hands of his legatee, there seems to be no resaon why they

legatee's liability,

(e) Shiva *v* Prayag, 36 C W. N 1046 56 C. L. J 92.
(f) 10 A 272. 15 I A 51
(g) 22 M 383 26 I A 83 3 C W N 415 9 M L J Sup 1 : 1 Bom L R. 277.
(h) 41 M 778 45 I A 148 23 C W N 173 28 C L J 428 35 M L. J 392 : 20 Bom L. R 1056 47 I C 354
(h1) 48 I.A. 195 25 C W N 564.

should not be a charge on the estate in the hands of his son and heir, who can no longer be said to take the estate by survivorship ; hence a son taking the estate by descent takes it with the burden of a decree obtained against the father, and is liable to be proceeded against in execution. (*i*) But in these cases the sons were liable for their father's debt, for whether they acquired right by birth and took the estate by *survivorship*, or not, they would be equally liable. It was, therefore, unnecessary to express an opinion in direct conflict with the decisions of the Privy Council.

son's liability.

Hence, on the other hand having regard to the cases declaring an impartible estate to be joint family property, it has been held that when a brother takes by survivorship such an estate, it is not assets of his predecessor in his hands, (*j*) and he is not bound to pay the debts of the deceased holder, excepting such as were contracted for justifiable causes. (*k*) According to the Madras Act only debts contracted for legal necessity affecting the whole joint family, may become a charge on the estate. This Act appears to attach no special importance to the father's debts which also are recoverable only in case the same were contracted for legal necessity, and thus, in so far as regards impartible estates, the Act restores the law regarding the father's debt to the former state in which the son's pious liability was attached only to debts proved to have been incurred for legal necessity, or at any rate for valid purposes of the family. (*l*)

brother's liability

(*i*) Ram Das *v* Tekait Braja, 6 C W N 879, Sreeman *v* Sree, 32 M 429 : 19 M L.J 401 2 I C 18, Shyam *v* Bijoy, 2 Pat L J 136 39 I C 36 · (1917) Pat 121, Kalahasti, Raja of *v* Achigadu, 30 M 454 17 M L J 367 ; Bobbili, Maharaja of *v*. Zamindar of Chunddi, 33 M 108 21 M.L J 593 : 8 I C 860

(*j*) Kali Krishna *v*. Raghunath, 31 C 224, Nachiappa *v* Chinnyasami, 29 M. 453 16 M L J 339

(*k*) Gopul *v* Raghunath, 32 C 158 C.W.N 330, Guu *v* Dhaui, 38 C .182 ; 7 I C 806, Harpal *v* Bishan, 6 A.L J 753 : 3 I C 907 ; Indar *v* Harpal, 34 A 79 8 A.L J 1251 12 I C 915

(*l*) Nachiappa *v*. Chinnayasami, 29 M. 453 · 16 M L J 339

Conflict of authority.

Conclusion.—It ought to be stated at the conclusion that the conception of impartible estates and their incidents, hitherto entertained by the people and the legal profession, upon the footing of which this chapter was originally compiled, seems to be at variance with the holder's right of alienation as explained in the recent decisions of the highest tribunal whose pronouncements are binding on all Courts and suitors as positive rules of law.

Impartible estate is absolute property

An impartible estate is to be regarded according to the recent decisions with respect to alienability, as ordinary property, save and except this only, that by reason of its impartibility, it is to descend to a single person to be selected from amongst the deceased owner's heirs, all of whom cannot be entitled to participate in it, as it is not partible property · the selection is to be made according to custom, the heirs other than the one entitled to the estate are entitled to get only maintenance out of it. Subject to this liability to provide maintenance for the junior members, the holder of the estate is its complete and absolute owner, in the same way as of any other property, and competent to dispose of it in any manner he pleases either by a deed or a Will, and it is descendible to one of *his heirs*, unless there be special family custom to the contrary proved by satisfactory evidence. Impartibility does not imply that the estate is to be preserved entire and undiminished, it merely means that the property is not liable to be divided by the deceased holder's heirs if more than one.

save for charge of

Reg XI of 1793

The former view can also be supported by the authority of Judicial decisions, customs, and legislation The preamble of Regulation XI of 1793 which declares the permanently settled estates to be heritable according to the ordinary law, recites the previous state of things, thus—"A custom, originating in considerations of financial convenience was established in these provinces under the Native Administrations, according to which some of the most extensive Zemindaries are not liable to division" And this custom is declared by Reg X of 1800 to be still in force as regards the impartible estates. These Regulations clearly support the view according to which impartible estates are to be preserved entire and undivided, and are not liable to partition by heirs or otherwise, and accordingly inalienable, the holder being merely a life-tenant and manager of the estate which belongs to

a joint family In an Article contributed to the Law Quarterly Review (*l*) Sir Comer Petheram, the late Chief Justice of Bengal points out that the doctrine enunciated by the Privy Council in *Sartaj Kowari's* case does not represent the Hindu view of their own law, and also the living customary rules or laws by which Hindus of the Mitakshara school regulate their lives and properties

Law Quarterly Review on it

But the people are bound by the pronouncement of the Privy Council, so long as the same is not modified by their Lordships themselves or by the Legislature.

Acquisitions.—The principle enunciated in these cases, with respect to acquisitions of immoveable property, made by the holder with the savings of the income, is analogous to that relating to similar purchases by a widow It has been held to be a question of intention on the part of the Zemindar, whether he treated the accessions as his private property, or as an increment to the estate. (*m*) A distinction, however, is drawn between lands situated within the estate, and those that are not so: the former are presumed in the above cases to be intended to be appurtenant to the estate, in the absence of any disposition *inter vivos* or testamentary. But it is held by the highest tribunal that there must be in the facts adequate grounds for holding that the late incumbent intended to incorporate the acquisitions with the ancestral estate. (*n*)

Acquisitions from saving

But the Privy Council has held that accretions are not accretion to land which had gardually and imperceptibly by the action of water gone to the owner of the adjacent soil, but properties acquired and added to the estate. (*o*) A recent decision of the same Board has explained the law and pointed out the error of the Court below thus —" its error is due to the idea that the produce of the impartible estate naturally belongs to, and forms an accretion to, the original property. In fact when the true position is considered there is no accre-

Meaning of accretions.

Acquisitions are not accretions to estates.

(*l*) Vol XVI, page 77
(*m*) Sameshwari *v* Maheswari, 10 P 630, Gurusami *v* Pandia, 4, M 1 39 M L J 529, Murtaza *v* Muhammad, 38 A 552 P C, see in this connection Rajindar *v* Raghubans, 40 A 470 45 I A 134 23 C W N 101
(*n*) Parbati *v* Jagadish, 29 C 433 29 I A 82 6 C W N 490 4 Bom L R. 365, Janki *v* Dwarka, 35 A 391 40 I.A 170 25 M L J 34 17 C W.N. 1029 18 C L J 200 15 Bom L R 853
(*o*) Rajindra *v* Raghubans, 40 A 470, 480 45 I A 134 28 C L J 456 20 Bom L R 1075 48 I C. 213 (1918) M W N 831 re-affirmed in Nawab Mirza *v* Nawab, 59 I A 1 : 36 C W N 137

tion at all. The income when received is the absolute property of the owner of the impartible estate. (*p*) It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely dissociated from the ownership of the *raj*. * * * It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character." (*q*) But it is now held by the same Board that the holder of the impartible estate, other than that granted by the Crown within stated boundaries, can enlarge the estate by adding other properties to it. (*r*)

Income during life-time of holder.

The rents which fell due during the life-time of the holder of the impartible estate are not accretions to the estate and hence, passed to the heirs of the last holder and not to the person who succeeds to the impartible estate. (*s*)

No accretion of moveables

Moveable property —As regards moveable property, the Calcutta High Court has held that there can be no incorporation of moveable property with an impartible estate. In order that there may be incorporation, the property to be incorporated must be of the same nature as the impartible property, (*t*) and this view has been upheld by the Privy Council in appeal. (*u*)

Sec 5—MAINTENANCE TO JUNIOR MEMBERS

Estate, source of maintenance

Maintenance of Junior Members, and Grants.— An impartible estate appears to be the hereditary source of maintenance of all the members of the family to which it belongs though it is exclusively held by a single member at a time.

Character of jointness.

It is already said that an impartible estate is the subject of joint ownership and survivorship under the Mitâksharâ law and that the right of sons does accrue to such an estate in the hands of the father in the same manner as to his self-acquired or ancestral property, from the moment of their birth, although it does not entitle them to call for its partition.

(*p*) *See* Harihar *v* Kesho Prasad, 1925 P 68 93 I C 454
(*q*) Jagadamba *v* Wazir Narain, 2 P 319 50 I A 1, 7 28 C W N 98 37 C L J 287 25 Bom L R 676 44 M L J 503 1928 P C 59
(*r*) Shiba *v* Prayag, 36 C W N 1046, 1061-2 56 C L J. 92
(*s*) Aparna *v* Siva Prosad, 3 P 367 1924 P. 451
(*t*) Prayag Kumari *v* Shiva Prosad, (Jharia estate) 1926 C 1
(*u*) 56 C L J 92, 112 36 C W N 1046

The right of maintenance is therefore, claimed by the junior members (*v*) and their descendants in the male line, by virtue of their co-ownership in the estate. It is held that the widows of junior members are entitled to maintenance. (*w*) But the Privy Council has decided in the case of *Rama Rao* v. *Raja of Pitapur* (*x*) that, apart from custo mand from certain near relationship to the holder, the junior members of the family have no right to maintenance out of it, and that there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right (*y*) It rests on such members to prove the custom negativing the ordinary law. (*z*)

Right to claim maintenance

extends not beyond first generation

Babuana & Sohag grants.—The *Babuana* grants of land to the junior members of the *Durbhanga Raj* family are impartible and descendible to the eldest male heirs of the grantee who holds them for the maintenance of the family consisting of the male descendants of the grantee, on failure of whom they revert to the grantor or the holder of the *raj* for the time being. (*a*) The holders of the grant are liable to pay the revenue and cess to the *Raj*. (*b*) The custom of succession to and the inheritance of *Sohag* property is the same as that of *Babuana* property. In each case women, widows and daughters and the descendants of daughters are excluded from the succession. (*c*) The existence of an adopted son will prevent such grants from reverting back to the estate, on the ground of

Nature of *Babuana* grants,

***Sohag* grants.**

(*v*) Venkatchella *v* Verkatachella, 20 M L J 394 4 I C 302
(*w*) Rangappa *v* Kulandai, 26 M L J 205 23 I C 831
(*x*) 45 I A 148, see *foot note* (*c*) above
(*y*) *See* Protap *v* Jagadish, 54 C 955 54 I A 289 31 C W N 943 46 C L J 136 1927 P C 159
(*z*) Vikrama Deo *v* Vikrama Deo, 24 C W.N 225, 228 (P C) 31 C L J 91 37 M L J 188 17 A L J 1011 21 Bom L R 930 52 I C 333
(*a*) Durgadut *v* Rameshwar, 36 C 943 36 I A 176 13 C W N. 1013 : 10 C L J 233, 6 A L J 847, 11 Bom L R 901, 19 M L J 567, 4 I C 2, Dwarka *v* Dumbarudhar, 38 C 278 But see *contra*, Laliteswar *v* Bhabeswar, 12 C.W N 958 8 C.L J 124
(*b*) Hitendra *v* Rameshur, 18 C W N 42 22 I C 873, Rameshwar *v* Janeshwari, 19 C L J 19
(*c*) Ekradeshwar *v* Janeshwari, 41 I A 275 42 C 582 18 C W N 1249 21 C.L J. 9 27 M.L J 373. 12 A L J 1217. 17 Bom L R 18 25 I C. 417

failure of male issue, even if the adoption was made by the widow of the last holder of such a grant, sometimes after the husband's death. (*d*)

Nature of *putra pout tradik* grants

The Putra-poutradik grants—in *Chota-Nagpur* appear to have originated in maintenance grants to junior members; they are enjoyed by the grantees and their male descendants in the male line, and widows. They do not pass by inheritance to daughters or to any one belonging to a different *gotra* or family. (*e*) But these become resumable by the *raja* or holder of the estate, on failure of heirs male and their widows; the lands that are subject of these grants are not absolutely severed from the estate, there being the reversion in favour of the holder. The grants of land by way of maintenance should, having regard to the real character of the impartible estates, be deemed not as transfer of ownership, but as assignments of only the rents and profits to be enjoyed by the junior member and his male issue who are entitled to get maintenance out of the estates.

supports the view of co-ownership

This view is in accordance with the Mitàksharà law which recognizes acquisition of ownership by birth, in the property of the father and other paternal ancestors, the lowest but invariable incidents of which are the right to maintenance and survivorship.

Maintenance grants and rule against perpetuity

But these grants, providing as they do for the defeasance of the interest and for its reversion, in the event of indefinite failure of male issue, contravene the rule against perpetuity as enunciated in the *Tagore* case, and would therefore be inoperative (*f*) unless their validity can be maintained on the strength of custom (*g*)

Bengal School

According to the Bengal School—however, ownership is not acquired by birth, sons are not therefore co-owners of their father in respect of the paternal or ancestral property,

(*d*) Pratapsingh *v* Agarsingji, (Gamph estate of Ahmedabad) 43 B 778. 46 I A 97: 24 C W N 57 36 M L J 511 17 A L J 522 · 21 Bom L R 496 50 I.C 457

(*e*) Koplinauth *v* Government, 22 W R 17 13 B L R 445; Narain *v* Lokenath, 7 C 461, Perkash *v*, Rameshwar, 31 C 561

(*f*) Sri Raja *v*. Sri Raja, 17 M 150

(*g*) Perkash *v* Rameshwar, 31 C 561.

but right to maintenance out of such property is expressly declared, not as an incident of co-ownership, but as an incident of their status of being male issue of their paternal ancestors There cannot be joint ownership and survivorship under the Dàyabhàga, hence the question as to the right of remoter descendants in the junior lines must depend on custom.

Pachete estate

In a case of *Pachete Raj* which appears to be governed by the Dàyabhàga, it has been held that there is no law or custom, which entitles any member of the family, other than the son or daughter of a holder of the estate to receive maintenance. (*h*) It was, however, in evidence in this case, that the other members did, as a matter of fact, receive maintenance allowances, but this was held referable rather to the favour of the Raja, than to any right in the recipients.

nature of its grants

In the case of *Pachete Raj* the maintenance grant is for life of the grantee, but is liable to be resumed by the successor of the grantor, should the latter die during the life-time of the grantee. (*i*)

Patkum estate

In the case of *Patkum Raj*, it has been held that maintenance grants are resumable by the *Raja* on the death of the grantees. (*j*) There was an admission on the part of the defendant as to the grant being resumable, The learned judges seem to have been influenced by what they observe in the following passage,—"The nature of a maintenance grant is obviously that whilst it makes for the immediate members of the family a suitable provision, it prevents by means of the exercise of the right of resumption, the *Zemindari* from being completely swallowed up by the continual demand upon it."

Maintenance grant due to co ownership,

The right of maintenance must according to Hindu law be referred to this co-ownership, of which this right and survivorship are the legal incidents. The Judicial Committee observes,—"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a *Raj*, or impartible estate, in favour of the junior members of the family, who, but for the impartibility of

(*h*) Nilmony *v* Hingoo, 5 C 256
(*i*) Chota *v* Purna, 21 C L J 144
(*j*) Woodayaditto, Raja *v* Mukoond, 22 W R 225

but Privy Council holds other-

the estate would be co-parceners with him" (*k*) The Privy Council has explained this right to maintenance as due to his relationship to the holder and not on account of any co-parcenary interest in the property or community of interest acquired by birth. (*l*)

Descendants of grantee should get

Descendants of grantees—But it should at the same time be borne in mind that the descendants of the original grantees also require maintenance, and there is no reasonable legal ground for drawing any distinction between the original grantees and their descendants with respect to their right to maintenance As regards the apprehension of the estate being swallowed up, it may be remarked, that it is not unreasonable to expect that the holder should make provisions for the maintenance of all the members, out of the large income of the estate. It seems to be contrary to the spirit of the Hindu law as well as to Hindu feelings, that the remoter descendants of the junior branches should be deprived of this source of their maintenance, whilst the holder of the estate should be permitted to waste its income and even dissipate the estate itself by alienations for satisfying his personal wants of an extravagant character.

It should, however, be observed that in those estates to which the right of junior members to succeed by survivorship is admitted to apply, the right of a junior member's descendants to maintenance, must follow as a necessary logical consequence from the doctrine of the Mitàksharà, on which survivorship is based. But it seems that even in such a case a grant has been presumed to have been for the grantee's life only. (*m*) Grants for maintenance however, are not in all cases to be necessarily presumed to have been gifts of life-interest only. (*n*)

How grants made

Modes of grant—Maintenance may be given in cash, or grants of land appertaining to the estate, may be made in lieu

(*k*) Yanumula *v* Yanumula, 13 M I A 333, 340, 13 W R P C 21
(*l*) Rama Rao *v* Raja of Pittapur, *supra*
(*m*) Tituram *v* Cohen, 33 C 203 32 I A 185 9 C W N. 1073 2 C L J 408 15 M L J 379 7 Bom L R 920 3 A L J 59
(*n*) Mohim *v* Sarajubala, 9 C L J 576

of maintenance, the rents and profits of which, are enjoyed by the grantee and his heirs male in the male line. (*o*)

Parmanent hereditary grants,

It has, however, been held that the holder of the estate is competent to make permanent hereditary grants for the maintenance of the junior members and their descendants (*p*)

why supported

The validity of those permanent grants, is maintained on the ground, that the holder has the power to alienate the impartible estate according to his pleasure, and not on the ground that the grantee's descendants are entitled to have maintenance out of the estate, as they undoubtedly would have according to the Mitâksharâ There cannot be any doubt that the holder of impartible estates, while making provision for the maintenance of their younger sons, will make the grants in perpetuity, when the veiw taken by the Courts in some cases, is known to them, namely, (1) that mere maintenance grants may be resumed by his successor, but (2) that he is competent to make the grants permanent and heritable in perpetuity.

Minerals.

In the absence of express grant, the minerals do not pass to the grantee of *khorposh* grant in Chota-Nagpur estate. (*q*) As between the *Zemindar* and the *jagirdar* who hold it for maintenance, the Zemindar must be regarded as the owner of the minerals. (*r*)

Presumption

Where the Zemindar and jagirdar are the members of the same family and the *jagir* is held under the Zemindar, the presumption is that the *jagir* is held as *khorposh* or maintenance grant. (*s*)

Amount of maintenance

Amount—In determining the amount of maintenance to be awarded to a junior member, the principles upon which maintenance is allowed to a Hindu widow should be applied : regard should be had to the income of the *raj* and other sources of income if any, and to the claims of other members of the family, as well as to the expenditure necessary for maintaining the position and dignity of the holder as a *raja* (*t*)

(*o*) Lakshmi *v* Deo Garu, 10 M 268 20 I A 9, Lakshmipathi *v* Kandasami, 16 M 54
(*p*) Udaya Aditya, Raja *v* Jadub, 5 C 113 on appeal to P C. 8 C 199 8 I A 248
(*q*) Udai *v* Jagat, 6 P 638 1928 P 66
(*r*) Bageswari *v* Kamakhya, 53 C L J 11 P C
(*s*) Bageswari *v* Kamakhya, 53 C L J 11 P C
(*t*) Mahesh *v* Dirgpal, 21 A 232 19 A W N 46

Claimant's remedy on refusal

Wrongful withholding—of maintenance and unwillingness to pay the same will entitle the claimant to a decree for the arrears within the period of limitation. (*u*)

Nature of maintenance grants

* **Maintenance grants, ancestral, impartible and alienable.**—Grants of land made for the maintenance of the junior members and their male descendants only, and resumable on their default,—are really intended to create an interest in property restricted in its enjoyment to the grantees and their male issue personally, and such to be inalienable, coming as they do within the principle of clause (*d*) and specially of the new clause (*dd*), section 6 of the Transfer of Property Act. They may be deemed to be assignments of the usufruct of the lands, not intended to be transferable. (*v*)

alienable, partible, divisible, in some cases

But the courts presume them to be alienable in the absence of proved family custom, or express terms in the grant, to the contrary. (*w*) In some cases the grants are held to be impartible, (*x*) while in others they are held divisible like other ancestral property. (*y*) they are held to become ancestral property in the hands of the grantee. (*z*)

Sec. 6—SUCCESSION

Primogeniture.

Primogeniture lineal and ordinary.—The succession to an impartible estate is regulated by the custom of primogeniture, or more properly speaking, the holder of the estate is to be selected according to the particular custom of primogeniture, obtaining in the same. In the majority of cases the lineal primogeniture appears to govern the succession to these estates, or to the office of the holder thereof, according as the holder is deemed to be the absolute master of the estate, or to be its sole manager

(*u*) Yarlagadda *v* Yarlagadda, 24 M 147, 153 27 I A 151, 157 5 C W N 74
* For alienation of maintenance grants, *see* Ch xvi Sec 3, Sub-Sec 3.
(*v*) Diwali *v* Apaji, 10 B 342
(*w*) Ram *v* Mudeshwar, 33 C 1158 10 C W N 978, Durgadut *v* Rameshwar, 36 C 943 36 I A 176 10 C L J 233 13 C W N 1013 6 A.L J 847 11 Bom L R. 901 4 I C 2, Laliteswar *v* Bhabeswar, 35 C 823, 12 C.W N 958 8 C L J 124
(*x*) Kopilnauth *v* Government, 22 W R 17, Lal Gajendra *v* Lal Mathura, 20 C W N 876, 1 Pat L J 109 35 I C 383, Ram Charan *v* Harihar, 35 I.C [illegible]2 (Pat), Durgadut *v* Ra[illegible]r, 36 C 943
(*y*) Laliteswar *v* Bhabeswar, 35 C 823, Ramchandra *v* Mudheswar, 33 C 1158
(*z*) Hazarimull *v* Abani, 17 C W N. 280 17 C L J 3[illegible]; 18 I C 625

By *lineal* primogeniture preference is given to the senior *line* · and the succession goes to the nearest in degree in that *line*, although he may be remoter in degree to another member of the family, who belongs to a junior line ; should there be more members than one in the nearest degree in the senior line, then the succession goes to the eldest among them ; in default of any one in the senior line, it goes to a similar member in the next senior line ; and so on.

lineal,

But by *ordinary* primogeniture preference is given to *nearness in blood* irrespective of the *line*, and the succession goes to the *nearest in degree* although he may belong to the most *junior line* ; should there be more than one in the same degree, the succession goes to the eldest among them, to whichever line he may belong.

ordinary

All estates to which survivorship applies, and in which the son of the last holder succeeds in preference to his younger brother and the like, must be taken to be governed by the rule of succession by *lineal* primogeniture.

Lineal where survivorship applies

In order to understand this position, let us take a case governed by the Mitakshara · suppose, *A* the holder of the estate dies leaving two sons *B* and *C* , *B* the senior son holds the estate, and *C* the junior gets only maintenance ; *B* dies leaving a son *D* , then, *D* can get the estate in preference to *C*, if lineal primogeniture governs the succession.

Example.

For, the estate being one to which survivorship applies is the subject of co-ownership of the members of the family *viz.*, *A*, *B*, *C* and *D*, the last three acquired a right to the estate from the moment of their birth. In a joint family the rule of succession does not apply ; although when a member of a joint family dies, it is ordinarily said that his undivided co-parcenary interest passes by survivorship to the surviving members of the family, yet this proposition is not at all accurate ; what really happens is, that the deceased member's interest *lapses* , the right of each member extends to the whole property, from inception, that right remains unaffected by the death of a co-parcener, which results only in the removal of a rival right of a similar character, co-existing in the property, and which event does not transmit any fresh

right to any member. (*h*) Therefore *C* and *D* both had a right to the estate from before *B*'s death which cannot confer any new right on *D*, then if *D* succeeds to the estate he can do so only by virtue of lineal primogeniture otherwise, *C* being nearer in relation to all common ancestors commencing from *A*, would take, if *ordinary* primogeniture were applicable. Although by reason of the custom of primogeniture *B* alone held the estate, yet as regards co-ownership, his position was not higher than that of *C* or *D*, his brother and son respectively, and the latter can take only according to *lineal* primogeniture.

Madras view

Accordingly, it has been held by the Madras High Court that when the senior line becomes extinct by reason of there being no son or other male descendant of the last holder, and the right of exclusive possession of the impartible estate is to pass to a member of a different branch, then it devolves, in the absence of proof of special custom of descent, upon the nearest co-parcener in the next senior line, and not on the co-parcener nearest in blood *i.e.*, by lineal primogeniture and not by ordinary primogeniture. (*i*) This is the conclusion that legitimately follows from the Mitakshara doctrines, and is approved by the Judicial Committee

upheld by Privy Council

leaning towards Bengal law

The tendency of decisions, however, has been to attach special importance to the last holder who is sometimes considered to form a fresh stock of descent. This may be perfectly true in the Bengal School But there is a great and fundamental distinction in doctrine between the two schools in this respect, which may be illustrated by the following example —

Example to explain

Suppose, the last holder dies without leaving male issue, but leaving his paternal grandfather's fifth and youngest brother and the said grandfather's second brother's son's son.

difference between succession and survivorship

If the estate is to pass by succession to the nearest heir of the last holder, then it will go to the granduncle in preference to the first counsin, in both the schools. But if the family be joint and governed by the Mitakshara, then the

(*h*) Lakshman *v* Ramchandra, 5 B 48, 62 7 I A 181 affirming 1 B 561, Debi *v* Thakur, 1 A 105 F B, Bhimul *v* Choonee, 2 C 379

(*i*) Naraganti *v* Venkata, 4 M 250 Kachi *v* Kachi, 24 M 562, 609 11 M L J 191 affirmed, 32 I A 261, 265 28 M 508

property is to pass by survivorship and not by succession, and as regards survivorship, there cannot be any difference between the first cousin and the granduncle, the former represents his deceased grandfather the second granduncle of the last holder, both of them would be equally entitled by survivorship. *(j)*

Cousin is preferred to grand-uncle

The heirship to the last holder is no test in such a case. If it be conceded that if there were a son left by the last holder he would take, then that would afford conclusive evidence of succession by *lineal* primogeniture, as has already been explained, and therefore the first cousin being in the next senior line, would take in preference to the grand-uncle. *(k)*

In Bengal eldest son will succeed.

But although the same conclusion would not follow from the Bengal doctrines, yet the succession of the eldest son of the last holder would follow, if the descent be governed by lineal primogeniture.

Custom

Where succession is governed by custom and not by the ordinary law and the eldest son of the last holder succeeds according to it, it would be wrong to think that such succession has anything to do with heirship to the last holder, for, the whole course of succession must be taken to be governed by custom irrespective of heirship to the last or any holder, although relationship to him is undoubtedly the most important factor, but the same should be dissociated from the idea of heirship which does not apply.

What primogeniture means

It has already been observed that succession by primogeniture may be either lineal, that is, in the line of the eldest, or of the next eldest and so on, or it may be ordinary, that is to say, it will not devolve on the eldest line, but on the eldest from amongst the nearest in degree. Now the question arises, nearest in relation to whom? In relation to the common ancestor of all the existing members of the family? Or in relation to the last holder?

Anomaly in succession

Succession of the nearest to the *last* holder seems anomalous in principle. Suppose the existing holder's eldest

(j) Debi v Thakur, I A 105 (F B), Bhimul v Choonee, 2 C 379
(k) Mohesh v. Satrughan, 29 I A 62.

son dies in his lifetime leaving a son, and then the holder dies leaving the said grandson and other sons, then if the eldest among his nearest relations is to succeed, his second son would succeed to the exclusion of the pre-deceased eldest son's son. This kind of succession is never found in practice. And it should moreover be borne in mind that according to ordinary Hindu law the right of representation is admitted amongst male descendants, and so the eldest son's son would stand in the shoes of his pre-deceased father for the purpose of inheritance from his grandfather. Hence it is difficult to say that he is remoter than his uncle.

explained

Now if the holder of the estate is taken to be the manager of the joint family property, and suppose the impartibility to be the result of family arrangement, then it may be expected that the primogeniture applicable to such a case to be ordinary, in the sense of a succession of the eldest amongst the nearest from the *common* ancestor, and not from the *last* holder. For, according to the classificatory system of computation of degrees, as well as of rank and honour, the eldest amongst the nearest from the common ancestor, would be the object of respect payable by all the other members of the family, and therefore is the proper person to step into the position of its head

What ordinary primogeniture means

Hence ordinary primogeniture, *prima facie* consistent with Hindu law and usage, appears to be the succession of the eldest amongst the nearest in relation to the *common* ancestor, and not in relation to the *last* holder.

When estate is granted by para-

If again the origin of an impartible estate be supposed to be a grant by the paramount power to a feudatory, then the course of succession to the *Raj* should likewise be presumed to have been settled at the time of the grant, in relation to the original grantee Therefore, if ordinary primogeniture be the rule of succession *originally* fixed, the nearness or otherwise of claimants was necessarily to be calculated in relation to the original grantee, who must have been the person principally considered at the time of the grant.

In practice, however, the nearest in relation to the last

holder is likely to have a closer connection with the *Raj* and its officers and servants, than a distant relation of the *Raja*, who may be the nearest in relation to the common ancestor. Hence the former would naturally be respected by persons connected with the *Raj*, and be looked upon by them as the proper successor to the existing incumbent. He would thu be in an advantageous position to easily take possession of the estate on the death of the last holder, and then to maintain his title to the same. And thus has arisen the importance of the last holder, with respect to succession and other matters.

Reasons for preference to nearest relation

The kind of primogeniture applicable to a particular estate is generally settled by proof establishing the local or the family custom. *(l)* So a consideration of the principles and the argument set forth in the above discussion may not be necessary in cases where there is a clearly established custom of succession.

Where custom prevails.

It has already been said that it is of the essence of special customs and usages, modifying the ordinary law of succession, that they should be ancient and invariable, *(m)* and it is further essential that they should be established to be so by clear and unambiguous evidence. *(n)*

Custom how established.

Succession to acquisitions.—The acquisitions from the income follow the ordinary rule of succession unless the facts show that the owner intended to incorporate that property with the impartible estate. *(n1)*

Succession follows ordinary law,

Case-law on succession.—When the decisions of the Courts on the subject of succession to these impartible estates are considered, it is found that, in some cases, the greatest importance is attached to the last holder who is deemed to be full owner and as such to become a fresh stock of descent. *(o)* On appeal from this decision, the Judicial Committee has held that "when an estate in impartible it is enjoyed in a different

unless modified by custom

(l) Order of succession cannot be presumed to be contrary to general Hindu law, because an estate is impartible, Har *v* Nagindra, 22 O C 68 6 O L J. 266 : 52 I C 2

(m) *See* Palani Ammal *v* Muthuvenkatachela, 29 C W N 846 P C, *see ante pp* 27-936

(n) Ramalakshmi *v.* Sivanatha, 14 M I A. 570 I A Suppl 1 17 W R 553 *see supra pp* 27, 936

(n1) *See ante p* 953 "Acquisitions"

(o) Muttuvaduganadha *v.* Periasami, 16 M 11. 2 M.L J. 265

mode from that prescribed by the ordinary Hindu law, but the inheritance is to be traced by the same mode, unless some further family custom exists beyond the custom of impartibility," and that accordingly the elder daughter's son who was the last male owner becomes the stock from which the descent had now to be traced, the ancestor who was his predecessor in title being no longer that stock and that the son of the last male owner is entitled to succeed in consequence of the full and complete ownership of his father who had himself become a fresh root of title. (*p*)

Distinction between Daya and Mit

The distinction between the Dàyabhàga and the Mitàkshara, should, however, be always kept in view, according to the former of which it was held by the Privy Council in the *Tipperah* case, that "it is the nearest in blood to the *last* male holder, that is the proper heir, and *not* the senior member of the whole group of agnates." (*q*)

Women under Mitakshara,

It is already said that an impartible estate may be the subject of co-ownership so as to pass by survivorship to male members, to the exclusion of the widow, the daughter and the daughter's son, of the last holder. It should be borne in mind that this can take place only when the family is joint and governed by the Mitàksharà Succession in such cases has been determined by survivorship by the Courts. (*r*) The illegitimate son of a Sudra Zemindar is excluded from succession by the widow or the members of a joint family of the deceased, according as the property was separate or joint family pro-

(*p*) 19 M 451 23 I A 128

(*q*) Neelkisto *v* Beerchunder, 12 M I A 523 12 W R P C 21

(*r*) Konammal *v* Annadana, 51 M 189 32 C I J 983 : 1928 P C 68, Bhaiju-nath *v* Tej, 43 A 228 48 I A 195 19 A L J 317 25 C W N 564 33 C L J 388 40 M L J 387 23 Bom L R 654 2 P L T 257 60 I C 534 on appeal from 38 A 590 (but *see* Rajkumar Babu *v* Janki, 24 C W N 857 P C, and *see* Gurusami *v* Pandia, 44 M 1 39 M L J 529), Naragunty *v* Vengama, 9 M I A 66 1 W R P C 30, Heeranath *v* Burm Narain, 17 W R 316 on appeal from 15 W R 375, Chintamun *v* Nowlukho, 1 C 153. 24 W R 255 2 I A 263, Sivagnana *v* Periasmi, 1 M 312 5 I A 61, Naragunti *v* Venkata, 4 M 250, Bhawani *v* Deo, 5 A 542, Rup *v* Rani, 7 A 1 11 I A 149, Durga *v* Durga, 4 C 190 5 I A 149, Jogendra *v* Nityanand, 18 C 151 17 I A 128 on appeal from 11 C 702, Subramanya *v* Siva, 17 M 316 4 M L J 152, Harpal *v* Lekhraj, 30 A 406, Kachi *v* Kachi, 28 M 509 32 I A 26 10 C W N 95 2 C L J 231 2 A L J 845. 15 M L J 312 7 Bom, L R 907, on appeal from 24 M 562, Gur *v* Dhani, 38 C. 182 7 I C. 806, Indar *v*. Harpal, 34 A 79. 3 A L J, 1251. 12 I.C. 915

perty. (s) The widow of the last holder of the estate may succeed to the impartible estate, in the absence of any proof of custom excluding her from succession, if her husband was separated from the members of the family. (t) Where the property is ancestral and the family undivided, a custom modifying the law, must be a custom to admit women, not a custom to exclude them. (u)

Women are excluded from succession in Killayat and Gujrat estates of Orissa. (u1)

In Jharia and Ramgar estates,

In the jungle mehals of perganas Jharia (v) and Ramgar, (w) the brother of a deceased holder, dying without issue, succeeds to the estate to the exclusion of the widow or other female relations. In the Jharia (x) and in the Ramgar (y) cases the properties were ancestral and the families undivided. In a recent dispute regarding the Jharia estate it has been held that women are not excluded from succession. (z) It is also held that the nature of the Jharia impartible estate is immoveable property.

and Nimar

In Nimar estate in the Central Provinces women are excluded from inheritance (a)

The Zemindari of Sadak Arjuni in the Bhandra District in the Central Provinces is an estate in which the law governing the descent is that applicable to a joint family. (a1)

Amgaon estate,

The Amgaon Zamindari, one of the group of estates in the Central Provinces known as the Wainganga Zamindaries, is a partible estate (b)

(s) Visvanatha v. Kamu, 24 M L J 271 21 I C 724 appeal after remand in 30 M L J 451 and P C appeal in 50 I A 32

(t) Tara Kumare v Chutterbhuj, 42 I A 192 42 C 1179 19 C W N 1119. 22 C L J 498 23 M L J 371 13 A.L J. 1034 17 Bom L R 1012 30 I C 833

(u) Heeranath v Burm, 17 W R 316, 335 on appeal from 15 W R 375, Rup v. Baisni, 7 A 1 : 11 I A. 149

(u1) Amarendra v Banamali, 1930 P 417 10 P 1 (Domepara estate)

(v) Widows of Zorawar v Koonwur Pertee, 4 Sel Rep. 57 (new edition p 72)

(w) Heeranath v Burm Narain, 17 W R 316 on apeal from 15 W R 375

(x) 17 W R 316, 333

(y) 17 W R 316, 335

(z) Prayag Kumari v Sive Prasad, 1926 C 1 the P C has not touched the point

(a) Rao Kishore v Gapenabai, 17 N L R 176 (P C) 24 C W N 601, 607 17 A L J 1077 22 Bom L R 507 37 M L J 562 53 I C 630

(a1) Sarjubai v Gangaram, 1930 N 35

(b) Martand v Malhar, 55 C 403 P C 24 N L R 25 32 C W N 621 47 C L J 150 overruling, 1923 N 201,

Full and half blood

In a Mitákshará joint family there is no distinction between full and half-blood; hence a half-brother, senior in age, succeeds by survivorship to an impartible estate, in preference to a younger brother of full-blood. (*c*)

Custom in Jungle Mehals

In the jungle mehals the lineal primogeniture appears to obtain as a local and family custom, as has been found in several cases, most of which are not reported. (*d*) In a case, the lineal primogeniture is held by the Judicial Committee to apply to Dhalbhum, one of the estates in the Jungle Mehals.

Dhalbhum

The Dhalbhum family is one of the families whose ancestors originally came from the north-west and established themselves by conquest in the Jungle Mehals, and is governed by the Mitákshará law. (*e*) In all the families the *Raj* descends to a single heir, and some of them keep up a sort of semi-royal state, and dignify the heir-apparent and those in immediate succession with titles of honour which denote precedence. These titles have already been set forth. (*f*) After describing the estate in this manner their Lordships observe that the fact "that according to the *kulàchàr* or custom in this family, and those belonging to the same group, a grandson whose father is dead succeeds to the grandfather's estate in preference to a surviving uncle"—"has an important bearing on the question" whether "the rule of lineal primogeniture applies in cases of collateral relationship." Their Lordships also hold that "the precedence conferred or marked by the titles of honour given to the sons of the reigning Raja in order of seniority, a precedence which would naturally be attached to the lines of descent traced from them," also points in the same direction. (*g*)

Talukdari estates in Oudh

It has, however, been held with respect to the Talukdari estates in Oudh that the cases where the holder's name is entered in the second list prepared under Act I of 1869, and

(*c*) Subramanya *v* Shiva, 17 M 316 4 M L J 152, Ramsami *v* Sudra, 17 M. 422 (P C Appeal 28 M 515 26 I A 55)
(*d*) Thakoor Jeetnath *v* Lokenath, 19 W R 239,
(*e*) Pratap Chandra *v* Jagdish, 54 C 955 54 I A 289 31 C W N 943 46 C L J 136 1927 P C 159 40 C L J 331 1925 C 116
(*f*) *See p* 935 *supra*
(*g*) Mohesh *v* Satrughan, 29 I A 62 29 C 343 6 C W N 459 4 Bom L R 371

not in the third, the estate, although it is descendible to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture. (*h*)

In such cases the degree prevails over the line, but where the degree is equal, the line prevails. (*i*)

Succession how traced.

A Special Bench of the Patna High Court, in the case of *Shaym Lal* v. *Bijoy*, (*j*) has held that the succession to an impartible estate is to be traced by the rule which would have governed the succession had the estate been partible. The same High Court, (*k*) after the decision of the Privy Council in the case of *Baijnath* v. *Tej* (*l*) has held that it is impossible to uphold the view expressed in the case of *Shyam Lal*.

Application under Or 34 R 6 of C P C.

One succeeding to the estate by survivorship is entitled to maintain an application for a decree for the unrealized debt by the sale of the mortgaged property under Order 34, Rule 6 of the Civil Procedure Code. (*m*)

Sons by different wives.

Priority among sons by different mothers.—When the last holder leaves sons by different wives of the same caste, the first-born son is entitled to become the successor, although his mother may be junior to his father's other wives that are also mothers of male issue. The rank or position of the mothers does not confer priority. (*n*)

Priority of son, by wives of different castes.

But if the holder leaves sons by wives of different castes, then a junior son's wife of the higher caste is superior to an elder son by a wife of the lower caste. (*o*)

by senior wife

As succession depends on custom, there may be a valid custom whereby the junior son by a senior wife has prior right of succession, to an elder son by a junior wife. The

(*h*) Achal Ram v Udai, 10 C 511 11 I A 51, Bhai Narendra v Achal, 20 C. 649 20 I A 77, Harbaksh v Dal, 22 A L J 1079 1925 A 155

(*i*) Narindra v Achal, 20 I A 77 20 C 649, Gursami v Sendatti, 39 M L J 529 · 61 I C 242 (*j*) 2 Pat L J 136 (1927) Pat 121 39 I C 36

(*k*) Siva Prasad (Raja) v Beni, 1 P 387 1922 P 529

(*l*) 43 A 228 48 I A 195 19 A L J 317 25 C W N 564 33 C L J 388 40 M L J 387 23 Bom L R 654 60 I C 534

(*m*) Siva Prasad v Beni, *above*

(*n*) Ramalakshmi, v Sivanantha, 1 A Sup 1 14 M I A 570 17 W R 553, Pedda Ramappa v Bangari Seshamma, 8 I A 1 2 M 286, Jagadish v Sheo, 23 A 369 28 I A 100 5 C W N 602 3 Bom L R 298 11 M L J 178

(*o*) Ramasami v Sundara, 17 M 422, on appeal to P C Sundaralingasami, v Ramasami, 22 M 515 26 I A 55

seniority and juniority are determined by the date of marriage and not by age (*p*)

Law is same as applicable to to ordinary property.

It has been held for determining who is to be heir to an impartible estate, the same rules apply which also govern the succession to partible estates, though these estates may be held by only one member of the family at a time; and accordingly it has been held that an illegitimate brother succeeds in prefernce to a legitimate but remoter relation. It is, however, difficult to understand the principle enunciated in this case, namely *Jogendra Bhupati* v. *Nityanund.* (*q*)

Sec. 7—ADVERSE POSSESSION

In order to acquire title by adverse possession by a member of a joint family the co-parcener's title must be denied and he must be absolutely excluded. (*r*) If the co-parcener lived in the property with other joint owners and had been supported by the proceeds of the joint family property, this is sufficient to legalise his exclusion and to save limitation. (*s*)

The mere possession of the joint property by a person believing it to be an impartible property and another member of the family sharing in that belief accepts maintenance, does not amount to the exclusion of the latter. (*t*)

A possession is never considered adverse if it can be referred to a lawful title (*u*)

(*p*) 17 M 422, affirmed by the Privy Council, 22 M 515 25 I A 55
(*q*) 18 C 151 17 I A 128, on appeal from 11 C 702, see *ante* p 496 and foot note (*l*) *supra* p 969
(*r*) Sri Raja Lakhsmi *v* Sri Raja Surya, 20 M 256 24 I A 118; 24 M 562, 52 I C 470
(*s*) 11 M 380, 14 M 237
(*t*) Raghunath *v* Moharaj, 11 C 777, 20 M 256 24 M 562
(*u*) Corea *v* Appulamy, (1912) A C. 230

CHAPTER XVI.

ALIENATIONS AND WILLS.

Sec. 1—ORIGINAL TEXTS

१। क्रमागते गृहक्षेत्रे पिता पुत्राः समांशिनः।
पैतृके न विभागार्हाः सुताः पितुरनिच्छतः॥
स्थावरं द्विपदञ्चैव यद्यपि स्वयम् अर्ज्जितं।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः॥
ये जाता येऽप्यजाता वा ये च गर्भे व्यवस्थिताः।
वृत्तिं तेऽपि हि काङ्क्षन्ति वृत्तिलोपो विगर्हितः॥ व्यासः॥

1 In houses and fields descended in regular course of succession (from paternal ancestors) the father and sons are equal sharers, but as regards the property acquired by the father himself, the sons are not entitled to partition, against the will of the father Though immoveables and bipeds (slaves) have been acquired by a man himself, neither a gift nor a sale (of them should be made) without convening all the sons For, those (issue) that are born, and those that are yet unbegotten, as well as those that are in the womb (of their mothers), all require means of support, hence the dissipation (by sale or gift without the consent of sons), of the means of support (namely, the immoveables and slaves) is highly censured —Vyàsa

२। भूर्या पितामहोपात्ता निबन्धो द्रव्यम् एव वा।
तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि॥ याज्ञवल्क्यः।

2 In land acquired by the paternal grandfather or a remoter paternal ancestor, or in corrody (*nibandha*=periodic benefit permanently derived from a person or porperty), or in chattels (=slaves, acquired by him) the ownership of the father and the son is the same —Yàjnavalkya.

Rights of father and son in ancestral property.

३। द्रव्ये पितामहोपात्ते स्थावरे जङ्गमे तथा।
समम् अंशित्वम् आख्यातं पितुः पुत्रस्य चैव हि॥
पैतामहं हृतं पित्रा स्वशक्त्या यदुपार्ज्जितं।
विद्या-शौर्य्यादिनाप्तञ्च तत्र स्वाम्यं पितुः स्मृतं।
प्रदानं स्वेच्छया कुर्य्याद् भागञ्चैव ततो धनात्॥ बृहस्पतिः।

3 In property immoveable as well as moveable, acquired by the paternal grandfather (or a remoter paternal ancestor) the parcenership of father and son is declared to be equal In such ancestral property as was lost and recovered by the father through his own ability, and in what is acquired by learning, prowess and the like, the father's ownership is ordained Of such property the father may make gift or distribution according to his pleasure.—Vrihaspati

Father's right over self-acquired property,

४। मणि-मुक्ता-प्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य समस्तस्य न पिता न पितामहः॥ याज्ञवल्क्यः।

Over gems, etc.

4 The father is master of all the gems, pearls and corals, but neither the father nor the paternal grandfather is so of the whole immoveable property — Yâjnavalkya

५। स्थावरस्य समस्तस्य गोत्रसाधारणस्य च।
नैकः कुर्य्यात् क्रयं दानं परस्परमतं विना॥
विभक्ता अविभक्ता वा सपिण्डाः स्थावरे समाः।
एको ह्यनीशः सर्व्वत्र दानाधमन-विक्रये॥ व्यासः।

Right of single co-sharer

5 A single parcener shall not without the consent of the rest make a sale or gift of the whole immoveable estate, or of what is common to the *got-a*=gentiles Kinsmen whether separated or undivided are equal in respect of immoveables. for, one has not power over the whole, to give, mortgage or sell.—Vyâsa

६। एकोपि स्थावरे कुर्य्याद् दानाधमनविक्रयम्।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषतः॥ वृहस्पतिः।

When he can alienate

6 Even a single member may make a donation, mortgage or sale of immoveable property, during a season of distress for the sake of the family, and specially for religious purposes —Vrihaspati

७। विभक्ता अविभक्ता वा सपिण्डाः स्थावरे समाः।
एको ह्यनीशः सर्व्वत्र दानाधमन विक्रये॥ वृहस्पतिः।

Vasista on immoveables

7 Separated or unseparated Sapindas are equal in respect of immoveables, for, in all circumstances, one is incompetent to make a gift, pledge or sale (of the same) —Vrihaspati

८। स्थावरे विक्रयो नास्ति कुर्य्यादाधिम् अनुज्ञया॥

Immoveables can be mortgaged

8 In immoveable property there is no sale, mortgage may be made by consent (of parties interested)

९। भूमिं यः प्रतिगृह्णाति भूमिं यश्च प्रयच्छति।
तावुभौ पुण्यकर्म्माणौ नियतौ स्वर्गगामिनौ॥

Religious merit in gifts

9 He who accepts land and he who gives the same, both of them are performers of a holy deed, and shall certainly go to the blissful region of heaven —Cited in the Mit, 1,1,32

१०। प्रतिग्रहः प्रकाशः स्यात् स्थावरस्य विशेषतः॥
याज्ञवल्क्यः। २, १७६॥

Acceptance to be made publicly

10 Acceptance of a gift shall be public, specially of immoveable property. —Yajnavalkya, ii, 176.

[The founder of the Bengal school does not admit the Mitakshara doctrine of *right by birth*, according to which the *birth* of the male issue is the *cause* of his *co-parcenary right* to the property of the father and other paternal

Right by birth not accepted in Bengal School

ancestor, which property is therefore called *unobstructed heritage*, but he maintains that *heritage* is *always obstructed* *Obstructed heritage* is also recognised by the Mitakshara, but is held to be applicable to collaterals only, and not to male issue, the heir *par excellence* Accordingly Jimutavahana maintains that the *demise* of the father or deceased owner is the cause of the heritable right of the son or heir To this position an objection may be raised, namely, how can one person's act such as the owner's death, be the cause of the right of another person, such as of the heir, the ordinary rule being,—one's own exertion is the cause of his proprietary right This objection which is equally applicable to the *obstructed* heritage under the Mitakshara,—is thus obviated by the founder of the Bengal school.—Dayabhaga, Chapter 1, paras 21-24]

२१। अन्यव्यापारेण अन्यस्य स्वत्वम् अविरुद्धं, शास्त्रमूलत्वाद् अस्य। दृष्टञ्च लोकेऽपि दाने हि चेतनोद्देश्यत्यागाद् एव दातृव्यापारात् सम्प्रदानस्य स्वत्वं। २१

न च स्वीकरणात् स्वत्वं स्वीकर्त्तुरेव दातृत्वापत्तेः। परस्वत्वापत्तिफलेन हि दानरूपता, तच्च फलं सम्प्रदानाधीनं। यथा देवतोद्देशेन द्रव्यत्यागं कुर्व्वन्नपि यजमानो न होता, किन्तु तस्यैव त्यागस्य होमाभिधाननिमित्तं प्रक्षेपं कुर्व्वन् ऋत्विग् एव होता इति उच्यते तद्वद् अत्रापि स्यात्। किञ्च "मनसा पात्रम् उद्दिश्य" (*a*) इत्यादि शास्त्रे स्वीकारात् प्रागेव दानपदं दृष्टम्। २२।

ननु पश्चात् स्वीकारः, अभूततद्भावे च्वि प्रयोगात् अस्वं स्वं कुर्व्वन् व्यापारः स्वीकारो भवति, अथ तत् प्रागेव स्वत्वं। २३।

उच्यते, उत्पन्नमपि स्वत्वं सम्प्रदानव्यापारेण मम इदम् इति ज्ञानेन यथेष्ट व्यवहारार्हं क्रियते इति स्वीकारशब्दार्थः। याजनाध्यापनसाहचर्य्याच्च (*b*) प्रतिग्रहस्य स्वत्वम् अजनयतोऽपि अर्ज्जनरूपता न विरुद्धा, जामदग्न्ये दक्षिणादाना-देव स्वत्वं। २४।

(*a*) मनसा पात्रम् उद्दिश्य भूमौ तोयं विनिक्षिपेत्।
विद्यते सागरस्यान्तो दानस्यान्तो न विद्यते॥

(*b*) अध्यापनम् अध्ययनं यजनं याजनन्तथा।
दानं प्रतिग्रहश्चैव षट्कर्म्माण्यग्रजन्मनः॥
षण्णान्तु कर्म्मणाम् अस्य त्रीणि कर्म्माणि जीविका।
याजनाध्यापने चैव विशुद्धाच्च प्रतिग्रहः॥

मनुः, १०। ७५, ७६।

Ownership may arise from another's act,

21 (The accrual of) one's proprietary right by another's act is not inconsistent, by reason of its being founded on the Shastras, and apart from the Shastras, it is seen also in the world (*i e*, on the actual practice among people), since, in the case of *gift*, the donee's ownership in the thing (given) arises from the giver's act consisting of the

relinquishment in favour (*i e*, with the intention of causing ownership) of a sentient being —D B, I, 21

e. g gift

Nor can it be contended, that the proprietary right (of the donee) arises from acceptance, (literally) appropriation (by him, of the thing given), since, in that case, there would arise this objection, namely, that the acceptor (or the donee) alone would bocome the *giver* (according to the grammatical rules), since, gift consists of an act of which the effect is the generation of another's proprietary right, and that effect would depend on (the act of acceptance by) the donee (according to the contention), in the same manner as a sacrificer, though making the relinquishment in favour of the Deity of a thing (owned by him) is not called the *hota*, but the priest alone, as performing the act of throwing (that thing into the sacrificial fire), which (act) is the cause of applying the name of *homa* to the relinquishment of that very thing,—is called the *hota* Besides in passages of the Shastras such as (*a*) "Intending in mind a fit object of the gift, etc," (the use of the word *gift* is found even before acceptance D B, I, 22

Meaning of acceptance

Should it be contended that as *swikara* means *appropriation*,—since by reason of the use of the affix *chwi* (in the word *swikara*) which implies becoming (of a thing) what it before was not his (*swikara*—) *appropriation* consists of an act making that one's *property*, which *was* not his *property*, —how can proprietary right arise antecedent to the same (*i e*, appropriation or acceptance) ?—D B, I, 23

its effect

The answer is, though proprietary right has already arisen (from the donor's act) yet it is by the donee's act consisting of the knowledge that " it is mine" that the property is made liable to user according to pleasure and this is the meaning of the word (*swikara*—) *appropriation* (or acceptance) Although acceptance (of gifts) does not (immediately) create proprietary right, still its being a mode of acquisition like officiating as a priest, and teaching, with which it is associated (*b*) is not inconsistent for, in the case of officiating as a priest, and so forth, the proprietary right arises from the right of the gift of the fees —D B, I, 24

How gifts to be made

(*a*) Intending in his mind a proper object of the gift, (the doner) should throw water on the ground (indicating the mental act of giving) there are bounds of the ocean, (but) there are no bounds of *gift*

Acceptance of gift means of livelihood

(*b*) Reading (the Shástras) and teaching (others to read them), performing sacrifices and officiating as priest (in sacrifices performed by others), making gifts (to the poor) and accepting gifts (made to them by the virtuous), are the six acts of the first-born caste but of these six acts of this caste, three are his means of livelihood, namely, officiating as priest, teaching and acceptance of gift from a pure person —Manu X, 75, 76

१२ । गताश्चागामिष्यन्ति ये कुले मम बान्धवा. ।
ते सर्व्वे तृप्तिमायान्तु मया दत्त-जलेन वै ।
सर्व्वभूतेभ्य उत्सृष्ट मयैतज्जलम् ऊर्ज्जितं ॥
रमन्तां सर्व्वभूतानि स्नानपानावगाहनै. ॥

जलाशयप्रतिष्ठायां उत्सर्गवचनं ।

12 Let all the relations in my family that have come to this world, or will (hereafter come, i e, those now existing as well as those that will come into existence in future), have satisfaction by means of the water let all beings enjoy it by washing, drinking and bathing —This text is cited by Raghunandana in his work called Consecration of Tanks

Consecration of tanks

Sec. 2—ALIENATIONS*

Sub-Sec 1—PROPERTY

History of alienation of land—Thr descriptions of property are found in the (Smritis) codes of Hindu law, namely, immoveable, moveable and *Nibandha.* Great importance is attached to immoveable property, the ownership of which appears to have been recognised by ancient law to be vested in joint families, the units of archaic society, or in the village communities which were but expanded families and not in the individual members thereof. It was deemed to be the hereditary source of maintenance not only of those members of the family that were in existence for the time being, but also of those that were to be born in future as well as of those that had departed for heaven to whom oblations were to be regularly offered every month which constitutes a day of the (*pitris*) deceased ancestors. Land being thus dedicated, as it were, to the family deemed to consist of the departed, the living and the future members, or to the village community, and the ownership being therefore vested in that permanent ideal entity, its living members could not be competent to alienate its property, which they were only entitled to use, occupy and enjoy, but bound to protect preserve and pass on to their successors without dissipation.

Three kinds of property, vested in families, consisting of dead, living and unborn persons, hence inalienable.

Texts absolutely prohibiting alienation of land appear to indicate the ancient law. In the course of time, the right of alienation had to be recognised, and it appears to have first come into existence in the form of gift of land to meritorious and useful strangers, for inducing them to reside in a village

Alienation recognised

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* Alienation by *Karta, see ante p.* 382, Ch V, Sec 6, Sub-Sec ii, by member, *p* 414, Ch V, Sub-Sec ii, Sec 7, by widow, *pp* 754-766, by manager of endowment *pp* 885-893, by holder of impartible estate, *pp* 944-950

for the benefit of the community, such as grants of land to a Bràhmana who was to impart religious instruction, to a physician for medical treatment, and to a person distinguished for secular learning for imparting secular instruction and helping the people in other ways,—called respectively *Brahmotter*, *Vaidyotter*, and *Mahattran*.

mortgage by *Karta*,

The next step in advance towards right of alienation was when a necessity affecting the whole family could not otherwise be met than by a transfer of landed property, which, consistently with the prohibition against alienation, took the shape of the pure usufructuary mortgage that appears to be the earliest kind of pledge of land. The alienation could be made by the *kartà* or the head of the family.

sale.

In process of time, however, out and out sale of land came to be recognised but still subject to the restrictions applying to families governed by the Mitàksharà.

Moveables—Moveable property was not of much importance in former days, and its alienation is not fettered by restrictions, the property being, from its very nature, easily removeable and difficult to trace. Although at present such property has acquired great importance specially in the shape of *funded property*, such as public debt, municipal debenture and share of Railway or other joint stock companies, as well as ships, machinery and the like.

Nibandha—*Nibandha* or corrody is some thing of value periodically received by one person from another, on the strength of a grant. The illustrations of *nibandha* given in the Mitàksharà while explaining the term, show it to be a benefit derived from land, (*a*) but the Dàyabhàga explains it to be what is promised by one person to be given periodically to another, as on the month of Kàrtika every year. (*b*)

G P. Notes—The incidents of immoveable property appear to be applied to this kind of property. Government

(*a*) Mit 1, 5, 4, *see supra p* 352

(*b*) D B 2, 13, *see supra p* 352

Promissory Notes and similar *funded* property were unknown to Hindu law: considering their importance they should be deemed as *nibandha* and as notmoveable property under Hindu law. These ought to have the incidents which Hindu law annexed to *nibandha*, *i.e.*, the incidents of immoveable property. This appears to be the conclusion that is consistent with the spirit of Hindu law, and is also supported by the explanation of the term given by the founder of the Bengal school in the Dàyabhàga According to this explanation the annuity which is promised in the from "*I will give it every month of Kartika*,"—does not seem to be necessarily annexed to land, but to create a personal obligation, although the right to receive and the liability to pay, may both be intended to be heritable, such as an annuity to a spiritual guide, the relation of disciple and spiritual guide being a heritable one, (c) instances like this, however, are now held to be, matters of moral obligation only.

Nibandha attaches to land
G P Notes moveables

But *nibandha* or corrody has been held to be limited to benefits arising out of land, and accordingly Government Promissory Notes have been held to have the incidents of moveable property. (d)

Slavery,

Slaves.—There was another kind of property which, regard being had to its importance, was by Hindu law placed in the same category with land, but which has ceased to exist in British Empire by reason of the humane legislation (e) prohibiting the recognition of and declaring it to be a serious crime to hold, such property.

abolished by British people

Slavery or proprietary right of man over man, was recognised by ancient law in all countries. Mankind owes a deep debt of gratitude to the British people for their humanity, who spent millions of money for abolishing slavery by emancipating the slaves existing at one time in the British Empire on payment of compensation to their owners, and who have since been sparing no pains to suppress in all countries this inhuman usage

Property
i land
ii *nibandha*,
iii slave,
iv moveable,

Conclusion—Thus there are four kinds of property dealt with by the commentators on Hindu law, namely, (1) land, (2) *nibandha*, (3) slave, and (4) moveable The first three

(c) Manu, viii, 388
(d) Doorga v Poorun, 5 W.R 141,
(e) Act V of 1843

are placed in the same category regard being had to their importance, and have the same incidents as immoveable property, in contradistinction to those of the moveable property. Now, what things were the Hindu lawyers contemplating, as constituting moveable property while they were dealing with the classification of property? The household furniture, the wearing apparel, the few ornaments put on by women, the domestic animals, the implements of agriculture or mechanical art carried on by the family, grains and the like are the only things they were thinking of, as composing moveable property, which was deemed to be of lesser importance. It would not be right or reasonable to include under the term *moveable* of Hindu law, the important kind of property that was unknown to ancient law, but has come into existence in the course of progress of the Western civilization of modern time, such as the *funded* property which bears a closer resemblance to the *nibandha* or corrody of Hindu law.

What are moveables

Sub-Sec ii—POWER OF ALIENATION

General principles of alienation considered

Capacity to alienate.—The subject of alienation has already been considered while the Mitákshará Joint Family, (e1) the Female Heirs, (f) the Endowed Property, (g) and the Impartible Estates (h) have been dealt with. Some general principles only relating to alienation may shortly be stated here

Alienation depends on state of ownership,

It should be observed that an owner may be incompetent to alienate his own property, while a person who is not the owner, or who is only a part-owner, may, under certain circumstance, be authorized to alienate what belongs entirely to another person, or jointly to himself and others.

nature of property

Capacity to alienate is also affected by the nature and character of the property as being moveable or immoveable, joint or separate

jointness,

In the case of joint property, the capacity of a co-owner is affected by the nature of the joint-tenancy, as the co-

(e1) *Ante p* 382 etc and 411 etc
(f) *Ante p* 754 etc (g) *Ante p* 886 etc
(h) *Ante p* 944

owners being joint-tenants or tenants-in-common, the joint-tenancy again may be convertible into separate tenancy, or it may be unseparable as in the case of two or more female heirs.

The capacity of a joint tenant is affected also by the purpose for which the alienation is made,—being a joint one of all the joint-tenants, or a personal one concerning himself alone.

and on the purpose

Owner incompetent to alienate.—Want of discretion incapacitates a person from making any transfer of his property, accordingly a person who is a minor, or an idiot, or a lunatic, cannot alienate his property.

Owner in competent when,

According to Hindu law women are deemed to be wanting in discretion, and therefore they require the guidance of their male relation in managing and dealing with their property. The Dâyabhâga distinctly lays down that a widow inheriting her husband's estate, must remain under the control of her husband's kinsmen *i. e.*, the reversioners, with respect to the management and disposal of property. (*i*)

a woman,

want of discretion.

It cannot but be admitted that women are impulsive, and are carried away by their feelings and sentiments which control their actions, and to which their reasoning power is subordinated. Having regard to this natural defect in the character of women, Hindu law provides, that women must, in all stages of their life, be under the guardianship of their male relations

The Legislature appears to have accepted this principle in placing a woman possessed of large property under the Court of Wards, and in providing that she cannot deal with any property without the consent of her constituted legal guardian. The Privy Council has held that a woman, a Ward of Court connot even surrender the widow's estate without the sanction of the Court. (*j*)

Court of Wards

And accordingly the Courts also require proof, in cases of alienation by Hindu ladies, that they had disinterested

Special protection for her.

(*i*) D B XI 1, 64

(*j*) *See supra p.* 798.

and independent advice, and that the deed was explained to, and understood by them. (k)

Two points to be considered.

Alienation of moveables—There are only two questions that arise for consideration with respect to the alienation of moveables, namely, (1) the father's power of alienation over ancestral moveables, under the Mitákshará and (2) the widow's power over inherited moveables.

Mit father's power

As regards the Mitákshará father's power of alienation over ancestral moveables it has already been said that alienation to an outsider should be distinguished from unequal distribution without any justifying cause among the male issues who are also joint owners. Gifts of small portions, out of affection, to members of the family are expressly allowed. A bequest, of the bulk of ancestral moveables to one of two sons even, to the exclusion of the other, cannot be valid (l)

Restriction on Hindu widow

The restrictions imposed on a Hindu widow against alienation of the husband's estate, apply to moveables as well as to immoveables, in all the schools (m) excepting in Mithilá, and in Bombay as regards those that are governed by the Vyávahára-Mayúkha. (n)

Her position in Mithila

According to the commentaries of the Mithila school the widow's rights in property inherited from the husband are the same as in property *given* by him, that is, absolute in moveables, and limited to life-interest in immoveables. Hence inherited moveables should become the female heir's *Stridhan.*

In Bombay, it has been held that although under the Mayúkha a widow has absolute power of alienation over moveables inherited from the husband, yet she cannot bequeath the same by a Will. (o) It is no doubt true, that a usage has sprung up in some districts in Bombay, recognising widow's power of alienation over moveables upon the autho-

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(k) *Ante pp* 771-772 (l) *See ante pp* 367-368

(m) Collector v. Cavaly, 8 M I A 529, Bhugwandeen v Myna Baee, 11 M I A. 506, Narasingha v Venkata, 8 M 290

(n) Birajun v Luchmi 10 C 392, Harilal v Pranvalavdas, 16 B. 229, 233, in this connection see *ante pp* 734-735

(o) Gadadhar v Chandrabhag bai, 17 B 690, see 28 B 453

rity of Mayùkha, but it is difficult to find any passage in that work, supporting or justifying the said view.

In the other schools although a female heir has only the Hindu widow's estate in moveables as well as in immoveables, yet no other rule is laid down to preserve the rights of the next heirs in the moveable property inherited by a woman, than the provision that a widow must be subject to the control of the husband's kinsmen, as regards the management and the disposal of the husband's property This provision however has been deemed to be of moral obligation only in this view, however, it would be difficult to protect the reversioner's interest from defeasance by the widow's unauthorized disposal.

other schools

Hence it is observed with respect to that provision—"These are no doubt moral injunctions, but practical effect has always been attempted to be given to them so far as circumstances at the present time allow" *(p)*

Observation of Mitra

Alienation of a single co-parcener's interest—One of the fundamental points of distinction between the two schools, consists in the difference in the nature of tenure of joint property, in Bengal co-heirs take as tenants-in-common or to use the expression of Jimùtavàhana, the right of each co-heir accrues and extends to a fractional portion only of the joint inheritance, and acting together, force each other to limit its operation to and adjust itself distributively on, particular portions only of the aggregate, which portions existing from before, but not manifest, are only made known by partition One of the legal consequences deduced from this doctrine, is, that each co-parcener is free to alienate his share without the consent of his co-heirs.

Distinction between Mit and Daya on coparcenary

Whereas under the Mitàkshara, co-parceners are joint-tenants, the right of each extending to the whole estate, or whole estate being jointly vested in all the co-heirs, so that no one has any definite share in the property, which they hold as a corporate body. Hence no individual member can alienate any joint property in which he has not individually any right or interest as may be transferred. Though one

Mitakshara co-parceners

Incidents of Joint tenancy

(p) Durga v Chintamoni, 31 C 214, 220 8 C W N 11.

member alone is entitled to enforce partition and so cause the joint title to be converted into several ones, and have a separate share out of the aggregate, which share, if allotted exclusively to him alone, may be transferred by him according to his pleasure. A single member, however, may alone *as representing* the whole family alienate any joint property for a family purpose, the incapacity relates to an alienation of his own interest only for his personal purpose.

Transfer of co-parcener's interest.

Rule relaxed in Bombay and Madras

The Mitakshara law incapacitating a co-parcener from alienating his undivided co-parcenary interest has been modified to some extent in Madras and Bombay by the operation of the principles of equity, in favour of purchasers for value, founded on the co-parcener's unrestricted right to call for partition (q)

but not in gifts and bequest

But as regards volunteers *i e* donees and legatees, the old rule against alienation of undivided co-parcenary interest is strictly maintained, and no member of a joint family in India can make a valid *gift* or *bequest* of his joint interest. (r) Hence a bequest by the father cannot be validated by even the consent of his son who is the only other member of the joint family to the extent of his father's undivided share in the joint family property. (s)

Alienation co-widows and daughters,

* The tenure of property inherited by co-widows or two or more daughters is deemed to be unseparable joint-tenancy so that there cannot be such a partition between them as to a division of title and the conversion of the joint estate into two separate estates to be held in severalty, hence one cannot make any valid alienation without the consent of the others. (t) But there may be a division of possession by agreement between them, or even by a decree of Court, for the limited purpose of securing to each a distributive enjoyment of the benefit of the joint property, but keeping intact the right of survivorship. (u) They may also divide the property by

when they can divide property,

(q) *See pp* 415-416 and 425 *supra*

(r) *See pp* 422, 424, 549 *supra*, Jamnadas v Gardhands, 1926 B. 463

(s) Bhikhabhai v Purshottam, 50 B 558 1926 B 378

* *See ante pp* 749-754

(t) Gajapati v Pusapati, 16 M 1 19 I A 184

(u) Dal v. Panbas, 8 C W.N. 658, *see pp* 750-751 *supra.*

contract, and agree to release their mutual right of survivorship and take possession of their shares with power of alienation, and so each may take an estate in her share during the life of both, so that the survivor is not entitled to claim any property alienated by the deceased, the alienee being entitled to hold it during her life also. (*v*) It is also held that one of them may alienate her life-interest in the estate. (*w*) And it is further held that a compulsory sale in execution of a money-decree of her life-interest would entitle the purchaser to hold it for her life. (*x*)

life-interest alienable

Alienation by non-owner.—A Sebayet or trustee managing an endowed property and a guardian managing an infant's estate, may in certain circumstances alienate the property under their charge, although they have no personal interest in the same. (*y*) So the Kartà or a member of a joint-family may make a valid alienation of the interests of himself as well as *of other members*, in a joint property under certain circumstances (*z*) Similarly a Hindu widow or other female heir whose right of alienation in the property inherited by her, is ordinarily restricted, may make a valid transfer for raising money for certain purposes. (*a*)

Alienation by *sebayet* *karta*, widow or other female heirs

All these analogous cases are governed by the same general principles The circumstances justifying transfers may vary in the different cases, but they must come under one of two heads, namely, either Necessity or Benefit to the estate, or to the person, including spiritual benefit. The lender or the transferee is bound to enquire into the necessity or the benefit

Presence of necessity or benefit required

The leading case on this subject is, that of *Hunooman Parsad Pandey.* (*b*) This classical judgment of the Judicial Committee was pronounced with respect to the power of a manager of an infant's estate. The principles laid down are as follows,—

Principles laid down in *Hunooman Parsad's* caes.

(*v*) Ramakkal *v* Ramasami, 22 M 522, *see p* 751 *supra*
(*w*) Vadali *v* Kotipalli, 25 M 334, *see p* 752 *supra*
(*x*) Ariyaputri *v* Alamelu, 11 M 304, *see p* 758 *supra*
(*y*) *See ante p* 886 etc
(*z*) *See ante, p* 382 etc
(*a*) *See ante p* 756 etc
(*b*) 6 M I A 393 18 W.R 81

i necessity

1. "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of *need* or for the *benefit* of the estate.

ii action of a prudent owner,

2. "But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona-fide* lender is not affected by the precedent mismanagement of the estate.

iii avoid pressure, and danger,

3. "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded.

iv lender to enquire,

4. "The lender is bound to enquire into the necessities for the loan, and satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting, in the particular instance, for the benefit of the estate.

v *bona-fide* creditor,

5. "If he does so enquire, and acts honestly the real existence of an alleged, sufficient and reasonable credited necessity, is not a condition precedent to the validity of his charge" in other words, "a *bona fide* creditor or transferee should not suffer when he has acted honestly and with due caution, but is himself deceived And

vi may not see application of money,

6. "Under such circumstances, he is not bound to see to the application of the money"

In the case of *Kameshwar Persad* v. *Run Bahadoor*(*c*) in which a mortgage executed by a Hindu widow was sought to be enforced against the reversioner, their Lordships held that those principles laid down in the case of *Hunooman Persad Panday*, apply—"not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitàkshará law, has made an alienation of ancestral family estate. (*d*) The principle broadly laid down is, that although the lender is not bound to see to the

principle applied.

(*c*) 8 I.A 8, 11 C C 843

(*d*) *See supra pp* 439-442, 444-453

application of the money,(*e*) and does not lose his rights if upon a *bona-fide* inquiry he has been deceived as to the existence of the necessity which he has reasonable grounds for supposing to exist, he still is under an obligation to do certain things." Then their Lordships cite from the judgment passages set forth above in paragraphs 4 and 5. And their Lordships go on to observe—"such being the law any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to shew the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities." As to the power of a widow to borrow for the purposes of a trading business inherited by her on the credit of its assets see *Sham Sunder* v *Achhan*, (*f*) *Sakarabhai* v. *Maganlal*. (*g*)

Widow's power of borrowing for trade

And in the case of *Prosunno Kumari Debya*, their Lordships held that those principles apply also to the power of a Sebayet and manager of property dedicated to the worship of a Deity Their Lordships say,—"The authority of the Sebayet of an idol's estate would appear to be * * * analogous to that of the manager for an infant heir, which was thus defined in a judgment of this Committee, delivered by Lord Justice, Knight Bruce," and then the above passages are cited. (*h*)

Prosunno Kumari v *Golab*

As regards the capacity of the *Pardanashin* Hindu ladies to alienate property, it should be borne in mind that the status assigned, and appears to be rightly assigned, to them by Hindu law, is, that of life-long pupilage or tutelage Hence they should be permitted to exercise this exceptional power only in cases of need or preservation of the estate. (*i*)

Alienation by *pardanashin* ladies.

(*e*) *See supra p* 393 and also *pp* 766-767.
(*f*) 25 I A 183, 192
(*g*) 26 B 206 3 Bom L R 738 , *see* also *p* 768 *supra*
(*h*) 2 I A. 145, 151 , *see foot note* (*d*) *p* 888 *supra*.
(*i*) *See supra pp* 759-765

by executors, trustees &c.

Other persons competent to transfer property not their own are Executors, Administrators, Trustees, Partners, Agents and the like, who are authorized by statutes or by the owner's express or implied consent. These cases are merely alluded here, the power of the two first is discussed later on.

§ 38 of Transfer of Property Act

The principles so lucidly enunciated by their Lordships in *Hunooman Persad's* case, and applied to other cases of analogous character, have been adopted and embodied by the Indian Legislature in Section 38 of the Transfer of Property Act.

Sub Sec iii —PRE-EMPTION

Pre-emption allowed in Behar,

The law of pre-emption was introduced into India with the Mahomedan government. The province of Behar was an integral part of the Mahomedan Empire and consequently in Behar the right of pre-emption was adopted and is enforceable irrespective of the parties concerned (*j*) It also applies among the Hindus of the District of Sylhet. (*k*) The pre-emptor must be either a native or domiciled in place where custom prevails. (*l*) The right is to some extent made applicable in the Punjab by statute (*m*) Where no special custom is pleaded, a claim by a Hindu for pre-emption must be tried on the principles of justice, equity and good conscience. (*n*)

Sylhet

the Punjab

Formalities to be observed

Where there is no local custom of the right of pre-emption amongst the Hindus, the Mahomedan law of pre-emption will not apply, if the claimant and the vendor are Mahomedans but the vendee is a Hindu (*o*) When in such a case, the Hindu vendee, the Mahomedan vendor and the Mahom-

(*j*) Jadu *v* Janki, 39 I.A 101, 106 39 C 915 16 C W N 553 15 C L J 483: 23 M L J 28 9 A L J 525 14 Bom L R 436 15 I C 659, Tokh *v* Ram, 90 I C 806 1925 P 743, Jadu *v*. Janoki, 35 C 575

(*k*) Nabin *v* Rajani, 25 C W N 901, 904 63 I C 196.

(*l*) Parsasth *v* Dhani, 32 C 988, 3 Pat L T 556, 67 I C 706, 24 W R 95

(*m*) Act XII of 1878, Punjab Customs 186

(*n*) Kheyali *v* Mullick, 20 C W N 1048 (pat)

(*o*) Ajimtulla *v* Jadav, 30 C W N 272, Furman *v* Bhurut, 13 W R, F.B. 21, *but see* Gobind *v* Inayatulla, 7 A 775 F.B

edan claimant considered that the law of pre-emption was applicable, it was held that the question as to the applicability of the law against a Hindu vendee was not necessary. (p) In this connection, *see ante pages*, 392, 446.

Formalities to be observed

Where the pre-emption is claimed by a Hindu, he must comply with all the requirements of Mahomedan law (q) When preference is claimed among rival *claimants by* reason of relationship with the vendor, it must be shown that they are descended from the common ancestor. (r) A son in a joint family cannot maintain a claim to pre-empt a sale of joint family property made by the father as manager for legal necessity (s)

Sec 3—GIFTS

Sub-Sec 1—CLASSES OF GIFTS

Gifts are of four classes

The subject of gift is discussed in the Hindu codes and commentaries, under the Head Topic of Litigation, or Form of Action, called Resumption of Gifts, where gifts are divided into four classes, namely, (1) *proper*, (2) *improper*, (3) *valid* or (4) *invalid* the original words being *deya* (देय = what should be given) *adeya*, (अदेय = what should not be given) *datta* (दत्त = *given i e*, irrevocably) and *a-datta* (अदत्त = ungiven).

1 proper,

1. A *proper gift* consists of the donation of the donor's own property, which is not prohibited. If a person has more property than what is sufficient for the maintenance of those he is bound to support, he may make a *proper* gift of the excess. The Hindu Codes recognize a man's proprietary right over his wife and son, but condemns a gift or sale of them hence a gift of them would be *improper*, as appears from what follows.

(p) Sitaram v Syed, 45 B 1056 48 I A 475 24 Bom L R. 595 26 C W N 221 : 64 I C 826 1922 P C. 41

(q) Nabin v Rajani, 25 C W N 901, 905 63 I C 196.

(r) Manji v Bhagole, 1929 A 419

(s) Pratap v Shiam, 42 A 264 18 A.L J 116 · 55 I C 37, but see Hiwanchal v Ajodhya, 1929 O. 265 F B

ii improper,

2. Subjects of *improper gift* are, either what are not the donor's own or exclusive property (though they are in his possession), or are what is forbidden to be given away they are enumerated in the following text of Nàrada, thus,—"The sages declare that a person cannot, even when placed in distressful calamities, make a *proper* gift of a thing entrusted to him by its depository, or borrowed (by him from another), or pledged (to him), or what is joint property (of himself and his co-parcener), or what is deposited (with him by another), or his son, or wife, or entire property, or what has been promised (to be given to onother)."

enumerated by Narada

and Mitàkshara's comment,

The Mitàkshara in commenting on this text says, that the text is intended to lay down the subjects of *improper gift* but not to indicate want of ownership, because the ownership does exist in son, wife, entire property and what is promised. It would appear therefore that a gift of these though *improper* may be valid, in those cases in which the donor is owner. For, in the same chapter, there is the following text of Yàjnavalkya,—"The acceptance of a gift shall be public, especially of immoveable property"—and the Mitàkshara introduces this text, thus,—"In this text the sages declare that the acceptance of property of which the gift is *improper* should be publicly made by the donee" So it appears that a *bonafide* donee without notice cannot be blamed if the thing given do not belong to the donor.

iii valid,

3 A *valid* (दत्त) gift is defined to be what has been made by a person of sound mind, and is not liable to resumption. Nàrada describes seven kinds of gifts that are lawfully made and cannot be resumed, in the following text—"The learned in the law of gifts, what is given as the price of goods sold, or as remuneration (to an artizan or the like), or for the pleasure (of hearing bards, musicians or the like), or out of affection (to a daughter or son), or in return for a benefit, or for the purpose of the bride's price, or for the purpose of spiritual benefit."

Thus it appears that a gift for consideration is recognized by Hindu Law.

4. An (अदत्त ungiven or) *invalid* gift is defined to be that which is liable to resumption. Nárada describes sixteen kinds of gifts which are illegally made and may be resumed as if *not-given*, in the following text,—" But (1) what is given by persons under the influence of excessive fear or (2) wrath, or (3) grief, or (4) suffering from disease, (5) what is given a bribe, or (6) in jest, or (7) through fraud, (8) what is given and" regiven or (what is given by mistake), (9) what is delivered by an infant (who has not reached the sixteenth year), (10) an idiot, (11) one not *sui juris*, (12) one overwhelmed by disease, (13) a drunkard, or (14) madman, (15) what is given with the desire of getting a return in the shape of performance by the donee, of some work (if not performed), or (16) what is given to a person not a proper object of the gift but representing himself, and mistaken by the donor through ignorance, to be a proper object, or for the performance of a religious act (falsely stated by a badman who really wanted to use the same in gambling and the like)—all this is ordained *invalid* gift (as if *not given*).

iv invalid

The fifteenth instance shows that a gift may be subject to a condition subsequent , and the gift is liable to defeasance on the non-fulfilment of the condition

Conditional gift

The author of the Mitàkshara concludes the subject of gift thus—" He who *accepts* any of the sixteen kinds of *invalid* gifts and he who *gives* an *improper* gift, the punishment of both of them is declared by Nàrada in the following text, namely,—"He who out of covetousness accepts an *invalid* gift, as also he who gives an *improper* gift, the donor of the *improper* gift should be punished, and likewise the acceptor of the *invalid* gift."

Giver and taker of invalid gifts

It should be observed that the enumeration of *improper* gift includes four kinds of property of which the donor is not owner, but holds the same as trustee With respect to the gift and acceptance of the same, the following provision found in an early chapter of the second book of the Mità-kshara (on sloka, II, 24).—"Punishment is ordained for the gift and acceptance of what is not (the donor's) pro-

What are improper gifts.

perty,—in the following text,—"He who accepts an *improper* gift (knowing that the donor is not its owner), as also he who gives an *improper* gift, both of them should be punished like thieves, and the highest penalty shall be inflicted on them."

There appears to be a distinction between *improper* gifts of which the donor is the owner and those of which he holds possession as mere trustee but is not owner.

Sec 108, Contract Act,

According to the Indian Contract Act, Section 108, a person in possession of goods by the consent of the owner, may give a good title to *banafide* buyer without notice But a volunteer donee has no such equity as may be invoked in favour of a *bonafide* purchaser for value.

Improper gifts not invalid when donee is owner

It should be observed with respect to the gifts of one's own property, which are ordained *improper* as set forth above that they are valid in law, though *morally* wrong, and that the donor is not intended to be liable to punishment for making them, his ownership being admitted, he must be held to be legally competent to make a valid gift, sale or the like alienation. Among these *improper* gifts is included the *gift of son*, which according to some Commentators applies one to the *gift of an only son*. But the *gift of a son*, whether of any son, or of an only son, is only *improper*, and *not invalid*, though the father's ownership over the son, is at persent restricted as regards alienation, only to a gift for adoption. The principle of *factum valet* is properly applicable to this case.

Sub-Sec 11—DEFINITION AND REQUISITES OF GIFT

Gift defined,

Gift is defined by Hindu lawyers, to be the creation of another person's proprietary right after the extinction of one's own proprietary right in the subject matter of the gift. The Mitáksharâ (on Yajnavalkya's sloka ii, 27) says,—"Gift consists of the extinction of one's own property, and the generation of another's property , and if that another *accepts*, then and not otherwise the genaration of another's property becomes complete (or effectual or operative). The acceptance again, is threefold namely, mentel, verbal, corporeal : mental acceptance consists of the utterance of the concept of relation

when complete

(between himself and the thing given as owner and property), by an expression like—"This becomes mine"; but corporeal acceptance is manifold, consisting of receipt or touch (of the thing given), or the like."

Mental acceptance when presumed

Mental acceptance appears to be presumed from the silence of the donee when in his presence a gift is made by the donor in his favour, or when he receives a thing sent to him as gift or persent, or is informed, of the gift, according to the maxim,—"what is not prohibited or dissented from, becomes permitted or assented to."

When donee's right accrues

Difference between Dayabhaga and Mitakshara on gift and acceptance.—It should be observed that there are two factors in a gift, namely, (1) the extinction of the donor's right, and (2) the creation of the donee's right In the Dáya-bhága there is an interesting discussion of the question whether it is only by the donor's act of relinquishment of his right over the thing in favour of the donee, or it is also by the donee's act of acceptance of the thing, that the donee's right over the same accrues ? The learned author of that treatise maintains the first, and controverts the second position that acceptance by the donee is also necessary in addition to the donor's act, for the completion of gift he refers to a grammatical rule, according to which a word formed by the suffix *tri* being affixed to a verb, signifies the agent, on whose exertion depends the completion of the act imported by the verb, and therefore the word *dátri* or donor formed by annexing *tri* to the verb *dá* (—Latin *do*) meaning to give, must signify the person by whose act the *giving* is completed, and goes on to point out that if acceptance by the donee be admitted to be necessary for the completion of a gift, then the donee would become the donor. Accordingly he maintains that both the effects, namely, the cessation of the donor's right and the accrual of the donee's right are caused by the donor's act of *giving*. No doubt the gift cannot become effectual or operative without acceptance by the donee. If he refuses to accept, then according to the Dáyabhága his right which accrued by the donor's act

Dayabhaga.

becomes extinguished and a new right accrues to the donor as if the property were never appropriated by any person.

Mitakshara.

The above passage of the Mitàksharà may be construed to support either view, but the Mitàksharà school appears to hold that gift itself is incomplete without acceptance

Distinction between them

Thus it is clear that there is an important distinction between the two schools with respect to the requisites of a valid gift according to the Mitàksharà school acceptance is necessary, there can be no complete gift without the donee's consent, whereas according to the Bengal school the donor's act of giving alone completes the gift It would no doubt be infructuous and ineffectual in case of non-acceptance by the donee, but practically the assent of a person may always be presumed to that which is beneficial to him.

Rule of English law

The accepted rule of English law is stated by Shephard and Brown in their commentary on the Transfer of Property Act, to be, that "when once the donor has done his part in transferring the property, it vests in the donee, subject only to his dissent. It is not positive consent, but absence of dissent, which is required to make a gift complete and irrevocable.

When acceptance by consent necessary

It should, however, be observed that acceptance by positive consent must be necessary, if the gift be *onerous* or *conditional i e*, depending on a condition to be fulfilled by the performance or non-performance of something by the donee.

Acceptance when complete according to Mit.

The Mitàksharà school may seem to go further, and to require possession or actual enjoyment by the donee for the completion of acceptance. Since it goes on to say (Mit, on Yaj ii, 27),—"As receipt or the like may be made immediately after the bestowal of water (by the donor, accompanying the act of giving,—being the prescribed ceremony for gift,—") (*t*) on gold, cloth or the like (moveable property), even the threefold acceptance becomes completed. But in the case of a field or the like (land), without the enjoyment of the fruit, corporeal acceptance is not posible, there must be even a slight enjoyment, otherwise, there is no completeness of a

(*t*) Text No 11*a ante p* 973

gift sale or the like (transfer). A title without corporeal acceptance consisting of the enjoyment of the fruit (produce) is weaker than a title accompanied by enjoyment This is so, in the absence of knowledge of the prior or posterior date of the two , in case of knowledge of the prior and the posterior time, the title of the prior date, though defective (in that way), alone prevails."

Above discussion relates to proof

It should, however, be noticed that in the above passages of the Mitàkshará, the subject dealt with is the proof of priority between two persons claiming title to the same property and the requisites of gift are incidentally discussed, and the question of possession is considered with respect to all kinds of transfer, as a factor determining priority of two titles ; and where their chronological priority is not known, there a title created by a gift, sale or the like, when accompanied by possession, is stronger than another title without possession. Where such priority is known, there the title prior in point of time prevails. But this is different from what are required for the completion of a gift as between the donor and the donee

Requisites of gift·

i subject certain, ii voluntary act, iii must be accepted.

Transfer of Property Act affects Hindu law as to mode of gift.—According to the definition of Gift in the Transfer of Property Act, Section 122 the requisites of a valid gift are as follows,—(1) the subject of the gift must be certain existing property, (2) it must be made voluntarily and without consideration and (3) it must be accepted by or on behalf of the donee during the life-time of the donor and while he is still capable of giving. but "if the donee dies before acceptance, the gift is void."

It should be noted here that the provision to the effect that nothing in the second chapter of the Transfer of Property Act shall be deemed to affect any rule of Hindu law, has now been repealed by Act XX of 1929 and the whole of the second chapter is now made applicable to the Hindus.

Agreeably to the Transfer of Property Act, a gift may be made to an unborn person, subject to certain conditions : see Sections 13 and 14 corresponding to Sections 113 and 114 of

the Indian Succession Act. Hence Section 122 defining gift cannot be taken to mean that the donee must, in all cases, be in existence at the time of gift. Acceptance before death of the donee, therefore, does not imply that the donee is actually in existence when the deed of gift is executed. The Chapter on Gifts, did not affect any rule of Hindu or Buddhist law, save as provided by Section 123. By the amendment of Section 129 by Act XX of 1929 the whole of this Chapter is now made applicable and the Hindu law on the subject of gift is thereby abrogated.

Acceptance.

§ 123 Transfer of property Act applies to Hindus

Hence Section 123 which prescribes the mode of effecting a gift, *does* affect the rules of Hindu law on the subject. It says that a gift of immoveable property must be effected by a *registered instrument* signed by or on behalf of the donor, and attested by at least two witnesses. (u) And a gift of moveable property may be effected either by a *registered instrument*, signed by or on behalf of the donor, or by *delivery*.

How delivery made

moveables,

The Section goes on to say—"Such delivery may be made, in the same way as goods sold may be delivered," that is to say, "by doing anything which has the effect of putting the thing given in the possession of the donee, or of any person authorized to hold them on his behalf" see the Contract Act, Section 90 and the illustrations under it But with respect to *delivery* for effecting the *sale* of tangible immoveable property of a value less than one hundred rupees, section 54 says that such "*delivery* takes place when the seller places the buyer, or such person as he directs, in possession of the property." The former relates to moveables, and the latter to immoveables and hence there is this difference between the two cases, as to what constitutes *delivery*

immoveables.

Complete gift how effected

But as regards the mode of effecting a complete gift by delivery of possession, the rule of Hindu law is changed with respect to both moveable and immoveable property, by Sec-

(u) Gift for religious charity exempted from the operation of *Sec.* 123 *see ante p.* 861.

tion 123 which provides two alternative modes for moveables, namely, either *delivery* or *registered instrument*, while the latter is the only mode it provides for a gift of immoveable property, although a sale of such property when tangible, and of a value less than one hundred rupees, may be made in either of the two modes as in the case of a gift of moveable property.

Possession in sale, mortgage and gift how effected

It is difficult to understand the principle of the distinction, why possession alone is deemed sufficient for *sale* (Section 54) as well as for *mortgage* (Section 59), but not for *gift* of the same property. (v)

Delivery of possession not indispensable

Practically, however, possession must accompany or follow in the majority of instances of gift of both moveable and immoveable property, although it may not be held as an indispensable requisite for a complete gift, and it is doubtful whether even the Mitâksharâ school regards possession as the *sine qua non* of a gift, or as a mere factor for determining the priority between two rival transfers of the same property.

Having regard to the amendment of Sections 2 and 129 of the Transfer of Property Act, the Hindu law of gift based on texts has, practically, become of no importance being replaced by the Transfer of Property Act.

Registration is no completion of gift

Delivery of registered deed, Possession and Registration.—Although according to the provisions of section 123, there cannot be a gift without a registered deed, it does not necessarily follow, that if there be a registered deed of gift, there must be a complete and irrevocable gift. Suppose a person intending to make a gift of a piece of land for residence to a person whom he believed to be a meritorious and virtuous man reduced to poverty for no fault of his own, executes, without the latter's knowledge, a deed of gift, and causes it to be duly attested and registered, and gets back the document from the Registration office, but in the meantime he discovers that the fellow is addicted to a vicious course of life, and has on account of it squandered his patrimony and is not at all a worthy object of bounty ; so he

Example

(v) Section 123 of the Transfer of Property Act.

changes his mind, destroys the registered deed, and makes a gift of the same property to another worthy person, by another registered deed in which are recited the facts of the due execution and registration of the first deed, of its not having been acted upon and given effect to, and of its destruction, and delivers the second deed to the donee who is also put in possession.

Surely in such a case the intended donee of the first deed of gift, cannot claim the property by virtue of that deed alone, because the other requisites of gift are wanting. Similarly, a sale also cannot be effected by a registered instrument alone for, the intention of the executant may be not to transfer the property but only to keep it *benami* in the name of the nominal buyer, with or without his knowledge.

Delivery of deed necessary.

The delivery of the deed to the transferee seems to be necessary for completing the transaction it would be conclusive evidence of the transferor's intention to do so

Whether delivery of possession necessary in all cases.

It has already been observed that although delivery of possession affords important evidence of transfer, still under the Hindu law the same was not absolutely necessary for the completion of a gift, if the other ingredients were present. In a case where the donor who was out of possession, did all that lay in his power to do to complete the gift, and acceptance by the donee was proved, the gift was held valid according to Hindu law, as between the donee and the wrong-doer in possession, though the donor could not deliver possession to the donee. (*w*) Possession was deemed necessary under the Hindu law as tantamount to acceptance of immoveable property. Hence in the absence of some possession or acceptance, a registered deed alone is held not sufficient to make the gift complete, in a case not governed by the Act. (*x*) Although under the Act, delivery of possession is not necessary in addition to a registered deed of gift, still acceptance is required. (*y*)

(*w*) Kali Das *v* Kanhya, 11 I A 218
(*x*) Lakshmoni *v.* Nittyananda, 20 C 464
(*y*) Dharmodas *v* Nistarini, 14 C 446, Bai Rambai *v* Bai Mani, 23 B 234.

But it should be borne in mind that according to the Bengal school, acceptance by the donee is not necessary, the transfer of property being effected by the donor's act of giving. This doctrine, however, does not appear to have been brought to the notice of the Courts.

Whether acceptance necessary

A Full Bench of the Allahabad High Court has held that after the passing of the Transfer of Property Act, delivery of possession is not essential to the validity of a gift made by a Hindu. (z)

Delivery not essential,

The Lahore High Court holds that it is not essential under Hindu law that possession of the gifted property should be actually transferred from the donor to the donee especially when the donee is a minor and lives with the donor. (a) In a similar case it is not necessary for the husband to vacate the house which was the subject of the gift by the husband to the wife and in which they were both residing from before the date of the gift (b)

Compulsory registration

When the law requires a registered deed, it appears to be necessarily implied that not only the execution, but also the registration of the deed should be voluntarily made by the donor, hence a deed of gift registered compulsorily would not be sufficient (c) But it has been held that a deed of gift executed by the donor, but registered at the instance of his widow after his death, is efficacious and valid (d) There is, however, an important distinction between the Registration Acts and the Transfer of Property Act with respect to registration The Registration Acts do not require any transfer to be made by writing, in fact all transactions amongst Hindus could be effected by word of mouth only all that the Registration law requires is that if certain transfers are made by writings they must be registered within a certain time after execution, hence a transfer may take effect from the date of execution of the document, and not from that of its registration But the Transfer of Property Act does, for the first time, require that certain transfers can now be *effected only* by registered instrument, there is no transfer of property, therefore, before registration The words of Section 123 are— 'For the purpose of making a gift of immoveable property, the *transfer must be effected* by a registered instrument" It is clear that there can be no gift *before* registration, the transfer of the property is not effected by the execution of the

Registration after death of donor

When registration necessary

(z) Lallu v Gur, 45 A 115 F B 20 A L J 744. 18 I C 798 1922 A 467
(a) Sarwan v Mansa, 1930 L 145
(b) Dhanna v Parmeshari, 1928 L 9
(c) Ramamritha v Gopala 19 M 433 : 6 M L J 207.
(d) Nandkishore v Suraj, 20 A 392, Meiyyalu v Anjalay, 25 M 672 12 M.L. J. 409

instrument of gift, *registration* like acceptance, being necessary to complete a gift under this Act There is no necessary presumption that the executant intended to complete the gift, because he executed the deed If he did not cause it to be registered when he could, there is rather a presumption in the other way If those words be construed to be equivalent to—"the transfer must be effected by an instrument which is to be registered," then a gift may be effected by a deed executed by the donor and registered by his legal representative after his death, and then there may also be compulsory registration, if the other requirements are proved to have been complied with The question is beset with considerable difficulty which is probably sought to be removed by declaring that Sections 54, 59, 107 and 123 of the Transfer of Property Act requiring registered instruments for effecting transfers shall be read as supplemental to the Registration Act, (Section 4, Transfer of Property Act), but what is intended is not clear

There were various conflicting decisions on this question and particularly of the Madras (*e*) and Bombay (*f*) High Courts, but the matter is set at rest by the Privy Council (*g*) by holding that on delivery of the deed to the donee there was an acceptance of the transfer as contemplated in Section 122 of the Transfer of Property Act, and thereon the gift became effectual, subject to its registration as required by Section 123.

Transfer of G P notes how effected.

G P. Notes.—The recognised mode of transferring Government Promissory Notes and the like, is, by endorsement, hence mere delivery of such property without endorsement is not sufficient to effect a gift. Accordingly a person claiming to hold such notes standing in the name of the donor, as donee by delivery of possession, was held not entitled to the same, the gift being incomplete without endorsement. (*h*) But the delivery of such notes to the donee in contemplation of death by the donor, but without endorsement, was held to be sufficient to vest them in the donee (*i*) and to entitle him to compel the donor's legal representative to endorse the same to him after the donor's death (*j*)

(*e*) Venkati Rama *v* Pillati, 40 M 204 F B

(*f*) Atmaram *v* Vaman, 49 B 388

(*g*) Kalyanasundaram *v* Karuppa, 50 M 193 31 C W N 509

(*h*) Khursedji *v* Pestonji, 12 B 573, Merbai *v* Perozbai, 5 B 268, 277

(*i*) Upendra *v* Nabin, 3 B L.R O C 113

(*j*) Visalatchmi *v* Subbu, 6 M H C 270

Sub-Sec. ii(a)—CONDITIONAL GIFT & DONATIO MORTIS CAUSA

Conditional gift —*It has already been observed that conditional gifts are recognized by Hindu law, and it has been held by the Courts that when a gift is otherwise valid it may be accompanied by conditions imposed on the donee, such as performing the worship of the donor's family God, or furnishing maintenance to the donor himself or to any other person.

Condition subsequent,

A gift may be made subject to a condition subsequent, that the property should pass over to another person on the happening or non-happening of some uncertain future event (*k*) It is held by the Judicial Committee that a Hindu has power to make a conditional gift of property whether by way of remainder, or by way of executory bequest, upon an event which is to happen, if at all, immediately on the close of a life in being (*l*) The donee to whom the gift over is made must be alive and capable of taking when the gift speaks, and the gift is to take effect on the death of a person then alive. (*m*)

Donatio Mortis Causa

Under the category of conditional gifts, comes a gift made in contemplation of death, the gift being defeated or revoked on the recovery of the donor It has been held by the Madras High Court that effect must be given to a gift in contemplation of death, when all the requisites for a valid gift under Hindu law have been fulfilled, namely,—"A giving either orally or by writing with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's life-time." The thing must be proved to have been delivered with the intention of making it the property of the donee from the time of delivery subject to a conditional right of resumption. (*n*)

Sub Sec iii—MAINTENANCE GRANTS

Hindu law same as, § 8 of Transfer of Property Act

The definition of gift (*o*) shows that by the donor's act of giving, his ownership in the property given becomes extinguished, accordingly when a Hindu makes a gift by the

* *See post*, Sec 4, Sub-Sec v " Estate, Limitations "
(*k*) Hira *v* Anmol, 1928 A 699
(*l*) Soorjeemoney *v* Denobundhoo, 9 M I A 123, 135
(*m*) Tarokessur *v* Soshi, 9 C 952 16 I A 51
(*n*) Visalatchmi *v* Subbu, 6 M H C 270 , *see* Bhaskar *v* Saraswatibai 17 B 485, 495 , *see also* Upendra *v* Nabin, 3 B L R O C 113 (*o*) *Supra p*. 991.

simple words—"I give this property to you"—he passes to the donee all the interest which he is then capable of passing in the property : hence the donee must be entitled to all the rights of the donor, in the absence of reservation either express or necessarily implied. The rule of Hindu law on this subject is the same as is laid down in the Transfer of Property Act, (Section 8) and the Succession Act (Section 95). This is the modern rule of construction of grants, according to which a grant is construed strongly against the grantor who cannot be said to have intended to retain any rights in the subject matter of the grant unless there be words in the grant itself, expressing or necessarily implying such intention.

Maintenance grant presumed for life.

When, however, a grant is expressed to be made for the grantee's maintenance, which he requires only for his life, then the grant is presumed to be limited to his life only, unless it is expressed or necessarily implied to be heritable. In the case of *Rameshar Baksh Singh* (*p*) it has been held by the Judicial Committee that when a grant for maintenance is made by the holder of an impartible estate to a junior member of a joint family, it is *prima facie* the intention that the gift should be for life. The same view is thus expressed in the case of *Maharani Beni Pershad* "Their Lordships will not discuss at length the terms of the grant, which was expressly made in 'lieu of maintenance.' It was, therefore, *prima facie* resumable on the death of the grantee in accordance with the law laid down in the cases cited by the Subordinate Judge" (*q*)

P C on *Rameshar's*

Beni Pershad's,

and *Titurain's* cases

In the case of *Titurain Mukherjee*, the same principle is applied to a maintenance grant made to a junior member, the terms of which were not known : "It remained only to say what could be presumed as to the nature of a *Khorposh* grant, the existence of which is not disputed, but of the terms of which there is no direct evidence. Both Courts in India held that the most that could be assumed as to the duration of such a grant, was that it was for the life of the grantee. They

(*p*) Rameshar v Arjun, 23 A 194 28 I A. 1,
(*q*) 26 I.A 216, 220.

further held that such a grant, regarding it as one for the life of the grantee, could not be presumed to be more than a grant of rents and profits, and could not be presumed to carry with it a right to open mines and remove minerals which are a portion of the soil. In these conclusions their Lordships concur." (r)

Principle laid down in above case

This case lays down an important principle, namely, that when rents and profits only and not the *corpus* of any land are presumed as intended to be assigned, as in the case of a maintenance grant resumable at the grantee's death, (s) the assignee is entitled only to the income yielded by the the surface of the land and not to the subsoil or underground rights, such as those of opening mines and raising coals or other subjacent minerals forming part of the soil whereof the proprietary interest was not transferred to the grantee. (t) The same principle appears to apply to service-tenures in which the usufruct only of the land granted, is intended for enjoyment by the holder of the service in lieu of his remuneration, during the continuance of his service.

Right to minerals

Presumption when grantee and his heirs are in long possession.

But where the members of a junior branch entitled to maintenance have for three generations held lands granted by way of maintenance without any interference on the part of the Zemindar for the time being, either by way of confirmation or revision, the successive enjoyment justifies the presumption that the grant was intended to pass all the interest in the land for the support of the grantee and his heirs in perpetuity (u)

Grants to donee and his heirs in male line.

It has already been observed (v) that there are maintenance grants made by the holder of an impartible estate to junior members, and intended to be held by them and their heirs male in the male line, which are said to be resumable on the indefinite failure of male issue, by the holder of the impartible estate for the time being. But such grants contravene the principle enunciated in the Tagore case, and

(r) 33 C 203, 217 32 I A 185 9 C W N. 1073 2 C L J 408 3 A L J 59 7 Bom L R 920 15 M L J 379

(s) Yarla v Ramasami 4 M 193

(t) *See ante p* 959

(u) Salur, Zemindar of v Pedda, 3 M 371.

(v) *See ante p* 960

would involve great deal of hardship and injustice by disturbing the titles of *bona fide* purchasers for value without notice ; if they be alienable as they are held to be by the Judicial Committee in the case of *Rajah Nursing Deb.* (w)

Resumable grant is unknown,

The grant of an estate resumable on indefinite failure of male issue is unknown to Hindu law They may be recognised as assignments of the rents and profits only and not of the land itself, intended for enjoyment successively by the grantee and his heirs male in the male line for their lives, the grant being confirmed, as it were, after the death of each life-tenant, to his heirs male. If such resumable maintenance grants be recognised as valid, then they should, as has already been said, be held *inalienable* as being an interest in property restricted in its enjoyment to the grantee and his heirs male personally, and as such, cannot be transferred by any of them, according to the principle laid down in the Transfer of Property Act, Section 6, Clause (d) and specially the new clause (dd). This would offend the English Law's abhorrence of inalienability of property but it appears to be the only view consistent with the principles of the Mitákshará law of joint families and impartible estates. In one case it has been held that a maintenance grant may be heritable, but not necessarily alienable. (x)

but how upheld.

Sub-Sec iv—GIFTS TO WOMEN

Gifts to women,

When grants made to women and specially to widows appear to be intended as provisions for their maintenance then a presumption arises in favour of their construction as conveying life-estates only, unless there be distinct words to show that the interest given is heritable and alienable. Such a construction is undoubtedly consistent with the ordinary ideas and wishes of Hindus who do not desire their estate to pass out of their family. Accordingly grants to women have been held to create only life interest, though the grantee may be declared to become "heir and *malik*" (y) or

(w) 9 M I A 55, 64-5, *see also* Kopilnauth v Government, 22 W R 17 and the Durbhanga Babuana cases at p 955 *supra*

(x) Bhaya Dirguj v Pande Fateh, 3 C L J 521

(y) Shmsool v Shewukram 2 I A 7, 14 22 W R 409

" owner", (z) or " owner " just as the grantor is owner. (a)

Gift by husband —* There is not, however, any general rule of Hindu law that a disposition in favour of women creates only a limited interest, such as they have in property inherited from a male relation according to the Bengal school. But there is a special rule applicable to a gift by a Hindu husband to his wife, of *immoveable* property which she is not entitled to alienate, which therefore cannot constitute her *Stridhan* property according to its definition (b) But even in her case it has been held that if a testator intends to give an absolute estate to his widow, she is entitled to the same. (c) But in construing deeds and wills whereby *immoveable* property is given by a husband to his wife, the special rule of Hindu law is not referred to in all cases, this circumstance explains why similar words are construed by different Courts to have different effects. Accordingly in the case of *Mussamut Surjamani*, a deed of gift to the donor's two widows and a daughter-in-law, declaring that they shall be as *malik wa khud ikhtiyar*, *i e.*, " owners with proprietary powers "—is held to convey heritable and transferable estate, (d) but similar words were held to have a different effect in the cases at the end of first paragraph of this topic. (e) The Privy Council has now explained its previous decisions and the law on this subject, (f) and in another case from Mithilà, it is held that a simple and pure gift by the husband to the wife does not convey to her absolute ownership, and she takes it for her life only

whether limited when given by husband

(z) Annaji *v* Chandrabai 17 B 503

(a) Harilal *v* Bai Rewa 21 B 376, Mathura *v* Bhikhan 19 A 16, see also Radha *v* Monirani 35 C 895 35 I A 118 12 C W N 729 8 C L J 48 10 Bom L R 604 5 A L J 460 18 M L J 287

* For elaborate discussion, *see ante pp* 823 828 (b) D B 41, 18.

(c) Collany *v* Luchmee, 24 W R 395, Surajmani *v* Rabi 30 A 84 · 7 C L J 131 12 C W N 231 10 Bom L R 9 : 18 M L J 7 35 I A 17, see Mohan *v* Niranjan 60 I C 619 (L), Murukonda *v* Murukonda, 10 L W 269 53 I C 253, Sasiman *v* Shibnarayan, 49 I A 25 26 C W N 492 35 C L J 427 20 A L J 362 24 Bom L R 576 65 I C 193 on appeal from 39 I C 755, *see pp* 823-828 *supra*

(d) Mohan *v* Niranjan, *supra*, Naulakhi *v* Jai, 40 A 575 16 A L J 564 46 I.C 905 (e) *See pp* 823-828 *ante*.

(f) Ramachandra *v* Ramachandra, (see *supra* p 825) 45 M 320 49 I A 129, 135 26 C W N. 713 35 C L J. 545 20 A L J 684 24 Bom L.R 963. 67 I C. 408

without any right of alienation unless that power is expressly given to her. (*g*) The same Board in a case not governed by the Mithilà law, has laid down that such property is taken by her as her stridhan, but over which she would not have any power of alienation unless such powers are conferred upon her. (*h*) But in a recent decision, the Privy Council lays down that the Board has held such a proposition as wrong, without, however, referring to the last mentioned decision of the Board, (*i*) and this has been finally approved by the same Board (*j*) also without noticing the Board's decision in the case of *Narsing Rao* (*k*) with the result that if the donor does not confer upon the wife express power of alienation, such power may, nevertheless, be deduced from the terms of the gift, if, the words used are sufficient to confer upon her absolute ownership, unless the circumstances or the context show that such absolute ownership was not intended. In this connection *see* page 730 regarding the effect of section 8 of the Transfer of Property Act and 95 of the Indian Succession Act on Hindu law.

And where a testator made a gift to his wife and son in the following terms, " The remaining 4 Annas I give to you and the son born of your womb for your maintenance "—and then declared his intentions with respect to their respective interests under the gift, in the following words,—" upon my death you and your sons and grandsons, &c., in due order of succession shall hold possession of the Zemindari. And I give to you the power of making alienation by sale or gift ; " it has been held that on a true construction of the gift each took an absolute interest in a 2 anna share, and the words " for your maintenance "—did not reduce the interest of either to one for life only (*l*)

(*g*) *see ante p* 827, Hitendra *v* Rameswar 7 P 500 32 C.W N 762 48 C.L.J. 83 1928 P C 112 appeal from 4 P 510 · 88 I C 141
(*h*) Narsing *v* Moha Laksmi, 50 A 375 32 C W N 1065 ; 48 C L J. 106 ; *see* Mohadeo *v* Babya [illegible]
(*i*) Shalig *v* Charunjit, 11 L 645 34 C W N 1073 P C
(*j*) Jagmohan *v* Pandit, 35 C W N 4 : 1930 P C 253, *see* Biprodas *v* Sadhan, 56 C 790, Pramatha *v* Suprokash, 58 C 77.
(*k*) 50 A 375 32 C W N 1065 48 C L J 106
(*l*) Jogeswar *v* Ram, 23 C 670 23 I A 37 6 M L J 75.

In this case it was contended that the mother and son took as joint-tenants and not as tenants-in-common. But their Lordships rejected this contention holding that that extremely technical rule of English conveyancing ought not to be imported into the construction of a Hindu will, the principle of joint tenancy being unknown to Hindu law, excepting in the case of co-parcenary between the members of a Mitákshará undivided family. (*m*)

Gift to women other than wife.—As regards women other than the grantor's wife, although there is no rule restricting their rights in the property conveyed to them, still in the absence of words indicating the transfer of a heritable and alienable interest, a grant appearing to be made as a provision for maintenance, which the grantor is bound to make, may be taken to confer only a life-interest, as has already been stated. (*n*) But otherwise, words sufficient to pass an absolute estate, if the gift were made to a man, will confer the same estate on a woman. (*o*) Accordingly, a deed of gift by a Hindu to his sister to the effect that she shall enjoy for life, and on her death her husband, sons, grandsons and other heirs shall continue to enjoy and possess in succession and shall have power to give or sell,—is held to confer an estate of inheritance, though the heirs were enumerated in improper order. (*p*)

sister.

So where a gift was made to a daughter-in-law, describing her as *malik mustaqil*, and where there was no circumstance to indicate that the donor did not intend that the donee should take less than full estate, it has been held that she took all the estate the donor had in it (*q*)

daughter-in-law.

(*m*) *See* Jio *v* Rukman, 8 L 219, Debi *v.* Krishna 1928 O 26, *see post* Sec 4, Sub-Sec v, "Estate, limitation"

(*n*) Sashayya *v* Narasamma 22 M 357, but see Jagarnath *v* Jaikishun 1 Pat. L J 16 3 Pat L W 164 34 I C 375 and compare Chauras *v* Jagannath 7. O L J 147 56 I C 287, *see p* 825 *supra*

(*o*) Ramjewan *v* Dal, 24 C, 406, Nanda *v* Pores 17 C L J 464, Gomatpam *v* Satagopachar, 27 M L J 329 24 I C 20, but see Ratna *v* Narayanaswami, 26 M.L J 616 : 24 I C 796, Jagarnath *v* Jaikishun, 1 Pat L J 16

(*p*) Basanta *v* Kamikshya 33 C 23 32 I A 181 10 C W N 1 2 C L J, 238 2 A L J 810 7 Bom L R 904 15 M L J 320

(*q*) Naulakshi *v* Jai, 40 A 575 : 16 A L J 564 : 46 I C 905, Sreepati *v* Sarbeswar 34 C W.N 409

Mother, daughter

There is no universal presumption with regard to mother or daughter, that in every case the estate she takes is less than what would be taken by a male (*r*)

Sub-Sec v—EXISTENCE OF DONEE

Donee must be in existence,

Donee must be in existence—It was held by the Courts that the donee must be in existence at the time when the gift was to take effect. This doctrine was laid down for the first time in the Tagore case, in which their Lordships held that a Hindu could not make a gift in favour of a person who was not in existence, either in fact or in contemplation of law, at the time when the gift was to take effect. (*s*) But the legislature has by statute made such gifts valid. (*t*).

not supported by Daya

Doctrine not supported by Dayabhaga —There appears to be some misconception with respect to the meaning of a phrase of the Dàyabhàga which is mistaken to support this doctrine as appears from the following passage in the judgment of that case—"It applies to all persons in existence and capable of taking from the donor, at the time when the gift is to take effect, so as to fall within the principle expressed in the Dàyabhàga, Chapter i, v, 21, by the phrase "relinquishment in favour of the donee who is a sentient person" (*u*)

Cause of mis conception.

The misconception appears to be due to mistranslation The whole sentence in the original, of which the *phrase* forms a part is as follows,—

दाने हि चेतनोद्देश विशिष्टत्यागादेव दातृव्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वम्·

of which following is the correct translation,—"since in a gift the donee's ownership in the thing (given) arises from the very act of the donor, consisting of the relinquishment of his ownership with the intention of passing the same to a sentient being"

Meaning of sentient being

The phrase does neither express nor imply that the "sentient being" must be in existence, or be present, at the time and the place of the relinquishment, nor does the term *sentient being* mean a human being only, as it may include lower animals, but it excludes inanimate objects On the contrary, the whole argument contained in paragraphs 21—24, (mistaken to be verses) of chapter i, of the Dàyabhàga, including the said sentence containing the phrase, shows that a gift is completed by the donor's act alone, acceptance by the donee being not necessary according to the Bengal school

Daya. law on father's

It has already been observed that it is not correct to say that there is no distinction between the ancestral and self-acquired property in the Bengal

(*r*) Mahim *v* Hara, 42 C 561, 30 I C 798, Atul *v* Sanyasi 32 C 1051 9 C. W N 783 2 C L J 50 (mother) Collany *v* Luckmee 24 W R 395 (daughter) Bobi *v* Kavoori, (1914) M.W N 387 23 I C 594, Mahadevarayya *v* Tirtha, I M 307 (daughter), Gobind *v* Chintaman 1928 N 55 (daughter), Katayya *v* Vardhamma 1930 M 744 (daughter), Bipradas *v* Sadhu 56 C 790; 1929 C 801 (daughter)

(*s*) 18 W R 359

(*t*) *See post p* 1008

(*u*) Tagore *v* Tagore 18 W R 359, 367 I A sup 47

school, as regards the father's rights over them One of the rules applicable only to ancestral property is, that the same cannot be unequally distributed by the father, nor can a partition of the same be made by the father until and unless the mother be passed child-bearing, inasmuch as all the grandsons born and to-be-born are entitled to the same, and if it be partitioned, and subsequently other sons are born, they are entitled to take their shares from what has already been allotted to their brothers contrary to the said rule. This throws considerable light on the subject of provisions for unborn persons For, if *Rai Bishenchand's case* were governed by the Bengal school, then the unborn persons could claim to get, what was given to them by the deed under the law laid down in the Dâyabhâgâ (v)

power of alienations of ancestral property,

throws light on present topic

Gift to unborn persons—The numerous religious and charitable endowments of the Hindus prove that gifts for the benefit of unborn persons are recognised And this is admitted in the Tagore case in which their Lordships observe,—"and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is conferred upon the beneficiaries, and their interest is in the proceeds of the property, the creation of a trust is practically necessary" (w)

Gifts to unborn persons are recognised

Their Lordships virtually lay down that the rules against perpetuity and remoteness do not apply to devises for the benefit of the public, as is provided in the Transfer of Property Act, Section 17, now 18, with respect to transfers *inter vivos* The rules are intended to operate only to prevent the tying up of property in the transferor's family or descendants

Application of Rule in *Tagore* case

Gifts for religious, charitable, educational or the like beneficent objects may be made by a Hindu for the benefit of both born and unborn persons, or those that are in existence as well as those that are to come into existence in future It would not, therefore, be right to say that a Hindu is absolutely incompetent to make a gift in favour of an unborn person. The text (x) embodying the declaration by an owner, dedicating a consecrated tank to his existing and future relations as well as to all animate beings, affords evidence of a gift to unborn persons, the donor continues to hold the property as trustee on behalf of the beneficiaries including himself The intervention of a trustee does not affect the question the beneficiaries are the really interested parties, and the trustee occupies the position of a mere holder of a property, for applying the property or its income, so as to secure the benefit intended to be conferred on the persons really interested

Gift for benefit of unborn persons can be made.

Examples

It is, however, a well-known doctrine of Hindu law that no property can be without an owner, but this does not militate against a disposition creating present and future interests in the same property in favour of existing and unborn persons respectively, so that there is always an owner to hold the property though not a full owner

No property without owner, explained

Although there is no authority in Hindu law to justify the doctrine that a Hindu cannot make a gift for the benefit

Rule introduced without

(v) Ch vii, paras 10-13, 11 I A 164 (w) 18 W R 359, 368 I A *Sup* 47.
(x) No 12, *pp*, 974-975 *supra*

authority in Hindu law.

of an unborn person, yet that doctrine had been engrafted on Hindu law as a settled rule of it by the decisions of the highest tribunal.

Disqualification of making gift to unborn persons removed

The Legislatures have now removed the disadvantage. The Madras Act (*c*) validates the dispositions in favour of unborn persons (*d*) with retrospective effect. (*e*) The Act of the Indian Legislature (*f*) also validates the disposition of property by a Hindu for the benefit of persons not in existence at the date of such disposition It extendes to the whole of British India except the province of Madras, where the operation of the Act can be extended by the Governor-General in Council. (*g*) But this Act has no retrospective effect.

Madras Act validated by I C as to Madras City.

The Act of the India Council (*h*) is subject to the limitations and provisions contained in Sections 13, 14 and 20 of the Transfer of Property Act, and Sections 100 and 101 (now, 113, 114, 115 & 116) of the Indian Succession Act. (*i*) The Madras Act, however, limited its operation in Sections 4 and 5 of the said Act to prevent the violation of the rules against perpetuity.

This local Madras Act was *ultra vires* in so far as it purported to affect the Madras city, inasmuch as the local legislature was not competent to override the Act of the Indian Legislature applicable to it. (*j*) The Indian Legislature has now removed the defect by the Hindu Transfers and Bequests (City of Madras) Act (*k*) and the previous Madras Act (*l*) has thus been made applicable to the city of Madras.

Sub-Sec vi—GIFT TO A CLASS

Real object of donor

This topic may also be of use in cases in which the transactions relate back to dates previous to the date on which Act, XV of 1916 came into force. As logical consequence of the doctrine that a gift to an unborn person is invalid, it was broadly laid down in some cases that where

(*c*) Act I of 1914 Madras (*d*) Sec 3 of the above Act
(*e*) Cl (2) of Sec 2 Act I of 1914, Muthusami v Kalyani, 40 M 818 35 I C 223 (*f*) Act XV of 1916,
(*g*) Cl. (2) of Section 2 of Act XV of 1916 (*h*) Act XV of 1916
(*i*) Sec 2 read with Sec 3 of Act XV of 1916, *See* Sec 12, Act XXI of 1929
(*j*) *See* preamble, Hindu Wills Act, Soundararajan v Natarajan 44 M. 416, 40 M L J 354 62 I C 987, (see P C. appeal 30 C W N 434 439 43 C L J 70.)
(*k*) Act VIII of 1921 (I C) (*l*) Act I of 1914

there is a gift to some persons who are in existence and to others who are not in existence at the time when the gift is to take effect, as a class, the gift is wholly void (*m*)

restricted.

But later decisions have restricted the operation of the rule, having regard to the principle upon which it is founded. The principle being that when the donor intends to confer a benefit equally on all the members of a class, it is difficult to say what his intention would have been, had he known the incapacity of an unborn person to take, hence the gift fails in its entirety, no benefit being derived by the members in existence.

Real object of donor to be considered

The difficulty, however, is not one which is insurmountable in all cases; for, intention being the sole principle, test or guide, it may appear that the donor had two-fold intention in making a disposition to a class, namely, a primary and a secondary intention. If it is manifest from the language of the document that the donor had the primary intention to confer a benefit on certain existing persons, and also a secondary intention to make unborn persons forming with them a class, participators of the same benefit as their co-sharers ,(*n*) or that the donor had the primary intention to benefit equally all members of the class and also a secondary intention to benefit the existing members, in either case the intention to benefit those members of the class that exist at the time when the gift takes effect, may be given effect to, although the intention to benefit the whole class fails, should there be no other objection to such a construction

Rai Bishen Chand v. Asmaida

The leading case on the subject is that of *Rai Bishen Chand* (*o*) in which a Mitákshará joint family consisted of a father, a son and a minor grandson the son was extravagant and the father had to liquidate the son's personal debts several times, the aggregate of which together with a sum of Rs. 5111 represented the value of the share the son would get on partition With the paramount intention to get rid

(*m*) Soudaminey *v* Jogesh, 2 C 262 , Kherodemoney *v* Doorgamoney, 4 C 455
(*n*) The principle of primary and secondary intention is looked into in Raghunath *v* Deputy, 34 C W N 61 P C 51 C L J 16
(*o*) 11 I A 164 6 A 560

of the son Rs. 5111 was paid to him to which sum he was equitably entitled in addition to the amount already paid to his creditors out of the joint estate, as his share on partition, and a deed of family arrangement was executed by the father with the consent of the son, settling the family property subject to certain charges for maintenance, on the next generation represented by the minor grandson in these words,—"*Babu Satrujit* the minor himself and his own brothers who may be born hereafter, are and will be the permanent and rightful owners and claimants of all the ancestral properties &c.," and immediate effect was given to the deed by putting the minor in possession of the properties through his guardian and mother the Respondent, and by causing the minor's name to be registered as proprietor in the Collector's records by expunging the name of the executant, and by allowing the Respondent to manage the entire estate on behalf of the minor, and after minor's death shortly after, on her own behalf as the heir of her minor son.

facts

creditor's contention,

A creditor of the son impeached the deed a sbeing a fraud on his creditors, and also invalid as being an illegal gift to unborn persons. The deed was held to be a *bona fide* family arrangement partaking the character of a partition in so far as the son was concerned, who received the value of his interest in the family estate, and was thenceforth totally excluded,—whereby the executant surrendered his interest to his grandson who on a complete partition would be entitled to one-fourth.

real intention of donor,

The intention is clearly expressed for the immediate vesting of the whole property and must continue to be so, if no brother is born to him, so that upon the whole document the intention was clear to benefit the existing grandson, there was also an intention to benefit his brothers if born subsequently, one may be called the primary, and the other the secondary intention.

as stated by P C,

With respect to the construction of deed, the Judicial Committee made the following important observations (*p*)—

(*p*) 11 I.A 164

"Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect, will yet give effect to part of it rather than hold that it shall fail entirely In the present case, there is every reason for holding that, if *Satrujit's* possible brothers are not able to take by virtue of the gift, he shall take the whole He is there present, and able to receive the gift He is an individual designated in the deed If the deed stood alone, it is a question in each case whether a designated person who is coupled with a class described in general terms is merged into that class or not. But the deed does not stand alone It is followed by actions of a kind which, even without a deed, may work a transfer of property in *India* *Satrujit* is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name, and afterwards as his successor Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed, and is clearly proved from the transfer of the property in fact "

doctrine of *cy pres*

The application of the doctrine of *cypres*, or of the doctrine of paramount intention and approximation, to this case is determined by the facts that a *persona designata* who is intended to get the property at all events, namely, in whole in one event, or in part in the opposite event, gets the whole property immediately as his own by divesting the donor, and is only intended to be partially divested in case an uncertain future event happens, he cannot, therefore, be merged into the class, and so be deprived altogether of the property, contrary to the clear intention in his favour.

an aspect not observed

There is one aspect, however, of this case, which may give a different complexion to the transaction, but that is not the ground of the decision, namely, that the three members being joint-tenants, the transaction may be looked upon as a surrender by the father and the son, of their undivided coparcenary interests, and the recital of the rights of the unborn grandsons may be looked upon as merely a statement of what, they contemplated, was to take place according to the ordinary Mitākshará law itself, which recognises the male issue's right by birth to ancestral property.

J Wilson's interpretation

The ground of decision in this case is thus explained by Justice Wilson :—

" The true ground of decision in that case appears to me to be that in construing family settlements of this nature, Courts are to ascertain the real

meaning of the parties to the transaction, that when the meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part And that, accordingly, if the plan be, to give a present gift to persons capable of taking, that gift is effectual, although it was also intended that other persons, incapable of taking, should afterwards come in and share in the gift" (q)

Ram Lal v Ganas Lal

Ram Lal Sett's Case.—The next in importance is the case of *Ram Lall Sett* (r) in which Justice Wilson delivered a very learned, elaborate, instructive and lucid judgment which every student of law should carefully, read In this case the facts were similar to those of *Bishen Chand's* case a Hindu governed by the Bengal School executed a deed whereby he made a gift *inter vivos* in these words,—"I make a gift of the said two parcels of land to Sriman Ram Lal and Sham Lal Setts the two now existing sons of my youngest son, and to the sons to be born unto him in future &c" And then the deed goes on embodying several directions and terms The donor's intention appearing from the deed is stated in the judgment, thus,—"He intended, I think, that he should at once cease to have himself any interest in the property given, that the two living grandsons should at once enter upon the possession and enjoyment of it, and acquire the right to dispose of it, that if brothers should afterwards be born, each of such brothers should at his birth step into an equal share of the property, but without any retrospective effect, and that no act of the living grandsons should prejudice this right of their after-born brothers, and that during the minority of the living grandsons their mother should manage the property for their benefit without being liable to account to them" His Lordship introduced the above statement by saying that he would state the intention without the use of technical words and in popular language, and therefore it is added,—"Expressing this in more technical language, I think he meant to give the two living grandsons a present possession and enjoyment of, the property, but that their title was liable to be partially divested in favour of after-born brothers This intention seems to me to be sufficiently expressed in the instrument of gift, and in this case, as in that before the Privy Council (*Bishen Chand's* case) the conduct of the parties makes the intention clear" (s)

facts

Intention of donor as stated in judgment.

The gift to the two living grandsons was for the foregoing reasons held good With respect to gifts to a class an important distinction is pointed out byhis Lordship, thus,—"There is, undoubtedly, a difference between a present gift to persons capable of taking, which is intended afterwards to open and let in others not capable of taking, and a future gift to a class which may or must include both classes, all of whom are intended to take at the same time The late decision of the Privy Council (in *Bishen Chand's* case) has not, therefore, I think, necessarily overruled *Soudaminey's* case," which related to a gift, contingent at the testator's death, to a class of persons to be ascertained at a future date It was a gift to such lawful male

Its difference with future gift to a class

(q) Ram Lal Sett v Kanai Lal Sett, 12 C 663, 676, *see* also, Madhabrao v. Balabhai, 52 B 176, 182 32 C W N 925 47 C L J 198 1928 P C. 33.
(r) 12 C. 663 (s) 12 C 663, 666-7

issue as might be living at the death of the testator's sons or grandsons who took life estates"

The result of the English decisions on gifts to a class, is shortly stated by his Lordship (*t*) thus,—"In dealing with a gift to a class you enquire first, at what period the class is to be ascertained—it may in the case of a will be on the death of the testator or at a later period If the class is to be ascertained on the death of the testator, no question of remoteness, can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking If the ascertainment of the class is deferred to a later date, those who become members of the class with the extended period are admitted, and subject to any question of remoteness those who are thus capable of taking, take In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded, and the rest take the whole, and this is so, even if the gift be to persons born and to be born If any die in the testator's lifetime they are simply excluded, and the rest take the whole If the gift to one is revoked by codicil, he is simply excluded, and the rest take the whole. If one is incapacitated from taking because he has attested the will, he is simply excluded, and the rest take whole"—English cases are cited in support of each of these propositions, they are omitted here (*u*)

Justice Wilson's con-clusion

Justice Wilson's conclusion on gifts to a class.—Having discussed the cases of *Soorjeemoney* (*v*) and *Kherodemoney,* (*w*) and *Soudaminey,* (*x*) his Lordship dissents from the view expressed in the last two cases, and states his conclusion as follows,—

"For these reasons I should be prepared, if necessary, to dissent wholly from the doctrine laid down in those cases, and to hold, as the *general rule,* that where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be and where *there is no other objection* to the gift it should enure for the benefit of those members of the class who are capable of taking. I think the late decision of the Privy Council is a direct authority for so holding, where *intention is* as I think it was in this case, *to give a present gift* to those of the class who are capable of taking" (*y*)

General rule qualified

It should be noticed that the general rule appears to be qualified by his Lordship in its application, by the two conditions indicated by the words italicized above

followed by High Court

This rule has been followed by the High Courts in subsequent cases the last of which is decided by a Special Bench

(*t*) 12 C 663, 679

(*u*) 12 C 663, 680

(*v*) 6 M I A 526 and 9 M I A 123

(*w*) 4 C 455

(*x*) 2 C 262

(*y*) Ram Lal *v* Kanasi, 12 C. 663, 685.

of the Calcutta High Court, in which all the other cases are cited. (z) It is observed,—"There is no rule of Hindu law to the effect that a gift *intervivos,* or a bequest, to a class of persons some of whom are incapable of taking by reason of the rule that the gift is valid only if it is made to a sentient being capable of taking, is void also as regards those who are sentient and capable of taking". (a)

In re Coleman and Farrom

In this case is cited the following passage from the English case—*In re Coleman and Farrom* (b)—

"Now I (Sir George Jessel) think there is a convenient mode of interpreting the testator's intention, and it is this The testator may be considered to have primary and secondary intentions His primary intention is that all members of the class shall take, and his secondary intention is that, if all cannot take, those who can shall do so Both intentions co-exist and are frequently exemplified" (c)

Testator's primary and secondary intentions

In the conclusion of this case it is stated that the testator's primary intention may be taken to benefit all the members of the class, born and unborn, but as those actually born were the immediate objects of his affection and bounty, the primary intention may also be taken to benefit them, even if they were not named, at any rate, if not his primary intention, his secondary intention was that at least those who were capable of taking shall take. (d)

Rules sometimes broadly enunciated

In some of the cases the general rule is rather too broadly enunciated, as if in every case the tow-fold intention is to be presumed. It should, however be borne in mind that the rule in *Leake* v. *Robinson* (e) is not a technical or unreasonable one, or such as cannot reasonably be applied to any case. There is undoubtedly a difficulty which cannot in all cases be obviated by the application of the rule of *cypres* or approximation. Consequently, the rule must be applied, should there be nothing in the Will justifying the Court in attributing to the testator an intention that those in existence should take in any event. (f)

Leake v *Robinson,*

proper place for its aplication

(z) Bhagabati *v* Kalicharan, 32 C 992 9 C W N 749 1 C L J 482 Also 38 I A 54 (P C)

(a) Bhagabati *v* Kalicharan, 32 C 992, 1009, *see also* Madhabrao *v* Balabhai, 52 B 176, 182 32 C W N 925 47 C L J 198 1928 P C 33, Debi *v.* Krishna, 1928 O 26

(b) 4 Ch D 165

(c) 32 C 992, 1012

(d) *See* Madhabrao *v* Balabhai, 52 B 176, 182 ; 32 C W N 925 : 47 C.L J. 198 1928 P C 32

(e) 2 Mer 363

(f) Khimji *v* Morarji, 22 B 533.

Gift to one of a series of persons—Analogous to the gift to a class is the gift to one of a series of persons, who may not be in existence when the gift speaks, that is, at the date of the gift in the case of a deed, and in the case of a Will at the death of the Hindu testator, as for instance, a gift over to the heir of the donor or of a specified individual, existing at the time the gift is to take effect. The English case of *Dungannon* v. *Smith* (g) is an authority for the proposition that a gift over to the heir of a person, which is to take effect at a future time if a condition subsequent be fulfilled, is bad, being tainted with the vice of remoteness, inasmuch as the heir to take may be a person who is not capable of taking by reason of the vesting being delayed beyond the period allowed by law. This rule, however, was not followed by the Calcutta High Court in a case in which a Hindu made a gift over to his heir, upon the ground that the sister's son who was to take as the heir was in existence at the time when the Will was made, and when the testator died. (h) It is pointed out by their Lordships that the decision in the English case follows a rule of English law settled by a long series of decisions in which it was held that a bequest is void for remoteness unless it necessarily vests within the time allowed by law for delaying vesting. But there is no similar rule here.

Illustration

Rule in *Dungannon* v *Smith*.

not followed by Calcutta

Where the ulterior gift is not valid for any reason the prior gift is not affected by it, (i) and, hence, where a posterior gift on the condition subsequent may be void for being in favour of an unborn person, the whole gift does not fail, the anterior gift will take effect, if the donee can do so. (j)

Possible not actual evetns—There is another very important rule of English law relating to the question whether a gift is tainted with the vice of remoteness, or offends against

Remoteness applies on possible events

(g) 12 Cl and F 546
(h) Bhoba v Peary, 24 C 646 1 C W N 578
(i) Section 30 of Transfer of Property Act
(j) Narsingh v Maha Lakshmi, 50 A 375 32 C W N 1065 48 C L J 106

the rule of perpetuity · the rule says,—"In deciding the question of remoteness, it is an invariable principle that regard is had to possible and not to actual events; and the fact that the gift might have included objects too remote, is fatal to its validity." A deed and a Will are to be construed by having regard to possible future events without waiting for actual events. (*k*)

Indian Succession Act

The Indian Succession Act appears to have adopted the English rule, but with a difference as to the period to which the vesting can be delayed for, the period according to English law consists of the lifetime of a person or persons living at the testator's decease, *plus* the absolute term of twenty-one years, but according to Section 114 of this Act the period consists of the lifetime of a person or persons living at the testator's death *plus* the *minority* of the unborn person who must come into existence before the death of the living person or persons So under the Indian law, it is an indefinite period varying practically from the lifetime only of living person or persons, to the said lifetime *plus* eighteen years and also the period of gestation, according to the date when the unborn person comes into existence in fact or in contemplation of law The language of Section 114 is as follows,—"No bequest is valid whereby the vesting of the thing bequeathed *may* be delayed beyond" the said period and so it clearly implies that regard should be had to possible events

Distinction between English and Indian laws

Transfer of Property Act

Section 14 of the Transfer of Property Act embodies the same rule, but its language is somewhat different, it is as follows,—"No transfer of property can operate to create an interest which *is to take effect* after" the said period. It seems to indicate that the *actual* event determines the validity of a transfer *inter vivos*

Sections not applicable to Hindus

According to case-law neither of these two Sections were applicable to Hindus who had been held to be incompetent to make a gift to an unborn person But these Sections have been made applicable to the Hindus by the Hindu Disposition

(*k*) *See* Narsingh *v* Maha Lakshmi, 50 A 375, 393 32 C W N 1065: 48 C.L J 106 30 Bom L R 1331 55 M.L J 42 1928 P C 155

of Property Act (XV of 1916) and again subsequently Section 14 of the Transfer of Property Act by the amendment of Section 2. (XX of 1929)

Rule of remoteness is

But subject to this distinction, this rule has been held to apply to cases of Hindu Wills, upon the ground that "the rule is not a rule of the strict English Common Law" but that—"The rule was established, in fact, is founded on reason and convenience" *(l)* Accordingly, a gift over to the male issue of the testator's sons was held void for remoteness as the class *might* include persons not in existence at the death of the testator Similarly a gift over to the testator's nearest *sapinda gnyati* was pronounced invalid, since he might not be in existence at the death of the testator, and since—"In a gift of this kind, regard is had to possible and not to actual events" *(m)* In this case there was no finding whether the person claiming to take as the nearest *sapinda gnyati* was alive at the testator's death, the same being held unnecessary

should it apply to Hindus

But a rule which may be perfectly reasonable and convenient in England where the object of the gift may come into existence after the death of the testator and before the expiration of the absolute term of eighteen years from the death of a person living at the testator's decease, cannot be held to be applicable to the Wills of Hindus who are held incapable of making gifts to any unborn persons If in England a gift made to an unborn person is neither unreasonable nor inconvenient should he come into existence within the said time, and the vesting be not delayed beyond the period allowed by law, why should then a gift over made by a Hindu to one of a series of persons, be held invalid by the introduction of this English rule, when the person actually to take the gift is to be ascertained on the happening of an uncertain future event which must happen, if it happens at all, within the lifetime of a living person, and the person is otherwise capable of taking, being alive at the testator's decease? Accordingly, it has, as noticed above, been held by Justices Banerji and Rampini, that a gift over to the testator's *heir* in case his widow should cease to reside in his dwelling-house, is valid under the Hindu law, where the heir claiming the gift was alive at the date of the will and the death of the testator *(n)*

The disqualification of a Hindu to make a gift in favour of an unborn person has been removed by the Legislature, *(o)* and the rule contained in Sections 100, 101 and 102 of the Indian Succession Act of 1865 (and Sections 113, 114 and 115 of Act XXXIX of 1925) are made applicable to the Wills of Hindus. *(o1)*

(l) Soudaminey *v* Joges, 2 C 262, 268-9
(m) Kamgutee *v* Kristo, 29 W R 472
(n) Bhoba Tarini *v* Peary, 24 C 646
(o) *See* Sundara Ranjan *v* Natarajan, 30 C.W N 343 43 C L J 70, appeal from 40 M L J 354 *(o1)* *See ante p* 1008

But an anomaly has been caused by the introduction of paragraph 2 in the restrictions and modifications attached to Schedule III as contemplated in Section 57 of the Indian Succession Act (XXXIX of 1925) which runs as follows: "Nothing herein contained shall authorise any Hindu, Sikh or Jain, to create in property any interest which he could not have created before the first day of September, 1870." This in effect perpetuates the evil, the Hindu Disposition of Property Act attempted to remove with respect to device of property.

Sub-Sec viii—PRIORITY AMONG TRANSFEREES

Yajnavalkya on priority,

Priority among transfers of the same property.—The rule of Hindu law on the subject of priority among successive transactions, and among successive transfers of the same property in favour of different persons, is contained in the following sloka of Yájnavalkya, (ii, 23),—

सर्व्वेष्वर्थ-विवादेषु बलवत्युत्तरा क्रिया।
आधौ प्रतिग्रहे क्रीते पूर्व्वा तु बलवत्तरा ॥ २, २३ ।

which means,—"In all disputes relating to property the posterior transaction prevails, but in the case of a mortgage, a gift, or a sale, the prior transaction prevails" —Yájnavalkya, 2, 23.

Two rules laid down.

Two rules are laid down in this text relating to priority among two or more transactions relating to property. The *first* rule which is put as the general one, and according to which a later transaction is to prevail over an earlier one, is applicable to all cases other than those covered by the *second* rule which is stated by way of exception to the former The first rule appears to apply to successive transactions between the same parties with respect to property, of the nature of contracts such as a contract of debt, in which the latest transaction is to be taken to represent their ultimate agreement in supersession of the earlier ones

first rule,

second rule

The second rule, according to which a prior transaction is to prevail against the subsequent ones, applies to successive transfers by mortgage, gift or sale, of the same property to different persons. This rule appears to be substantially the same as is laid down in Section 48 of the Transfer of

Property Act barring however the qualifications restricting the operation of the rule.

Possession in priority

It should be noticed that the application of this rule of priority depends upon the fact that one of the transfers was earlier than the other But, as under the Hindu law, all transfers of property could be, and were often, made by word of mouth only, the possession of the disputed property by a transferee was necessarily under that law regarded as a very important circumstance, and was allowed to have the effect of determining priority, when it could no be ascertained which of the two oral transfers was prior in point of time, and in consequence the rule could not be applied for determining priority.

Rule altered by T P Act

Notwithstanding the rule of Hindn law permitting transfers by word of mouth only, all important transactions came to be effected by Hindus in practice by means of writing , but the rule continued to exist in theory, and also in practice in backward districts, until the same has been altered by the Transfer of Property Act as regards sales, mortgages, leases, exchanges and gifts (*p*) of immoveable property, with a few exceptions.

Transfers effected by delivery of possession

But sales of tangible immoveable property, of a value less than one hundred rupees, and mortgages of immoveable property where the principal money secured is less than one hundred rupees, and also leases other than those from year to year or for any term exceeding one year or reserving a yearly rent, may even now be effected by delivery of the property *i.e*, by putting the transferee in possession of the property.

Registration Act sec 50

In a case of competition between two successive deeds relating to rights to, or interest in, the same immoveable property, one of which is unregistered and the other registered, the registered deed is declared by Section 50 of the Indian Registration Act to take effect against the unregistered one, even if the latter be anterior to the former. A student of law at first feels some difficulty in understanding the

(*p*) *See* §§ 54, 59, 107, 118 and 123, in this connection see *foot note* (*s*) *p.* 861.

propriety of this rule, as also the principle on which it is founded. For, if the law allows a sale or gift to be made by an unregistered document, how can the transferor who has already passed whatever interest he had in the property to the transferee by the unregistered deed, and who has therefore ceased to be owner of the property, create any right in favour of another person by executing a registered deed, when he himself has no right whatever in the property? It is sought to be explained by saying that the effect of the rule is to declare a transfer by an unregistered instrument to be a fraud on the subsequent purchaser by a registered deed, Practically, however, the Section seems to legalise fraud, inasmuch as the effect of the rule was to defraud of their just rights, innocent transferees for value ignorant of the peculiar law invalidating transfers permitted by itself, by allowing subsequent fraudulent transactions to prevail.

Doctrine of notice.

The evil effect of this rule was considerably reduced by the introduction of the doctrine of notice, which the Courts as Courts of Equity could not but introduce and engraft on the Section. The transferor in such a case is undoubtedly guilty of fraud, and if the subsequent transferee takes a registered deed of transfer, knowing that the property has already been transferred to another person by an unregistered deed, he becomes a party to the fraud, and as no person can be permitted by a Court of Equity to derive any advantage from his own fraud, he is held to be not entitled to claim property under the said Section 50. (q)

Present estate

But this fraud can no longer be perpetrated with respect to sales, mortgages, and leases, of immoveable property, inasmuch as such transfers cannot now be effected by unregistered instruments These transfers can, under the present law, be effected only by registered deeds, except in a few instances set forth above, in which they may also be effected by the alternative mode of delivering the property, or oral agreement accompanied or followed by delivery of possession.

(q) Narain v. Dataram, 8 C 597 (F B)

And it has been laid down in Section 48 of the Registration Act, that a registered deed relating to any property cannot take effect against any oral agreement or declaration relating to such property where the agreement or declaration has been accompanied or followed by delivery of possession

Sec 48 of Registration Act

A prior mortgage, however, loses priority, if through his fraud, misrepresentation or gross neglect, another person is induced to advance money on the security of the mortgaged property, and accordingly it is laid down in Section 78 of the Transfer of Property Act that in such a case the prior mortgage shall be postponed to the subsequent mortgage.

Fraud, etc. of prior mortgagee.

Sub-Sec ix—UNIVERSAL DONEE

According to Hindu law a person having male issue cannot make a gift of his whole property. A Hindu is bound to provide maintenance for his male descendants, and his wife and parents. This maintenance appears to be a legal charge on his property The universal donee therefore, appears to be liable not only to pay the donor's debts but also to meet the donor's obligation to furnish maintenance to the donor's wife (*r*) and the like, to the extent of the property.

Sub-Sec x—REVOCATION OF GIFT

It has been held that the texts to the effect that a gift once made cannot be revoked, if it is to a benefactor, or to a father, "apply as between the donor and the donee and relate to property which it was competent for the donor to give. They cannot affect the joint ancestral estate of a Hindu and his sons. Their rights and liabilities are governed by special texts dealing with that estate, and such of these special texts as relate to gifts form exceptions to the general texts on the subject." (*s*)

Revocation of gift

A donor having delivered the deed of gift to the donee cannot resile before the document is registered, as neither death, nor the express revocation by the donor, is a ground for refering registration. (*t*) The gift is completed by the

(*r*) Jamuna *v* Machul, 2 A 315

(*s*) Shri Sitaram *v* Harihar, 35 B 169, 181 12 Bom L R 910 81 C 625

(*t*) Venkat Subba *v* Subba, 32 C.W N 708 P C

delivery of the deed within the meaning of Section 122 of the transfer of Property Act, and thereupon the gift become effectual subject to its registration under Section 123. (*u*)

Sec. 4—WILLS

Sub-Sec i—HOW APPLIED TO HINDUS

Joint family, normal condition

Wills unknown —Wills were unknown to the Hindus, and in fact, they appear to be opposed to the spirit of Hindu law. The joint family system is the normal condition of Hindu society, and the original theory of property in land was, and to a great extent still is, that it belongs to the family and not to its individual members .

where no individul right existed

The *family* is an ideal entity composed of its past, present and future members connected lineally and collaterally through the male lines of ascent and descent,—and landed property forms the hereditary source of the family fund, and is held in trust by the members in successive charge of it, for the spiritual and temporal benefit of all the members whether deceased, or existing or to-be born afterwards It appears that at first neither alienation nor partition was allowed of the land itself, notwithstanding the separation of the members in mess And although in course of time, the original state of the family has changed, and partition is allowed, and individual rights are recognised, still so long as the family continues joint no alienation of his interest in the joint property could be made by a member for his personal purposes, according to the Mitâkshârâ school, and even in the Bengal school, restrictions are imposed by the Dâyabhâga on the power of alienation as regards *ancestral* property The Mitaksharâ law on this point has however, been modified by the Courts to a certain extent, and the Dâyabhâga law with respect to a father's power of alienation over ancestral immoveable property has been misunderstood, by reason of an erroneous application of the doctrine of *Factum valet*

Later development

Change in divine law cannot commend to Hindus

It should be noticed that the law of succession and inheritance is believed by Hindus to be founded on divine ordinance , it would therefore be irreligious to disturb the divine rule of devolution of property by disposing of it in a different manner, hence Wills executed in contemplation of death, and containing dispositions of property contrary to the divine law of inheritance, were not likely to commend themselves to the Hindu ideas and sentiments that were more religious than secular

Right ceases at death, hence Will impossible.

Besides, under the Hindu law, the proprietory right of a person is extinguished by his death , post-mortem dispositions of property by a Will would be in direct conflict with this doctrine, and it would be difficult to reconcile them, except by the introduction of some fiction

Adoption a substitute for Will

Adoption—or the affiliation of a son and appointment of an heir, takes the place of Will in Hindu law An *anumatipatra* or deed authorizing the executant's wife to make a posthumous adoption bears a close resemblance to a Will, although it is not admitted to operate as a testamentary disposi-

(*u*) Kayana *v* Karuppa, 50 M 103 . 54 I.A. 89 . 31 C M. N. 509

tion, since it has been held that the son adopted by a widow takes the adoptive father's estate, not by devise but by descent (v) According to Hindu law, the husband and wife form one person, and the deceased husband is deemed to live in the wife who is regarded as the surviving half of the husband : hence in an adoption by the widow, it is the deceased husband who is taken to act through his *widowed wife*, (—विध्रवा पत्नी—expressive of the Hindu idea of the relation), she is the instrument through whom the husband himself is supposed to act Likewise a Hindu widow seems to be competent to make a disposition of property appertaining to her husband's estate in her hands, if she was directed in that behalf, by the husband who himself intended to do the same, but was accidently unable to carry out his intention

Hindu Wills recognised —Wills made by Hindus came to be recognised by the English lawyers connected with the old Superior Courts as Judges, Advocates and Solicitors, as a matter of course. It was quite natural for them to assume that Hindus had the power of making testamentary disposition of heritable property owned by them, of which they could make alienations *inter vivos*, the power being taken as an ordinary incident of ownership. The Legislature also made the same assumption in the Regulations relating to the devolution of the Zemindaris, i e., the most valuable interests in land created by the Permanent Settlement of 1793 A.D. whereby the hereditary Collectors of land-revenue in Bengal, Behar and Orissa, were converted into proprietors. As these offices though permitted to be heritable, were indivisible, it became necessary to declare that the Zemindaris which were converted into property of the Malguzars who used before to collect the revenue thereof, were to be subject to the ordinary law of inheritance like other properties, and were no longer liable to devolve entire to the eldest son alone Accordingly, Reg XI of 1793 was passed, of which section 2 says,—

Will recognised by English law years,

in Regulations

"If any Zemindar shall die *without a Will*, or without having declared by a writing, or verbally, to whom and in what manner, his landed property is to devolve after his demise, and shall leave two or more heirs, who by Hindu law may be respectively entitled to succeed to portions of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled "

(v) Perhlad v. Budhoo, 12 M I,A 275, 279 12 W R O P C

Similarly, Regulation X of 1800 which was passed by way of exception to the preceding Regulation, declared that certain estates which had been impartible, and succession to which used invariably to devolve to a single heir, by long established custom, shall continue to devolve to a single heir to the exclusion of the other heirs, *if the proprietor die intestate* There are several other Regulations and Acts in which testamentary power is recognised. (*w*)

and in Acts

Wills made under Regulations

The Regulations of the eighteenth century, creating the Zemindaris that have become the most important and valuable landed estates in this country, and declaring their incidents, did practically confer the testamentary power on the Zemindars, though in an implied and indirect manner The Zemindars were aware of the contents of the English Regulations through translations made for their benefit, into the language understood by them, and did not fail to take advantage of the power so given by exercising the same

Mahomedan law

The Mahomedan law recognises testamentary power with respect to one-third only of a person's estate, for, it recognises as indefeasible, the claim of the descendants as well as of the ascendants upon a deceased person's estate to the extent of two-thirds of it, but subject to the payment of debts and other dues And although a Mahomedan is competent to make a *gift* of his whole property by a transfer *inter vivous*, he is not permitted to deprive by a Will his legal heirs of their legitimate shares in his estate beyond the extent of a third of it, except by their consent Although the Mahomedans ruled India for many centuries, still the Islamic law could not make any impression on the Hindu mind, inasmuch as the law of both Hindns and Mahomedans being mixed up with their respective religions, were antagonistic to each other, and as the orthodox learned Brahmanas who were the repositories of Hindu law, could not consistently with their position in Hindu society, and therefore did not, associate with the *mlechhas*, or study their law and the language in which the same was recorded It is no doubt, true that the Kayasthas, the other important literate class among the Hindus, used to learn the language of the rulers, but their knowledge of the Mahomedan usages could have no effect on Hindu law, which was the monopoly of the Pundits who were completely ignorant of Mahomedan law This explains how it is that there is not even a passing allusion to the subject of Wills in the numerous works of Hindu law compiled by Brâhmanical writers during the Mahomedan rule, specially when they themselves would surely have benefitted by the introduction of gifts made in contemplation of, and coming into effect after, death, as they were the recipients of pious gifts made by Hindus It should, however, be acknowledged that the Brahmanas were characterised more by self-denial than by selfishness in fact, the spiritualism of the Hindus is due to the noble example of Brahmanical self-abnegation and self-sacrifice

had no influence on Hindu law, why.

The origin of Wills among Hindus cannot be traced to any influence of

(*w*) See Reg V of 792 and Oudh Talukdars Act No 1 of 1868,

the Moslem law nor to any improper influence of Brahmanas who are unjustly accused, merely on assumption and supposition, but not on the solid basis of proved facts. Charity and religious gifts are extolled in every system of religion Brahmanical influence was stronger before the establishment of British rule how is it then, that will of Hindus came into existence for the first time under the British rule and not before, if Brahmanical influence had anything to do with the origin of Hindu Wills ? Many of the heterodox Pundits with whom Englishmen came into contact, may have been guilty of conduct justifying a low opinion of them, but orthodox Pundits were distinguished for their self-denial, renunciation, and exemplary spirituality, by reason of which alone they could maintain their high position in Hindu society It is no doubt true that the Pundits depended for their support on the voluntary gifts made by Hindus on the occasions of performing religious rites and ceremonies, but it is worthy of special remark that gifts were made to learned Pundits, as they had to maintain their pupils who used to live with them as members of their family, for learning the Shastras from them, they led a simple life, and were not covetous of wealth, if they got more than enough, they never amassed but spent the excess for the benefit of the needy and indigent persons.

Wills not due to Brahmanical influence.

Gifts and Wills —The so-called early Wills were really deeds of gift or settlement made by Hindus shortly before their death and intended to operate *inter vivos*. It was often found that following the injunction of the Shástras, Hindus in their old age, relieved themselves of wordly cares by surrendering their property to their male issue either by way of partition or by way of gift or settlement, but not by Will.

No necessity of Wills,

The idea of making Will was not of spontaneous growth among Hindus. The people of Calcutta and other Presidency towns had the English solicitor for their legal advisers, and many Hindus sought their advice in all transactions relating to property ; the solicitors did in fact, draw all deeds in English, according to the instructions of their Hindu clients who had but a smattering of English and were sometimes completely innocent of it. It was an English solicitor who drafted the Will whereby his Hindu client gave power of adoption to his three executors including his widow, and to the surviving two executors in case of the widow's demise before adoption. (*x*)

which came through influence of English lawyers

(*x*) Amrito v Surnomoye, 24 C 589 1 C.W N 345, 25 C 663 2 C W N 389 & 27 C 996 27 I A. 128. 4 C W N 549

How Hindus imbibed the idea,

The Hindus appear to have imbibed the idea of testamentary power either from the English solicitors or from the legislative enactments already referred to. And as it is a weakness of human nature to hanker after power, the idea has gradually spread to people outside the Presidency towns and to persons other than Zeminders. But the recognition of unrestricted testamentary power of Bengal fathers over ancestral property is not justified by the Hindu law and usages ; and although the highest tribunal has pronounced that there is no distinction between the *ancestral* and the self-acquired properties as regards the father's power of disposition over them in Bengal, still this view appears to be contrary to the Dàyabhàga as well as the traditional notion of their law prevailing among the Bengali Hindus in all districts , and it is also inconsistent with their joint family system. And it is sometimes found that what is said to be settled law in the Courts, is unsuitable to the people, and is neither known to, nor accepted by, the generality of them, as the basis of their transactions , so the law of the Courts in some respects, is not what the people think to be their law.

Will described by P C.

Wills among Hindus are sought to be explained as "a development of the law of gifts *inter vivos*." A will is described by the Privy Council as "a disposition of property to take effect upon the death of the donor" which "though revocable in his lifetime, is until revocation a continuous act of gift upto the moment of death, and does then operate." (*y*)

Explanations of wills

This is a fiction, as no person retains consciousness or a sound disposing mind up to the last moment of his life. There is another fiction for explaining the post-mortem disposition of property, namely, that the deceased person continues to act beyond the period of his own death, and in order to explain the validity of a dead man's action, a distinction may be drawn between *title*, and *ownership* in the sense of personally holding and enjoying. When a person holds an estate to himself and his heirs for ever, his title subsists beyond his death, although his ownership died with him.

(*y*) Tagore v Tagore, 18 W R 359, 366. I A Sup 47

Hence the gift or disposition which takes effect on the moment after death is deemed to be an incident of the subsisting title. But still the difficulty remains unsolved the title remained entirely in the deceased person up to the last moment of his life, he did not divest himself to any portion of his title during his life. Hence the deceased's portion must be admitted to act on the moment *after* death, if the disposition are to be deemed *his* acts It would be an absurd assumption, and as regards *subsisting title*, where does it remain *after* the owner's death? It cannot subsist as if suspended in the air, and a title without being vested in a person in existence is impossible. Such metaphysical explanation of Wills is useless sophistry

Why proprietory right acknowledged by law

Property and its incidents are creatures of law In order to induce people to lead a life of industry and thrift, the law tells them—If you exert yourself to acquire property by legitimate means, you will be entitled to hold the same as yours, to use and enjoy it according to your pleasure but without prejudice to the lawful rights of others, and not only you will be at liberty to make a gift or a sale or any other transfer during your life, but you are also permitted, subject to certain restrictions, to declare your desire as to what persons are to get your property after your demise shall be carried into effect. It is only the law applicable to the deceased testator that gives effect to his dispositions, nothing else can do the same.

Analogy between gift and Will.

Practically, however, testamentary disposition appears to be an extension of gift, the people derive their conception of bequest from donation Gift, *donatio mortis causa* and Will appear to successive conceptions, the former leading to the latter. There is undoubtedly a close connection between gifts and bequests.

The limits of the analogy between Wills and gifts *inter vivos* which have been recognised (z) by the Judicial Committee are as follows,—

"The analogous law in this case is to be found in that applicable to gifts, and even if Wills are not universally to be regarded in all respects as gifts to

(z) Bai Moti v Bai Mamu, 21 B 709 24 I A 93 105 1 C W N 366

take effect upon death, they are generally so to be regarded *as to the property* which they can transfer *and the persons* to whom it can be transferred " (*a*)

Sub-Sec ii—DISPOSITION BY WILL

Definition of will

Definition of Will—The following definition of Will is given in the Succession Act —

" Will means the legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death " —Section 2, (*h*)

criticised

This definition is open to objection on several grounds. Firstly, it uses the term *testator* which means the executant of a *will*, and therefore its meaning cannot be understood by one who does not know the meaning of *will* thus this definition is tainted with a logical defect which, in Sanskrit, is called "the fallacy of mutual dependence" अन्योन्याश्रयत्वम् which is defined to be स्व ग्रह-सापेक्ष-ग्रह सापेक्ष ग्रहत्वम् *i.e.*, a fault vitiating a definition in which the meaning of the term defined depends upon the meaning of another term which again depends on the meaning of the first term. Secondly, as the term *testator*, is not defined in the Act, the definition is liable to be read by substituting the word *person* for *testator*, and to be misapplied, by reason of the distinctive characteristic of *wills* being omitted in the dispositions *inter-vivos*, which are intended to be carried into effect after the death of the executant by being vested in possession, but which are not revocable. (*b*)

Distinction between gift and will

The distinctive feature of a Will is its *ambulatory* character, however solemnly a Will may be executed it may be undone the next moment. the test of the testamentary character of a disposition is its revocability, (*c*) this is stated in Section 62 of the Succession Act. But it should have been expressly made a part of the definition which should be made clear, thus,—"Will is the legal declaration by a competent person of his intentions with respect to his property, which he desires to be carried into effect after his death, such declaration being liable to be altered or revoked by him at any time

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(*a*) Tagore *v* Tagore, 18 W R 359, 365 9 A Sup 47.

(*b*) Sita *v* Deo, 8 C W N. 614 : 3 C.L J 370.

(*c*) 8 C.W N 614

when he is competent to dispose of his property and becoming operative if not so done." But it should be observed that an instrument which is a Will does not cease to be so, by reason of a clause in which the testator says that he shall not have the power to *sell* any property, but he shall *mortgage* the same for raising money if needed (*d*)

Person As all persons are not competent to make testamentary dispositions, the term *person* in the above definition of will, is qualified by the adjective *competent.*

Property The term *property* has not been defined either in the Succession Act, or in the General Clauses Act X of 1897, or in the Bengal General Clauses Act I of 1899, or in the Transfer of Property Act.

Explanation of The word property is used in two senses; it signifies either ownership of a thing such as land or chattel, or the thing itself as the subject of the ownership. A thing is *property* in relation to its owner, and a person's relation to the thing as the subject of his ownership in his *property* in the thing.

Immoveable The definition of immoveable property (*e*) says that it includes land, and benefits to arise out of land. Accordingly, the same land may be the property of more persons than one not only as co-sharers having co-ordinate rights, but also as proprietors, tenure-holders and undertenure-holders of different degrees, the latter holding in subordination to the former, until the cultivator or the actual occupant is reached, and in some districts of Bengal there are so many as a dozen subordinate interests of different degrees, the owner of each of which calls the land his property, or also as successive owners, namely, life-tenant and remainderman or reversioner. Thus there are three modes of division of property in land, namely, *first,* division by metes and bounds or geographical or geometrical division, *second,* division by creating tenures and undertenures, and *third,* division by successive limitations, *i.e.*, by limiting the time of successive enjoyment. (*f*)

(*d*) Sagore *v* Digambar, 14 C W N 174
(*e*) Act X of 1897, clause 25
(*f*) Gonendra N Tagore, 4 B L R, O C 103

Value of property

Although ordinarily the term property is used to designate a thing that is of value, yet if there is an abundant and inexhaustible supply of the same, easily accessible then it has no marketable value or price For instance, nothing can be of higher value than the air, without which life cannot exist, still it cannot be property.

Property defined

Property may be defined to be a thing or a right to a thing which can fetch a price It is extended to things which intrinsically have no value, but which are valuable as evidences of rights to receive money or profits, as for instance, bonds, debentures, government securities or other negotiable instruments, shares of joint stock companies, and the like.

Can Sebayet make Will

A person may exercise all the rights constituting ownership, over property which belongs to a deity or a religious or charitable endowment, and which he holds as a Sebayet or trustee and can even alienate for the benefit of the owner, and with respect to which he can appoint his successor in the office of Sebayet It has been held, that his rights over the property cannot be called his *property*, and so an instrument executed by him to appoint his successor, and intended to be operative after his death, cannot be regarded as a Will, or admitted to probate. (*g*)

Definition of Will in I Vict C 26

It should, however, be noticed in this connection, that the English Wills Act, 1837, (*h*) explains the meaning of Will thus, "the word Will shall extend to a testament and to a codicil, and to an appointment by Will or by writing in the nature of a Will in the exercise of a power, and also to a disposition by Will and testament to devise, of the custody and tuition of any child, * * *, and to any other testamentary disposition." So in England the donee of a power of appointment may appoint the property by a Will, although the property is not his. The definition of Will enables him so to do. But the definition of Will in the Indian Succession Act is not so comprehensive, nevertheless the Legislature

Power of appointment, in English law.

(*g*) Chaitanya *v* Dayal, 32 C 1082 9 C W N 1021, Jogadindra *v* Madhusudan, 20 C L J 307 27 I C 24, see Baisnav *v* Kishare, 15 C W N. 1014

(*h*) 1 Vict. c 26

seems to be oblivious of this distinction, and appears to have the English definition in mind while enacting Section 69 of the Indian Succession Act, which contemplates "a Will made in the exercise of a power of appointment, when the property over which the power of appointment, is exercised would not in default of such appointment pass to his (the testator's) executor, or administrator, or to the person entitled in case of intestacy." Unless the term *property* in the Indian definition be taken in a most comprehensive sense so as to include also property over which the testator has merely power of appointment, the said Section 69 cannot be reconciled with the definition of Will. Similarly Section 60 which provides that "A father, whatever his age may be may by *will* appoint a guardian or guardians for his child during minority"—also shows that the framers of the Indian Code had the English definition in their mind.

Succession Act.

There are many cases in which testamentary documents executed by Sebayets appointing their successors, were taken without dispute to be Wills and admitted to probate. Such Wills are analogous to those whereby powers of appointment are exercised. But these writings cannot come within the Indian definition of Wills, if the term *property* be strictly construed, as is done in the case of *Chaitanya* v. *Daval.* (*i*)

Sebayet's Will admitted to probate

It should be noticed that *property* in a Will unless expressly restricted to what is existing at the time of its execution, comprises what is acquired by the testator subsequently to the execution of the Will, answering the description of the property : Section 90. This is another incident whereby a Will is distinguished from a conveyance or a gift which must relate to existing property only.

Property includes future property

Codification.—The Indian Succession Act (X of 1865 new XXXIX of 1925) codified the law of succession both intestate and testamentary , but it was not originally intended for the Hindus, Sikhs, Jainas and the like who are governed by Hindu law, and who form the bulk of the population of India, although it professed to be the territorial law of British India It was intended for the domiciled English-

I S Act for whom intended

(*i*) 32 C 1083 9 C W N 1021 , *see foot-note (g)*

men and other Europeans, the Eurasians (now called Anglo-Indians) and the Native Christians: there having been neither personal nor territorial law applicable to them, the Courts had the difficult task of supplying the deficiency by the application of principles of equity, justice and good conscience.

Hindus excluded

The Hindus being expressly excluded from its operation the framers of the code never troubled themselves with the consideration whether the rules propounded by them would be suitable to the Hindus, as they were legislating for the benefit of persons whose ideas, sentiments and habits were like those of Europeans, for, the Eurasians and the more respectable of the Native Christians were either Anglicized in their thoughts, feelings and habits, or sought to become so by imitating the Europeans and following their ideals. The rules are mainly and substantially the same as those of the English law with some modifications, additions and alterations.

Certain sections extend to Hindus

But five years after the passing of the Act, the Hindu Wills Act No. XXI of 1870 was passed, Section 2 of which extends to Hindu Wills a large number of Sections of the Succession Act in what is called by an eminent Judge, spasmodic method of legislation. (*j*)

Object of Hindu Wills Act

The preamble of the Hindu Wills Act stated that it was enacted to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the Wills of Hindus, Jainas, Sikhs and Buddhists in Bengal and in the towns of Madras and Bombay, Section 2, however, showed that the whole law of testamentary succession provided in the Succession Act had, with the exception of a few sections, been extended to the Hindus. Having regard to the *subjects* enumerated in the preamble, and to the *rules* which were provided by the Act, *most* of them appeared to be intended by the Legislature to be *rules of interpretation*, and not only rules relating to the mode in which Wills were to be executed, but also those relating to the estates bequeathed and their inci-

(*j*) Cally Nath v Chunder, 8 C 378, 391

dents, as well as those relating to the capacity of the testator to create and to the capacity of the legatee to take the legacies, appeared also to be intended to be included under *rules for execution.*

In this manner only one can reconcile the enumeration of the subjects for which rules were enacted, with the rules themselves that were actually enacted by Section 2, of the Act.

New I S Act

This Act and the Indian Succession Act of 1865 as well as some other Acts have been repealed by Act XXXIX of 1925 in which most of the provisions of the Acts repealed have been incorporated with but slight alterations with almost all the defects of the previous Acts.

Effect of S, 3

Sir Lawrence Jenkins, in the case of *Radha Prasad Mallick* v. *Ranimoni* (*k*) which came before the Court again, and was approved by the Privy Council, has adopted the canon of construction of an incorporated statute laid down in *In re Wood's Estate.* (*l*) His Lordship went on to say —

"Section 3 of the Hindu Wills Act 1870 is by way of proviso to the portions of the Succession Act (X of 1865) incorporated by Section 2 and it is thereby provided that nothing in the Act contained 'shall authorise a Hindu, Jain, Sikh and Buddhist to create in property any interest which he could not have created before the first day of September 1870' Whether this provision has regard only to the nature of the interest or extends also to the capacity of the person in whose favour the interest is expressed to be created has been a matter of considerable discussion If the narrow view be adopted, nothing in the shape of repugnancy would arise on the construction of the Act, but this cannot be said of the wider view, indeed its adoption involves to an appreciable extent the nullifying of that which has been incorporated," He then on the authority of previous decisions added that "the proviso I have read controls both the quantity and quality of the interest created and its natural and ordinary meaning includes the capacity of a donee to take"

Advisibility of applying English rules to Hindus

Thus a body of rules proved by experience to be expedient and suitable for the nation civilized in a particular way, has been extended to a people with different family and social organisations and with different customs, habits of thought, ideals of life, and religious belief and sentiments and aspirations It was assumed that rules that were adopted in England

(*k*) 38 C 183, 197-199, 15 C W N 113 affirmed by P C 41 I A 173 41 C 1007 20 C L J 348 18 C W N 873 26 M L J, 653. 23 I C 713 (previous case reported in 35 I A 118 35 C 896)

(*l*) (1886) L R 31 Ch D 607, 615

as appropriate and beneficial must be so here also As a general rule the assumption is undoubtedly right But it seems that in some respect it would have been better if, instead of hard and fast rules, the matter had been left to the discretion of the Courts, as for instance the rule relating to revocation of Wills The stringent rule may lead to miscarraige of justice

It is difficult to understand the principle upon which is founded the imperative exceptional rule that marriage shall not revoke a Hindu's Will The principle upon which a Will is revoked by marriage is, that it creates a change in a person's condition, such new duties and obligations, that they give rise to a presumption that he would not adhere to a Will made before it. The principle equally applies to Hindus, but the old rule is again perpetuated in the new Act. (*m*) It may no doubt be said that the distinction is justified by reason of polygamy But it is so rare, and is resorted to under such exceptional circumstances, that it cannot justly support the rule.

or birth of son.

It must be admitted that the birth of male issue is an event of the highest importance in a Hindu's life, and this ought to operate as a revocation of a previous Will. Suppose a Hindu having no male issue, but only a daughter by his wife who was not likely to give birth to any more child, made a Will whereby he gave his whole property to his daughter, subsequently his wife died, and he was prevailed upon by relations to marry another wife, by whom he had a son, and he died thereafter leaving the son, and the daughter forgetting either to revoke or alter the Will. Can it be said that the testator intended that his estate shall go to his daughter to the exclusion of his son? Yet that must be the effect of his Will under the present law, according to which a Will cannot be held revoked otherwise than by the modes laid down by the Act, (Section 70) although it is contrary to what ought, according to all right thinking persons, to be deemed the dying intention of the testator Accordingly it has been held that the birth of a posthumous son has not

(*m*) *See* Secs 57 and 69 of Act XXXIX of 1925

the effect of revoking a Hindu's Will devising his self-acquired property (*n*) But the Hindu Judge Sir Subrahmania Ayyar was *dissentient*. It is submitted that if a Hindu testator does recite in his Will that he is sonless or destitute of male issue, then the default of male issue should be presumed to form the foundation of his Will, which in case he gets a son subsequently, should be construed to be intended by him to become inoperative as regards dispositions that may be presumed to be such as he would not have made, had he got a son.

Act v of 1881.

By the Hindu Wills Act the provisions of the Succession Act relating to the grant of Probates and Letters of Administration had been extended to the Hindus, but subsequently the said provisions were replaced by the Probate and Administration Act No V of 1881 which contained substantially the same rules as the Succession Act (X of 1865) with slight alterations. This separate Act applied to the whole of British India, and to all persons who were exempted from the Succession Act, but the Section 187 (213 new) which made the grant of Probate (or Letters of Administration) absolutely necessary for establishing the right as executor (or administrator) or legatee, (*o*)—had not been incorporated in the Probate and Administration Act, though it was retained in the Hindu Wills Act. The consequence was that taking out of Probate or Letters of Administration was original with those to whom the Succession Act or the Hindu Wills Act did not apply, such as the Mahomedans. The provision is still retained in the present Act XXXIX of 1925

new I S Act

Subjects dealt here.

It is not necessary to enter into the details of the law embodied in these statutes, a few observations only are therefore made here on some important topics, and on certain matters that are not found in the Act, but are contained in the decision of the Courts

(*n*) Subbareddy *v* Doraisami 30 M 369 17 M L J 259 followed in Bodi *v* Venkataswami 38 M 369 and Alwandar *v* Dhanakoti, 1927 M 383

(*o*) The obtaining of probate subsequent to the institution of the suit but before decree, is sufficient compliance with the provisions of Section 187 (213 new) Chandra *v* Prasanna, 38 I A 7 38 C, 327 15 C W N

How wills made

How Wills made.—Before the passing of the Hindu Wills Act, a Hindu could make a will by word of mouth only, (*p*) or by writing of any form, embodying testamentary dispositions, though neither signed by the testator nor attested by witnesses, provided the same contained testamentary intention. (*q*) But Hindus must now execute Wills according to the formalities perscribed by Section 63 of the Succession Act. If the instrument complies with the requirements of law as regards execution of a Will, and also fulfills the conditions necessary to bring it within the definition of a Will, then whatever may be its name or form it will be deemed as a Will, and as such admitted to Probate. A document called an *ekrar* or "agreement" and also *niyam-patra* and *ekrar* or "condition-deed and agreement." (*r*) and another called *sambandha-nirnaya-patra* or "letter settling matrimonial alliance," (*s*) were held to operate as Wills as regards the testamentary dispositions contained therein the tests are whether the dispositions are to take effect, not *inter vivos*, but after the executant's death, and whether it is ambulatory and revocable at the executant's pleasure. (*t*) The mere statement by the testator in his Will that "if it be necessary for him to raise money he would be at liberty to mortgage the properties but not to sell the same absolutely"—cannot be construed to render irrevocable what is called a Will and contains dispositions of properties expressly stated to become operative after the executant's death , but it should be taken merely to indicate how the testator intends to act in future, nor can it have the legal effect of depriving the testator of his power of alienation. (*u*)

Sub-Sec iii—TESTAMENTARY POWER

Who can make Will—A minor cannot make a Will; (*v*) but a Hindu who has attained the age of discretion is

(*p*) Beerpertab *v* Rajender 12 M I A 1 9 W R P C 15
(*q*) Shumsool *v* Shewukram, 2 I A 7, 13 22 W R 409, Tara *v*. Nobeen, 3 W R 138
(*r*) Ram Moni *v* Ram, Gopal, 12 C W N 942
(*s*) Din *v* Krishna, 36 C 149 13 C W N 291 · 1 I C. 791
(*t*) Sita *v* Deo, 8 C W N 614 3 C L J 370
(*u*) Sagor *v* Digambar 14 C W N 174
(*v*) See 59, Bai Gulab *v* Thakorelal, 36 B 622 14 Bom L R 748 : 17 I C 86, Krishnamachariar *v* Krishnamachariar 38 M 166 24 M L J 517 19 I C 452, Hardwari *v* Gomi, 33 A 525 8 A L J. 385 9 I C 1017

competent to give power of adoption to his wife, according to Hindu law, one who has completed the fifteenth year is major, and Section 57, with Sch III, says that nothing in it shall affect any law of adoption It seems therefore that a Hindu, whatever his age may be, can by a Will empower his widow to adopt.

Subject of devise—A person cannot bequeath property which he could not have alienated *inter vivos*. It should, however, be observed that the converse proposition is not necessarily true in all cases A Hindu widow or any other female heir who has a limited interest and cannot ordinarily alienate, cannot devise *inherited* property. Although they are entitled to make transfers *inter vivos* for legal necessity, yet as their interest ceases on their death, and the estate passes to the reversioner, there is nothing left upon which their Will can operate A Will made by a Hindu widow whereby she devised her husband's estate inherited by her, was declared invalid during her life, in a suit brought against her by the reversioner. (*w*) She is competent, however, to make a valid Will of her Stridhan property.

Mitakshara co-parcener's power—A member of Mitákshará joint family, cannot make testamentary disposition of his undivided coparcenary interest in joint property, which he cannot alienate for his personal purposes during his life and which on his death lapses, or (as is loosely stated) passes by survivorship to the surviving male members of the family, so that there is nothing left on which his Will can operate. (*x*) In a case, when two brothers, members of a joint Mitákshará family executed an agreement by way of a 'Will,' it has been held by the Privy Council (*y*) that though the document in question could not operate as a Will as being executed by members of a joint Mitákshará family, yet it might be good evidence of a family arrangement.

(*w*) Jaipal *v* Indar, 25 A 238 31 I A, 67 8 C W N 465 6 Bom L R 495 : 14 M L J 149

(*x*) *See pp* 424-426, Tadi Bulli *v* Tadi Bulli, 50 M 421 : 31 C.W N 799, 801 45 C L J 512 1927 P C 80

(*y*) Seth Lakhmi *v* Anardi, 31 C W.N. 101 P C 43 C L J 513

In Madras and Bombay

It should, however, be noticed that although in Madras and Bombay the Mitákshará law has been modified by the Courts in favour of purchasers of value on grounds of equity and an alienation by a member of a Mitákshará joint family, of his undivided coparcenary interest, though made without the consent of his co-sharers, is recognised as valid by the Courts, if made for valuable consideration, yet he cannot dispose of it by Will Such alienation is certainly inconsistent with the strict theory of joint family, and this doctrine established by modern jurisprudence by way of exception, has been, as it should be, limited by the requirements of equity; and it does not admit of extension, as if it were a settled principle of Hindu law which should be carried out to all its logical consequences. (z)

Power of appointment—It has been held that the power of appointment is recognised by Hindu law, there being an analogy to it in the law of adoption a person may by Will confer power on another person to appoint his property, without being subject, to any condition that the object to whom the property is to be appointed must be in existence at the testator's death (a)

Bengal father's power—As regards the Bengal school, it has already been stated that the father is held to have testamentary power as well over ancestral as over his self-acquired property, without any distinction whatever, (b) although a student of the Dáyabhága would be at a loss to understand how such a doctrine was deduced from that treatise admitted to be of paramount authority in Bengal.

Other systems of jurisprudence

In some systems and in the early stages of most systems of jurisprudence, the power of alienation *inter vivos* is found unrestricted, but nevertheless the power of devise is circumscribed by the claim of near and dear relations upon the testator's estate whom he was under the obligation to maintain. Accordingly the testamentary power is limited to a

(z) Lakshman *v* Ramchandra, 5 B 48 7 I A 181 affirming 1 B 561, see *supra pp* 424—426

(a) Act XV of 1916 *but see* old law Bai Moti *v* Bai Mamu, 21 B 709 24 I A 93 1 C W N 366, Javerbai *v* Kablibai, 16 B 492, 498

(b) Tagore *v* Tagore 18 W R 359, 365 I A sup 47

certain share of the estate, the rest being subject to the law of intestate succession.

Daya father's right saddled with obligations

That the male issue has more than a mere claim for maintenance, upon ancestral property in the father's hand according to the Dáyabhága cannot be questioned, and it is a general principle of Hindu law that a person is bound to provide his wife with maintenance, and is also under obligation to furnish with means of livelihood his male issue whom he brings into existence The Hindu law also imposes on a man the liability of maintaining his parents. A man's right over his property is curtailed by these obligations. He cannot at any rate *give away* his property and deprive these persons of the means of subsistence.

Tagore case

In the Tagore case the Judicial Committee did not enter into the question as to how far the testamentary power as to ancestral property can supersede the son's claim to maintenance, but decided the case upon the assumption that it could not.

Hindu Wills Act

The Hindu Wills Act (now incorporated in the Indian Succession Act) refers to it by saying that nothing in the Act shall authorize a testator to deprive any person of any right of maintenance, of which he could not previously deprive by Will.

Mitakshara father's power--*It should be observed that a person governed by the Mitákshará, is competent to alienate even the ancestral property by a sale, gift or any other transfer *inter vivos*, if at the time of such alienation he has no co-parcener jointly entitled to the property the subsequent birth or adoption of a son cannot affect the validity of the alienation so made. But a Will of ancestral property does not stand on the same footing, but is virtually revoked by the subsequent birth or adoption of a son who becomes at once entitled to such property equally and jointly with the father, and survivorship applies, if the latter dies leaving a male issue, the title by survivorship being prior to the title by devise, so that his undivided co-parcenary interest passes to the surviving co-sharer, and there is nothing left on which

with regard to ancestral and

* *See ante p 421*

his Will can operate. (*c*) It would depend on the state of things existing at his death whether his Will would be effectual and operative or not, it would operate on any separate and divided property. (*d*) The result would be the same if there be a son in the womb at the testator's death. (*e*)

self-acquired property

According to the Mitâksharâ law the male issue acquires a joint right by birth and not only to the ancestral but also to the father's self-acquired property but nevertheless the father's power of alienation *inter vivos* over the latter is recognised. Still because a son as co-parcener takes by survivorship and not by succession even the father's self-acquired property, a Will would have stood on the same footing as one relating to ancestral property in Southern India, but for the theory of analogy of a Will to a gift *inter vivos*, as regards the property that can be bequeathed. Hence it has been held that a Mitaksharâ father is competent to bequeath his self-acquired property. (*f*)

Excluding Heir-at-law—He can be *disinherited* only by valid dispositions in favour of other persons, not otherwise. (*g*)

Sub-Sec iv—CAPACITY OF LEGATEE TO TAKE

Who can take under Wills

Existence of legatee—It has already been stated that the disqualification of unborn persons to get as legatee, if born subsequent to the death of the testator, has been removed. (*h*) But before the removal of the disqualification, in order that a person could take as legatee, it was necessary that he must have been in existence at the testator's death: fœtal existence was not sufficient if the child did not come into separate existence, in other words, if the child *in embryo* at the testator's death had subsequently, been born, alive, he was entitled to the legacy bequeathed to him. He was deemed to be in contemplation of law in existence

Child *in embryo*

(*c*) Nagalutchmee *v* Gopoo, 6 M I A 309, 345, Parvatibai *v* Bhagwant, 39 B 593

(*d*) Vitla *v* Yamenamma, 8 M H C 6, Sattaj *v* Deoraj, 10 A 272 15 I.A 51 Venkata *v* Court of Wards, (Pittapur case), 22 M 383 26 I A. 85

(*e*) Minakshi *v* Virappa 8 M. 89

(*f*) Jugmohandas *v* Mangaldas, 10 B 528, 551-5, Nagalingam *v* Ramchandra 24 M 429, 436-8

(*g*) Tarucknath *v* Proson, 19 W R 48, in this connection *see* Venkatpathi *v* Suryanaryana, 1927 M 206 and Narsingh *v* Maha Lakshmi, 50 A 375, 393 32 C W N 1065, 48 C L J 106 Ram Kaur *v* Atma. 8 L 181

(*h*) *See ante p* 1008.

at the decease of the testator, though he was not so in fact. (*i*)

Adopted son.—The above principle is extended to a son adopted by a Hindu widow after her husband's death, and he is deemed in contemplation of law, to be in existence at the death of the adoptive father. The adoption is tantamount to birth as son of the adoptive father, and this new birth relates back to the father's death, and entitles him to take the father's estate either by inheritance or by devise. It should be observed that this exception is made in favour only of the *testator's* adopted son, it cannot apply to the adopted son of any relation of his, who cannot have a better position than that relation's real legitimate son.

Death of legatee before testator—A legatee must survive the testator to become entitled to the legacy, if he dies before the testator, the legacy lapses. There is an exception to this rule laid down in Section 109 applicable to a legacy bequeathed to the testator's child or any other lineal descendant, which does not lapse in case the latter dies in the testator's life time, leaving any lineal descendant who survives the testator, but the legacy shall take effect as if the legatee died immediately after the testator, unless a contrary intention appears by the Will

Legatee as executor—If a legatee is appointed an executor of the Will, he cannot take the legacy unless he acts, or otherwise manifests an intention to act, as executor. Section 141.

Trustees.—Property may be bequeathed to a person who is to hold it in trust for the benefit of others, without deriving therefrom any benefit himself, the devisee in trust is to carry into execution such of the trusts as are valid, should there be a residue left, it would go to the heir-at-law, if there be no residuary legatee. Trusts for religious and charitable endowments are well-known.

But a testator cannot, through the intervention of trusts, Trust cannot

(*i*) Tagore v Tagore, 18 W R 359, 365 I A Sup 47

validate unauthorised interest: create indirectly beneficiary estates of a character unauthorized by law, which he is incompetent to do directly. (j)

Power to appoint—Power may be conferred by Will on a person to appoint the testator's property. (k) The power may be either general, or special. When the donor of the power authorizes the donee of the power to appoint the property to any object the donee pleases, it is called a general power of appointment. And power is called special or particular, when the donee's right of appointment is restricted to some objects designated in the Will by the testator himself. The devisee of a general power of appointment is virtually the legatee of the property over which the power is to be exercised, for, as he has the power to appoint the property to any object he may think proper, he may appoint it to himself, and in the absence of appointment it devolves as *his* property: see Section 91. If no appointment is made by the donee of a special power, the property goes equally to all the objects of the power, if the Will does not provide for the event of no appointment being made. see Section 92. These two sections relating to powers of appointment, have, not however, been extended to the Hindus, probably because there was then no case recognising *powers of appointment* as part of Hindu law. (l) The first case on the subject is that of *Bai Motivahoo* v. *Bai Mamoobai*, decided in 1897. (m) But when a Hindu testator directed that the donee of the power shall remain in possession and occupation of his estate and shall appoint an *heir* either in his life-time or by Will, it did not amount to an absolute gift thereof to the donee. (n)

general

special.

When legacy to unborn persons valid.

Unborn persons,—subject to certain restrictions, used to become legatees under Sections 112 to 114 of the Succession Act extended to Hindus. An unborn legatee must always be described as a relation of a living person.

(j) Bai Moti v Bai Mamu, 21 B 709 24 I A 93 1 C W N 366

(k) Tagore v Tagore, 18 W R 359, 368 I A Sup 47

(l) *Vide* Sec 57 Indian Succession Act

(m) 24 I A. 93, 105 21 B 709 I C W N 366

(n) Brij v Suraj, 34 A 405 39 I A 150 16 C W N 745 · 16 C.L J 47 ; 9 A. L J 802 (1912) M W N. 646 14 Bom L.R 827 23 M L J 38 ; 16 I.C. 92.

A legacy to an unborn person coming into existence after the testator's death, was valid under the following conditions —

1.—If the possession of the legacy was deferred to a time later than the death of the testator, by a prior bequest or otherwise ;

2.—If the legatee came into existence before the said later time which could not be beyond the death of one or more living person or persons, *i. e.*, he must have been in existence at the expiration of the life-time of a person or persons living at the testator's death ,

3 —When the legacy was subject to a prior bequest, it must have comprised the whole of the remaining interest of the testator in the thing bequeathed , and

4 —The legacy must have been given in such terms that it was not possible for the vesting being delayed beyond the lifetime of living persons or person and the minority of the unborn legatee.

The Hindu Disposition of Property Act (XV of 1916) has removed the restriction of making a device in favour of unborn persons erroneously imposed on Hindus by judicial decisions. But paragraph 2 of the restrictions and modifications attached to Schedule III as contemplated in Section 57 of the Indian Succession Act, has introduced an anomaly into the question. (*o*)

Rule against perpetuity —The aforesaid fourth condition is called the *rule against perpetuity* or *remoteness* The principle being that property must not be permitted to be tied up, so as to make it inalienable But as property can be given to an unborn person, subject to a prior estate, for life, to a living person, it must necessarily be tied up until the attainment of majority by the former . and hence vesting is permitted to be delayed up to that time but not beyond it (*p*) The rule of English law according to which vesting

(*o*) *See ante p* 1008.

(*p*) Soundara *v* Natarajan, 43 C.L J 70 : 80 C.W N 434, 439 P C, appeal from 40 M L J 354.

can be postponed to an absolute period of twenty-one years after the life of living person, is also founded on the same principle, but the Indian rule is more logical.

Act XV of 1916, etc

*** Devise to unborn person**—The legislature has now by statute made the provisions of some of the Sections applicable to unborn persons (*q*) In this connection *see ante*, Sec. 3, Sub-Sec. v.

Sub Sec v—CONSTRUCTION OF WILLS

New mode of devolution—It has already been stated that no person can, either by gift *inter vivos* or by testamentary device, lay down a new mode of devolution (*r*) Such attempts to interfere with the course of descent according to law cannot be regarded as a condition of defeasance. (*s*)

No new estate can be created

Estates, limitations—A Hindu can by Will create such estates only as are consistent with Hindu law He cannot make his property descend in a new line of succession different from what is directed by Hindu law to attempt to do so, would be assuming to legislate. (*t*) Nor can a person create a joint tenancy among legatees by a devise in their favour of any property without specification of any share in it, the legatus take the property as tenants-in-common (*u*)

Different estates

Estates are interests in land that may be possessed by a person a life-estate, an estate tail, and a fee simple are the freehold estates in English law, an estate for life of either the tenant or any other person was regarded the lowest estate worthy of acceptance by a *free man*, according to the feudal ideal and it was deemed larger than a lease for any term of years, however long. An estate tail with succession by primogeniture is unknown to Hindu law, and a Hindu cannot create it by Will. (*v*)

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* *See ante pp* 1007-1014

(*q*) See *supra p* 1008, 1009

(*r*) Tagore *v* Tagore, 18 W R 359, 364 I A Sup 47, Purna *v* Kalidhan, 38 C 603, 619 38 I A, 112 15 C W N 693 14 C L J 1 21 M.L J 1119 11 I C 412, Ambalika *v* Arpini, 45 C 835 23 C W N 160 29 C L J 2?4 47 I C 402, Raghunath *v* Deputy, 34 C W N 61 51 C L J 16 P C, Madhavrao *v* Balabhai, 52 B 176 32 C W N 925 47 C LJ 198 1928 P C 33, Satya *v* Annapurna, 48 C L J 523 1929 C 145

(*s*) Purna *v* Kalidhan, 38 C 603, 620, *see above*, Raghunath *v.* Deputy, *supra.*

(*t*) Tagore *v* Tagore, 18 W R 359, 364 I A Sup 47

(*u*) *See ante p* 879, Jio *v* Rukman, 8 L 219, *see* Debi *v* Krishna, 1928 O 26

(*v*) *See foot notes*, (*r*) (*s*) and (*t*) *above* and Tagore case

Contingent interest

** Hindus are held competent to create contingent interests by way of remainder or by way of executory devise, upon an event happening at the latest, on the close of a life in being. With regard to the testamentary power under Hindu law, the Judicial Committee made the following observations in *Soorjeemoney Dassee's* case (*w*)

Soorjeemoney's case,

"Whatever may have formerly been considered the state of that law as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as completely established This being so, we are to say, whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law, in allowing a Testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen, if at all, immediately on the close of a life in being Their Lordships think that there would be great general inconvenience and public mischief in denying such a power and that it is their duty to advise Her Majesty that such a power does exist"

In this case the testator gave his estate absolutely to his five sons in equal shares, and then added a clause of conditional defeasance, in which he provided that if any one of his sons die without leaving male issue, then his share shall not devolve on his widow, daughter or daughter's son, but shall go over to the testator's male issue then living This gift was held valid according to the principle enunciated in the above passage

Narendra Nath Sircar's case

But it has been held by the Judicial Committee in *Narendra Nath Sircar's* case that the law has been modified by Section 111 (now 124) of the Succession Act, which lays down that if no time is mentioned in the Will for the occurrence of the event upon which the gift over is made contingent, the gift cannot take effect unless the event happens before the period of payment or distribution, *i e*, ordinarily, before the death of the testator. Accordingly, although the facts in this case were on all fours with those of *Soorjeemoney's* case, it was held that the gift over could not take effect (*x*)

** *See ante p* 999

(*w*) 9 M.I A 123, 135

(*x*) Narendra *v.* Kamalbasini, 23 I A 18

124 Sec

This Section 111 (now 124) appears, from its illustrations as well as from the preamble of the Hindu Wills Act, now replaced by the Indian Succession Act, to embody a rule of construction, though it is a hard and fast rule, and it was thought, that if the time for the occurrence of the event be stated in the Will to be after the period of distribution, the gift would take effect on the happening of the event But in a case,—in which the testator bequeathed to one Kasiswar a legacy subject to the condition subsequent, that if the legatee died without leaving male issue, after the expiration of nine years from the testator's death (which was also the period of distribution), then it shall go over to Monohur,—it was held by the Calcutta High Court that the gift over could not take effect, when Kasiswar did not die before the period of distribution under the Will, inasmuch as the time for the occurrence of the event was not mentioned by the words—"after the expiration of nine years from the testator's death"—which stated only one limit, namely, the commencement, the other limit *i e*, the end not being set forth, *time* cannot be held to be *mentioned*. It would appear that if the testator had added the words—"and within 50 or 60 or 80 years from it,"—then in the opinion of the learned Judges, time would be held to have been mentioned and the requirement of the section complied with, and the gift over would have taken effect. It has also been held that the rule is not one of construction (*y*)

Privy Council on above

The Privy Council has explained the scope of Section 111 (new 124) of the Succession Act in the case of *Bhupendra Krishna Ghosh* v *Amarendra* (*z*) It is stated that —

Rule in *Edwards* v *Edwards*.

"Secion 111 (124 now) embodies the rule enunciated in *Edwards* v *Edwards* (*a*) The rule of construction laid down in this case has been considerably modified by later English decisions The Indian Act, however, has given it statutory force Even in India as regards, Hindus, its application is confined to special tracts such as the territories subject to the Lieutenant Governor of Bengal and the Presidency towns of Bombay and

(*y*) Monohur *v*. Kasiswar 3 C W N 478.

(*z*) 43 I A 12 : 43 C 432 20 C W N 169 23 C L J 169 · 30 M L J 110 : 18 Bom L R 347 14 A L J 167 34 I C 892, on appeal from 41 C. 642

(*a*) 15 Beav 361 (1852).

adras Their Lordships think that it should be applied only to cases strictly coming within its scope In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow That being so, the gift to the nephews is not affected by Section 111 (old) and must take place" In this case the testator bequeathed the property in the following words "I * * * appoint my wife * * * to be the sole executrix of this my Will I hereby authorize my said wife to adopt Dattaka Putra In case of death of an adopted son my said wife shall adopt one after another five sons in succession If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister * * * who may be living at the time of my death"

In another case (*b*) the Privy Council has quoted the observation of the House of Lords made in the case of *O' Mahoney* v. *Burdett*, (*c*) which their Lordships say "as one which emerged through a thicket of technical decisions to a ground of plain and pre-eminent good sense." Lord Hatherley says that.—"that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the Will which are inconsistent with that supposition." But in this case the provisions of Section 111 (now 124) are not applicable.

O'Mahoney Burdett.

The principle enunciated in *Narendra Nath Sarkar* v. *Kamalbasini*, (*d*) seems, in effect, to have been modified by the subsequent decision in *Bhupendra Nath Ghosh* (*e*)

A testator, after life estates bequeathed that A shall be the owner of the property after him and after A's death who shall be A's son shall be the owner and if there be no son to A, B, C & D (all living) shall be the heirs and owners of the estate, it has been held that the gift to A's unborn son or to B, C, and D are alternative bequests and hence, though bequest to A's unborn son was bad it does not follow that the bequest in favour of B, C, D was also void *ab initio*. (*f*)

(*b*) Chunilal v Bai Samrath, 38 B 399 19 C L J 563 18 C W N 844 16 Bom L R 366 26 M L J. 647 12 A L J 742 23 I.C 645
(*c*) (1874) L R 7 H L 388, 404
(*d*) 23 I A 18 23 C 563 6 M L J 71.
(*e*) See *foote note* (z) above
(*f*) Darshan v Wali, 1929 A 102

Latest view of the Privy Council.

Sections 124 and 131 of Succession Act.—The Privy Council, in a recent case, (*Indira Rani* v *Akshay**), has explained the legal effects of these Sections. The testator in this case bequeathed his estate to his sons *inter alia* in the following term "* * * but nevertheless in the event of any sons or son's sons dying without leaving lineal male issue him surviving the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share or the property as he or they would inherit under the Hindu Law" On the death of the eldest of the two sons without leaving lineal male issue, his widow *Indira Rani* claimed her husband's half share in the estate. Her case was that the gift over to the son (*Akshoy*) other than the one (*Indira's* husband) who died without a lineal male issue, is inoperative under the provisions of Section 124 and, therefore, on the death of her husband, his estate devolved upon her. In support of her contention she also relied on the decision of the Board in *Narendra Nath* v *Kamalbasini* (g) Their Lordships distinguished this case from the one for their decision, on the ground that in *Narendra Nath's* case, the death without issue, contemplated in the Will, was during the life-time of the testator, whereas in the case now for their Lordships consideration, the testator contemplated the death of the legatee after him also.

Their Lordships held that the language of the illustration, "A legacy is bequeathed to A., and in case of his death to B," is not the same as, "A legacy to A., and in case of his death before or after that of the testator to B" They, therefore, added "In other words, A's (*Indira's* husband's) interest in the legacy, B (*Akshoy*) surviving, is cut down to a life-interest, and Section 131 of the Act becomes relevant as an enabling provision." The claim of the widow *Indira Rani* on the death of her husband without lineal male issue on the ground stated above, failed.

* *Judgment not yet reported*
(g) 23 I A 18 23 C 563 6 M I J 71

Executory devise.

Remainder or executory devise—When a testator bequeaths to one legatee a property, not absolutely, but to be enjoyed for a limited period, and his remaining interest therein to another, the latter is called *remainder* or *executory devise* under different circumstances, if the remaining interest is not bequeathed, it reverts to the testator's estate, and is called *reversion*. The distinction between the terms *remainder* and *executory devise* of English law will appear from their following descriptions —" A *remainder* is an estate in land so limited in the instrument creating it, as to be expectant immediately upon the natural determination of a particular estate of freehold limited by the same instrument."—A *particular estate* is only a part, or *particular*, of the fee simple being an interest less than the whole, as a lease for a term, an estate for life, or an estate tail, of which the latter two are freeholds.—" Every devise of a future interest, not preceded by an estate of freehold created by the same Will, or which being so preceded, is limited to take effect before or after, and *not* at the natural determination of such prior particular estate, must then be an *executory devise*." (*h*)

Remainder,

Particular estate

Limit.—To *limit* is to mark out or describe the extent of interest bequeathed by stating its commencement, duration, termination, &c. · and *limitation* means either act of *limitation*, or interest *limited*

Reference to death in a Will will, *prima facie*, refer to death at any time, but it is to be fixed from the wording of the Will. (*i*)

Power to create estates—A Hindu may by Will create particular estates in property excepting an estate tail, as well as remainders and executory interests whether vested or contingent as stated above (*j*)

Vested & contingent

Legacy, vested & contingent.—A legacy may be either vested or contingent. A vested legacy is either vested in interest only, or vested in both interest and possession, a

(*h*) Bigelow on Wills, 351.

(*i*) Suresh v Jyotirmoyee, 53 C.L J 129 P C. (*j*) *See ante p* 1044

contingent legacy depends on the happening or non-happening of some uncertain future event.

absolute & conditional

A legacy again may be absolute or conditional: a condition is either precedent or subsequent. A condition precedent is one which must be fulfilled before the legatee can take a vested interest, but as the law favours vesting, substantial compliance with such condition is sufficient: Section 128. A condition subsequent is one on the fulfilment of which a legacy given to, and vested in one person, goes over to another person by divesting the former (Section 131), but as the law disfavours divesting, strict fulfilment of such condition is required to give effect to the ulterior legacy. Section 132. Condition of residence is held valid, whereby the devisee forfeits the legacy by ceasing to reside in the specified house. (*k*)

condition precedent

The English principle according to which in some cases a construction is voided, which involves a condition precedent, is not applicable to Hindu cases (*l*)

when conditions void;

Conditions, however, that are repugnant to the gift are void. When a testator absolutely divests himself of his interest in property, by giving the same to another person, so as to vest in the donee its ownership, which consists in the right of using, enjoying and disposing of it according to his pleasure, he cannot then impose any condition restricting that right, since it would be repugnant or contrary to the incidents of the transfer itself Hence restraints on alienation, partition or enjoyment are invalid and ineffectual. (*m*) So an absolute gift either by Will or *inter vivos* in favour of donee cannot be curtailed so as to deprive the heirs of the donee coming in after his death. (*n*) An unqualified gift will not be cut down by subsequent words unless they clearly

(*k*) Ganendro *v* Juttendro, 1 I A, 387, Bhoba Tarini *v* Peary, 24 C 645

(*l*) Probodh *v* Harish, 9 C W N 309.

(*m*) Tagore *v* Tagore, 18 W R 359, 365, Ram *v* Atma, 8 L. 181, Section 138

(*n*) Suresh *v*. Lalit, 20 C W N 463 22 C L J. 316 31 I C 405, Raghunath *v* Deputy, 34 C W N 61 51 C L J 16 P C, Satya *v*. Annapurna, 48 C L J 523 1929 C. 145, *but see*, Kounamma *v* Machamma, 1928 M 297 Nanda Kishore *v*. Pasupati, 1928 P 348,

have that effect. (*o*) So a devise to the effect that the estate shall vest in the legatee and that he shall be the testator's heir and successor, are clear dispositive words creating absolute estate of inheritance and cannot be cut down so as to bar the legatee's heirs coming in. (*p*)

specific & general

A legacy may also be specific (s. 142), or demonstrative (s-150), or general. specific legacies are liable to be adeemed (s. 152), but are not liable to abatement with general legacies, in case of deficiency of assets (s. 149). A demonstrative legacy is neither liable to ademption (s. 153), nor ordinarily liable to abatement, , but it is liable to abate, when it becomes general legacy by reason of the failure of the fund out of which it is payable, to the extent of the failure. (*q*)

Direction to accumulate

Accumulation.—Hindu testator's attempt to tie up property in various ways, of which a very common one is a direction to accumulate the income of the estate or any property, since the testator's death. The Section 117 of the Succession Act which deals with accumulation, and allows it only for one in two cases, has not been applied to the Hindus , though Thellussons are not unknown amongst them. In some cases, however, accumulation is necessary, as that of the surplus income of the legacy to a minor after defraying his legitimate expenses, or when legacies and debts are directed to be paid by the accumulation of the income of property, the corpus of which is to go to some other legatee after such payment. But where the direction to accumulate is unreasonable, or unlawful, or inconsistent with, or repugnant to, the gifts made, it must be rejected as inoperative. (*r*) It must depend on the circumstances of each case, as to how far effect can be given to such direction.

Amrito Lall Dutt's case.

The first express decision dealing with a Hindu's power to direct an accumulation, and its limits, is the case of *Amrito Lall Dutt*, (*s*) in which Justice Jenkins held after

(*o*) Tripura *v* Jagat, 40 C 274 : 40 I A 37 : 17 C L J 159 17 C W N 145 : 15 Bom L R 72 17 I C 696
(*p*) Raghunath *v* Deputy, 34 C W N 61 P C 51 C L J 16.
(*q*) Succession Act, S 129
(*r*) Cally Nath *v* Chunder, 8 C 378.
(*s*) 24 C 589 : 1 C W N 345

discussing previous cases,—"that it is not incompetent for a Hindu with proper limitations to direct an accumulation of the income of property which under his Will vests in his executors or trustees," (*t*) and that "in the absence of special provision the *limit* must be that which determines the period during which the course or devolution of property can be directed and controlled by a testator". (*u*) The inference drawn by Justice Harington from the judgments in this case and the previous cases discussed therein is,—"that there is nothing *per se* illegal in a direction to accumulate made by a Hindu and that, if such a direction is neither so unreasonable in its conditions as to be void as against public policy nor given for purposes of carrying out an illegal object nor in its effect inconsistent with Hindu law it should be given effect to." (*v*)

Bequest in favour of heirs

How to construe Wills.—Hindus are often found to make Wills whereby the estate is given to the heirs-at-law, subject to some provisions for maintenance and management. Having regard to the facts that the Hindus believe their law to be of divine origin, and that the same is perfectly suitable to their sentiments, the presumption is in favour of the testator's intention being that the heirs are to take by descent and not by devise.

Intention to be given effect to

Intention of the testator.—In construing a Will, the object of the Court is to ascertain from its wording the *expressed* intention, (*w*) and effect must be given to it, and not to *unexpressed* intention, since, to do that would be to speculate and to make a new Will for the testator · intention is to be gathered from the words of the entire Will, taking them in their ordinary meaning, (*x*) and putting on them a benignant construction, (*y*) and should not overlook the customs, habits

(*t*) 24 C 589, 614-5, *see* Ram Lal *v* Bidhumukhi, 47 C 76

(*u*) 24 C 589, 615

(*v*) Rajendra *v* Raj Coomari, 34 C 5, 11 11 C W N 65, Nafar *v* Ratar 15 C W N 66 13 C L J 85 7 I C 921

(*w*) Raghunath *v* Deputy, 34 C W N 61 P C. 51 C.L J 16; Suresh *v*. Lalit 20 C W N 463 22 C L J 316 31 I C 405, Aghore *v* Kamini, 11 C L J 461 6 I C 554, Narasimha *v* Parthasarathy, 37 M 199, 221 41 I A. 51 18 C W N 554 19 C L J 369 · 26 M L J 411 23 I C 166, Jio *v* Rukman, 8 L 219

(*x*) Bolo *v* Koklan 11 L 657, 663 P C, *see* Jio *v* Rukman, 8 L 219; Pramatha *v* Suprakash, 58 C 77

(*y*) Section 74, Succession Act, Tagore case, 18 W R 359 364.

and predilections of the class to which the testator belonged (z) But to construe words of one Will by the construction of more or less similar words in a different Will which was adopted by a Court in another case, is always dangerous. (a)

The Privy Council in the case of *Narasinha* v. *Parthasarathy, has* very clearly explained the law thus ·—

Narasinha v Parthasarathy

"In all cases the primary duty of a Court is to ascertain from the language of the testator what were his intentions, i e, to construe the Will It is true that in so doing they are entitled and bound to bear in mind other matters than merely the words used They must consider the surrounding circumstances, the position of the testator, his family relationships, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure *The Court is entitled to put itself into the testator's armchair* Among such surrounding circumstances which the Court is bound to consider none would be more important than race and religious opinions, and the Court is bound to regard as presumably (and in many cases certainly) present to the mind of the testator influences and aims arising therefrom." (b)

Hunooman persaud's and

In *Hunoomanpersaud's case* the Privy Council observed :—

"Deeds and contracts of the people of *India* ought to be liberally construed The form of the expression, the literal sense is not to be so regarded as the real meaning of the parties which the transaction discloses" (c)

Soorjeemoney's cases.

In *Soorjeemoney's case* their Lordships remarked —

"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition, nor so far as we are aware, is there any difference as to the materials from which the intention is to be collected Primarily the words of the Will are to be considered They convey the expression of the testator's wishes but the meaning to be attached to them may be affected by surrounding circumstances and where this is the case those circumstances no doubt must be regarded Amongst the circumstances thus to be regarded is the law of the country under which

(z) Swaminatha v Duraisami, 1927 M 681, *see* also *foot notes*, (b), (c) and (j) below.
(a) Sasiman v Shib 1 P 305 49 I A 25 26 C W N 425 . 35 C L J 427 42 M L J 492 24 Bom L R. 576 20 A L J 362 66 I C 193 1922 P C 63; Raghunath v Deputy, 34 C W N. 61 P C 51 C L J. 16; *see* Durga v. Lal, 1928 O 509
(b) Narasinha v Parthasarathy, 37 M 199, 221-2 *Supra*; see Parami v Mahadevi, 34 B 278 12 Bom L R 196 5 I C 960.
(c) This adopted in Vasonji v Chandi, 37 A 369 19 C W N 873 22 C.L J 180. 29 M L J 180 17 Bom L R 556 29 I C 781.

the Will is made and its dispositions are to be carried out If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect unless the language of the Will or to the surrounding circumstances displace that assumption " (d)

Words not to be interpreted as in English deed

In a case—in which by a deed of compromise and release in the English form, between the co-parceners of a joint family with respect to their joint estate, to which a widow of a deceased member in her character as his heiress was a party, a certain sum of money was paid to her, therein expressed as the share of her deceased husband, "for her own absolute and separate use,"—it was contended that those words should be taken in the sense attached to them when occurring in an English deed. But the Judicial Committee held that the money represented her husband's share in the joint property, which she took as her husband's heiress, and accordingly she took only the Hindu widow's interest therein and those words implied that she was to enjoy them separately without interference by the co-sharers.

English rules of construction.—With respect to the applicability of the English rules of construction to instruments executed by Hindus, Justice Wilson made the following thoughtful and instructive observations in the case of *Ram Lal Sett* —

Ram Lall Sett's case

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between the natives of this country Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many of such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose, than upon the fact that English documents of a normal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them It is a very serious thing to use such rules in interpreting the instrument of Hindus who view most transactions from a different point, think differently from Englishmen, and who have never heard of the rules in question Even in England no one thinks of construing a mercantile

(d) 6 M I A 525, 550.

contract by the same canons as a marriage settlement There are in some points different rules for interpreting deeds and wills—wills of realty and wills of personalty, conveyances on sales, and family arrangements "(e)

The rule in *Shelley's* case is based in England upon feudal customs and has no existence in Bombay. (*f*)

But when a testator bequeathed his property to his two daughters stating that my daughters are my heirs, they shall be entitled to all my properties in equal shares and they shall get such rights as are enjoined by the Hindu shastras, the daughters did not each get an absolute estate in the moiety. (*g*)

A gift of one third share after division to each of the two widows of the testator and his son's widow who was childless saying that they should be his heirs (*waris*) without any provision of gift over upon the death of the widows, conferred them with full proprietory rights (*h*)

The construction of the Will which had been construed by the Privy council on three occasions, again came before the High Court for the construction of the following portion of the Will :

"to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike"

There was no son born or adopted by the daughter Ranimoni during the life time of the testator and, therefore, it has been held that on the death of Ranimoni, there was intestacy. (*i*)

Rules of construction of Hindu's Will

The Succession Act contains many rules of construction which are taken from the English law , most of them are of universal application, but a few of them do not seem to be so. These rules with a few exceptions have been extended

to Hindu Wills. Several of these rules do not appear to be quite consistent with Hindu law. For instance, the rule (s. 95) that a legatee is entitled to the whole interest of the testator in the property, would apply to a Hindu widow to whom the husband has bequeathed immoveable property; also the rule (s. 106) that if a legacy is given to two persons jointly, then on the death of one before the testator, the other takes the whole,—is inconsistent with the Bengal School according to which joint heirs or donees of land are tenants-in-common. The Judicial Committee says that—"In construing the will of a Hindu it is not improper to take into consideration what are known to the ordinary notions and wishes of Hindus with respect to the devolution of property." (*j*) But this principle cannot be followed where hard and fast rules of construction are to be applied.

Summary of the rules.—The substance of the general rules of construction in the Succession Act is as follows.—The meaning of a clause is to be collected from the entire will, (s. 82), without rejecting any part admitting of reasonable construction, (s. 85), the intention must be expressed or necessarily implied by the language of the will, (s. 74); for determining what property or person is intended, evidence may be taken or facts the knowledge of which is conducive to the right application of the words (s. 75), evidence is also admissible in case of latent ambiguity (s. 80), if the thing bequeathed is sufficiently identified from its description, a part of the description may be rejected if it does not apply to any property, but not otherwise (s. 78, s. 79); when the words of the will show what person is meant then an error either in the name or in the description may be disregarded or corrected—one by the other (s. 76); a word omitted may be supplied by context (s. 77); the meaning of words may be abridged or extended, if the testator appears from the will to use them in that sense, (s. 83), the same word should be taken in the same sense (s. 86); of two meanings of a clause, that which gives it some effect

(*j*) Shumsool *v* Shewukram, 2 I A 7, 14 22 W R 409

should be preferred to the other according to which it has no effect (s. 84), effect is to be given to the testator's intention even partially where effect to full extent cannot be given (s. 87), and where two clauses are irreconcilable, the last shall prevail (s. 88), according to the maxim—"The first grant and the last will prevails."

Words and phrases.—The following is an alphabetical list of words and phrases which have got technical meanings in Hindu law.—

A-putra · See *Putra* below.

Acquired by me It may be ambiguous in a document executed by a Hindu. It may be self-acquired in the legal sense of the term, or it may mean that the property was acquired during the regime or by the activities of the person in question and not self-acquired in the legal sense of the term *i. e.*, without using the ancestral funds. (*k*)

Agnates males are the *gotraja sapindas*. (*l*)

Aulad. It ordinarily means the legitimate issue of the family (*khandan*) of the first proprietor (*m*)

Aurasa-Putra-Poutradik See *putra* below.

Aurat madkhula, *Auratmadkuha* *aurat madkhula* literally means 'a woman brought into the house-hold' and is used in common parlance to describe a 'concubine' or a 'kept mistress' in contradiction to a wife *Aurat madkuha* married according to recognised form. (*n*)

Bandhu *See ante pp.* 103-114, 569-576, 614.

Bradar, *Bradran*, *Bradarn Juddi*.—The words *bardarn juddi* is a Persian expression (*bradar* is singular *bradran* is plural) means uterine brothers. The word *bradran* is not restricted to the relations of the same degree but includes descendants of those on equal degree. The word *juddi* means 'grandfather and upwards' and *juddi* in the adjectival form denotes 'in the line of grandfather.' The words *bradran juddi*

(*k*) Ramasamy *v* Marimuthu, 1928 M 764

(*l*) Jadunath *v* Bisheshar, 1932 P C 142

(*m*) Sher *v* Ganga, 36 A 101 41 I A 1 12 A L J 188 18 C W N 401 19 C L J 277, 290 16 Bom L R 306 26 M L J 291 22 I C 294

(*n*) Gurdial *v* Bhagwan, 8 L 366

taking the word *juddi* in its restricted meaning, denote 'related to the grandfather.' (*o*)

Contingent interest is dependent upon some event or condition which may or may not happen. (*p*)

Daya *See ante p.* 87.

Degree *See ante pp.* 91-92.

Dharma : *See ante pp.* 16, 855-859. A gift for ***dharma*** is void for uncertainty. (*q*)

Descendant It includes both male and female. The *lineal descendants*, therefore, includes both male and female descendants, (*r*) and must only mean legitimate *lineal* descendants. (*s*) An adopted son is a *male lineal descendant* within the meaning of Section 59 (1) (a) of the Punjab Tenancy Act of 1887. (*t*)

Family. The word is elastic and capable of different interpretation, (*u*) and the "members of the family" in some cases may be very generally used so as to include female members. (*v*) ***Khandan*** means family, (*w*) and consists of one's lineal ascendants and descendants and his collaterals in the male line. (*x*)

Member of a Hindu joint family has, however, a restricted meaning. (*y*)

Generation to Generation · The words have a technical meaning in many parts of India as conveying a heritable and alienable estate. (*z*)

Gotra, Sagotra *See ante p.* 88, 89.

Heir: The use of the word *heir* by the manager of a Mitàksharà joint family is often loosely made in his transactions on behalf of the family and it includes the heirs of the mem-

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(*o*) Amarendra v Banamali, 10 P 1, 19-21 1930 P 417
(*p*) Sashi v Promode, 1932 C 600
(*q*) Runchordas v Parvatibai, 23 B 725 26 I A 71, *See Putra* below
(*r*) Bhimnath v Tara, 33 C W N 837 P C 49 C L J 594
(*s*) Sabha v Piare, 11 L 481, 490 F B
(*t*) *Ibid*
(*u*) Gunendra v Surendra, 24 C W N 1026, 1030 P C 1 28 M L T 453. 61 I C 323
(*v*) Keshava v Nathravati, 1928 M 200, 203
(*w*) Sher v Ganga, *Supra*
(*x*) Dharani v Kalawati, 50A 885, 890-892 1928 A 459.
(*y*) *See ante p* 327 *etc*
(*z*) Jagmohan v Sri Nath, 35 C W N. 4, 9 P C, Ramlal v. Secretary, 7. C. 304 8 I A. 46, Lalit v Chukkan, 24 C 76 24 I.A 76. 1 C W N 387,

bers of the family and not the heirs of the *kasta* only. (*a*) Words meaning heir are often used in the sense of successor.

The words *heir and successor* when used in a sentence like 'A shall be my heir and successor', convey an absolute estate. (*b*)

The word *uttaradhikari* means by derivation after-owner, but by usage 'heir'.

The word *waris* and *janashin* are words of limitation denoting an estate of inheritance unless showing a different meaning from the context, waris being 'heir' and janashin being *locum tenens*. (*c*)

Imlak It is an Arabic word of the same root as *malik* and means property. (*d*)

Janashin See *heir* above

Khandan. See *Family* above.

Lineal Descendants See *Descendants* above.

Male lineal descendants See *Descendants* above

Malik · It was used in the sense of an owner but not necessarily an absolute owner but by judicial interpretation it is held to signify full proprietory rights.

In a bequest to a wife it was held to give her a widow's estate only, (*e*) and a contrary view has also been expressed, (*f*) The word coupled with 'master and manager' means only 'kasta and manager.' (*g*) "It is not that the word is a 'term of art' it does not necessarily define the quality of the estate taken but the ownership of whatever that estate may be." (*h*) In Behar it means literally one who holds land (*i*) and, therefore, absolute proprietor. (*j*) The Calcutta and

(*a*) Hasan Imam *v* Brahmdeo, 1930 P 301
(*b*) Raghunath *v* Deputy, 34 C W N 61 P C 51 C L J 16
(*c*) Jagdeo *v*. Deputy, 1926 O 431, see Shalig *v* Charanjit, 11 L 645 34 C W N 1073
(*d*) Jagdeo *v* Deputy, 1926 O 431
(*e*) Punchoo *v* Troylucko, 10 C 342
(*f*) Jamna *v* Ramautor, 27 A. 364, see Mithibai *v*. Meherbai, 23 Bom L R 858 64 I C 397, Mangalji *v* Rambhaoo, 64 I C 752 (N)
(*g*) Prasannamayi *v* Kadambini, 3 B L R O C 85
(*h*) Bhaidas *v* Bai Gulab, 46 B 153 49 I A 1 26 C W N 129 20 A.L J 289 35 C L J 413 42 M L J 385 65 I C 974
(*i*) Sasiman *v* Shib, 49 I A 25 26 C W N 425 35 C L J 427. 20 A L.J 362 42 M L J 492 24 Bom L R 576
(*j*) Nand Kishore *v* Pasupati, 1928 P 348.

the Allahabad High Courts (*k*) have held that the word *malik* alone, unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the term, indicates absolute estate. This view has been affirmed by the Privy Council. (*l*)

The expression *nirbyadha malik* (*m*) or *sampurna malik* (*n*) will clearly indicate full ownership and the words *malik like myself* will convey the whole interest of the conveyor. (*o*) *Malik-o-gabiz* has, likewise, a signification of a full ownership in property. (*p*)

Pinda. *See ante p.* 90.

Pun or Punyakarya Includes such a variety of things, *viz*, religious duty, acts of charity and moral duty or obligation, that a gift to *punyakarya* is void for vagueness. (*q*)

Putra In Sanskrit and in Bengali it means 'son' and includes 'son's son' and 'son's grandson', and sonless (*a-putra*) means, destitute of male issue to the third degree. (*r*) In Benares school the technical meaning of the word *putra* has been extended to include three successive descendants of the heirs of a deceased owner. (*s*) It seems that the term *a-putra* is used in the Smriti texts in the sense of one destitute of male issue, however low, and not to third degree only as limited by the commentators

Putra poutradi grants in Chota Nagpur, by the Maharaja did not acquire the technical meaning, but is to be taken in

(*k*) Sudhamoni *v* Surat, 25 C W N 527, Nanlaki *v* Joy 40 A 575 : 16 A L J. 564 46 I C 905

(*l*) Sudhamoni *v* Surat, 28 C W N 541 P C 38 C L J 253 73 I C 530, Saraju Bala *v* Jyotirmoyee, 58 I A 270 35 C W N 903 p c *See* Surajmani *v* Rabi, 30 A 48 35 I A 17 12 C W N 231 7 C L J 131 18 M L J 1 5 A L J 67, Hitendra *v* Rameshwar, 7 p 500, 508 32 C W N 762 42 C L J 83

(*m*) Suresh *v* Lalit, 20 C W N 463 22 C L J 316 31 I C 405; Sudhamoni *v*. Surat, 25 C W N 527 affirmed by P C 28 C W N 541 *supra*

(*n*) Sulochana *v* Jagattarini, 30 C L J 51 53 I C 602

(*o*) Amarendra *v* Suradhani, 14 C W N 458 5 I C 73

(*p*) Fateh *v* Rup, 38 A 446 43 I A 183 21 C W N 102 26 C L J 182 18 Bom L R 900 20 M L T 481 37 I C 122, Surajmani *v* Rabi, 30 A 84 35 I A 17 7 C L J 131 12 C W N 231 18 M L J 7 10 Bom L R 59, Ram Kaur *v* Atma, 8 L 181

(*q*) Satkari *v* Hazarilal, 58 C 1025, *see* Gobardhan *v* Chuni, 30 A 111.

(*r*) Bissonath *v* Bamasoondary, 12 M I A 41, 47 7 W R P C 1

(*s*) Buddha *v* Laltu, 37 A 604 42 I A 208 22 C L J 481 20 C W N 1 29 M L J 434 17 Bom L R 1022 13 A L J 1007 : 30 I C 529 on appeal from 34 A 663, *see ante p* 567

the literal sense to mean son and son's son (*t*) and so on in the male line. (*u*)

Putra-poutradi-krame are words of limitations for a heritable estate, although a bequest is heritable without any such words (*v*) and they convey an absolute estate (*w*)

Aurasa putra poutradic in *sanads* for *babuana* grants must be construed as subject to the custom excluding widow and not as general words of inheritance (*x*)

Nirbyadha Malik. See *Malik* above.

Raisat The term is commonly used to represent an 'estate' and in Oudh it is invariably used to describe *talukdari estate* (*y*)

Sagotras *See ante* p. 89

Sakulya · *See ante* p 98.

Samana-Pravaras *See ante* p 89

Samanodokas *See ante* p 98.

Sampurna Malik See *Malik* above

Santana The word means issue generally, and not male issue only (*z*)

Santana-Sreni-Krame,—These are words of limitation and convey absolute interest. (*a*)

Spes successiones is merely on expectation or hope of succeeding to the property (*b*)

Uttaradhikari See *Heir* above.

Vested interest is an immediate right of present enjoyment or a present right of future enjoyment. (*c*)

Waris.—See *Heir* above.

Sub-Sec vi—EXECUTOR

Before the Hindu Wills Act, a Hindu executor was only

(*t*) Parkash *v* Rameswar, 31 C 561, 569, *see* Lal Gajendra *v* Lal Mathura, 1 Pat L J 109 20 C W N 876 35 I C 383

(*u*) Ram Narayan *v* Ram, 46 C 683, 693 46 I A 88 29 C L J 332 23 C W N 866 17 A L J 398 36 M L J 344 21 Bom L R 597, 50 I C 1 appeal from 19 C W N 466

(*v*) Section 95 of Succession Act, Lalit *v* Chukkun, 24 C 834 24 I A 76 1 C W N 387, Panchubala *v* Jotindra, 30 C W N 821, 825

(*w*) Bipradas *v* Sadhan, 56 C 790, 797, Giribala *v* Kedar, 56 C 180, 185

(*x*) Ekradeshwar *v* Janeshwari, 42 C 582 41 I A 275 18 C W N 1249 21 C L J 9 27 M L J 373 12 A L J 1217 17 Bom 18 25 I C 417

(*y*) Jagdeo *v* Deputy, 1926 O 431

(*z*) Kisto *v* Sulamonee, 7 W R 320, Hurish *v* Chmeder, 24 W R 268

(*a*) Bhoobun *v* Hurrish 4 C 23 5 I A 138 3 C L R 339

(*b*) *See Supra p* 1058 *foot* (*d*) (*c*) *Supra p* 1058, foot note (*p*)

a manager ; but now the testator's estate is vested in the executor as trustee for the purposes of administration. But he is not a trustee for the heir, in respect of the undisposed of residue, within the meaning of Section 10 of the Limitation Act. (*d*)

An administrator *pendente lite* intermeddling with the estate of a deceased person renders himself liable to be sued as *quasi* executor *de son tort* to pay his debt. (*e*)

(*d*) Kherodemoney *v* Doorgamoney, 4 C 455

(*e*) Khitish *v*. Radhika, 35 C 276 12 C.W N 237

IMPORTANT ACTS AFFECTING HINDUS

CASTE DISABILITIES REMOVAL ACT XXI OF 1850.

Preamble.

An Act (*a*) for extending the principle of section 9, Regulation VII, 1832 of the Bengal Code throughout the Territories subject to the Government of the East India Company

Whereas it is enacted by section 9, Regulation VII, 1832 the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled , and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company ; It is enacted as follows .—

Law or usage which inflicts forfeiture of, or rights on change of religion, or loss of caste to cease to be enforced.

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person (*a*) forfeiture (*b*) of rights or property, or may be held in any way to impair or affect any right of inheritance (*c*) by reason of his or her renouncing, (*d*) or having been excluded from the communion of, any religion, or being deprived of caste (*e*) shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

An Act to remove all legal obstacles to the marriage of Hindu Widows.

HINDU WIDOW'S REMARRIAGE ACT XV OF 1856.

An act to remove all legal obstacles to the marriage of Hindu Widows.

Preamble.

Whereas it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by

reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property ;

and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience ;

and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare ; It is enacted as follows :—

Marriage of Hindu widows legalized

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding

Rights of widow in deceased husband's property to cease on her re marriage.

2 All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died ; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Guardianship of children of deceased husband on the marriage of his widow

3. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grand-father or the mother or paternal grand mother,

grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother , and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors

Nothing in this Act to render any childless widow capable of inheriting,

4. Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such preperty if before the passing of this Act she would have been incapable of inheriting the same by reason of her being a childless widow

Saving of rights of widow marrying, except as provided in sections 2 and 4

5. Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled ; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Ceremonies constituting valid marriage to have same effect on widow's marriage

6. Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage shall have the same effect if spoken, performed or made on the marriage of a Hindu widow , and

no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of widow.

Consent to re marriage of minor widow.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

Effect of such marriage Proviso.

And all marriages made contrary to the provisions of this section may be declared void by a Court of law. Provided that in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to re-marriage of major widow

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

THE CODE OF CIVIL PROCEDURE ACT V OF 1908.

Liability of ancestral property

53. For the purposes of Section 50 and Section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

(Provisions relating to Purdanashin lady etc. are omitted)

THE HINDU TRANSFERS AND BEQUESTS ACT, 1914.
MADRAS ACT NO. I OF 1914

(Came into force on the 14th. February 1914).

An Act to declare the rights of Hindus to make transfers

and bequests in favour of unborn persons (in the Mufassal of Madras).

WHEREAS it is expedient to declare the rights of persons governed by the Hindu law to make transfers and bequests in favour of unborn persons, It is hereby enacted as follows:— Preamble

1. This Act may be called "The Hindu Transfers and Bequests Act, 1914." Short title

2. (1) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu law who are domiciled within the limits of the Presidency of Madras. Application and extent

(2) In the case of transfers *inter vivos* or Wills executed before the date of this Act the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to such date Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of the Act.

Explanation:—Hindus governed by the Marumakkattayam or the Alyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition.

4. The limitations and provisions referred to in section 3 shall be the following, namely —

(*a*) in respect of dispositions by transfers *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by Will, those contained in sections 113, 114, 115, and 116 of the Indian Succession Act, 1925.

[§§ 3 and 4 have been substituted for §§ 3, 4 and 5, by § 11 of Transfer of Property (Amendment) Supplementary Act XXI of 1929 which came into orce on 1st April 1930 §§ 3, 4 and 5 were as follows :—

Transfers and bequest in favour of unborn persons

"3 A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be"

Rule against perpetuity in regard to transfers

"4 No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some persons who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong"

(This is § 14 of the Transfer of Property Act, 1882)

Rule against perpetuity in regard to bequests.

"5 No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong"

(This is § 101 of the Indian Succession Act, 1865, now § 114 of new Act XXXIX of 1925)

THE HINDU DISPOSITION OF PROPERTY ACT XV OF 1916

(Received the assent of the Governor-General on the 28th. September, 1916).

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of the property by Hindus for the benefit of persons not in existence at the date of such disposition, It is hereby enacted as follows —

Short title and extent

1. (1) This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends, in the first instance, to the whole of British India, except the province of Madras provided that the Governor General in Council may, by notification in the Gazette of India, extend this Act to the province of Madras.

[See Madras Act I of 1914 above]

Disposition for the benefit of person not in existence

2 Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was

not in existence at the date of such disposition

3. The limitations and provisions referred to in Section 2 shall be the following namely —

Limitations and conditions

(a) in respect of dispositions by transfer *inter vivos* those contained in Chapter II of the Transfer of Property Act, 1882, and

["Chapter II" has been substituted for "sections 13, 14 and 20", by § 12 of Transfer of Property (Amendment) Supplementary Act XXI of 1929, S 12, which came into force on 1st April, 1930]

(b) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.—

[The words and figures "sections 113, 114, 115 and 116 of the Indian Succession Act, 1925" have been substituted for "sections 100 and 101 of the Indian Succession Act, 1865" by § 12 of Transfer of Property (Amendment) Supplementary Act XXI of 1929]

4. Repealed by § 12 of Transfer of Property (Amendment) Supplementary Act XXI of 1929

The original § 4 was as follows —

"4 Where a disposition of property fails by reason of any of the limitations referred to in Section 3, any disposition intended to take effect after or upon failure of such prior diposition also fails ']

Failure of prior disposition

5. Where the Governor-General in Council is of opinion that the Khoja community in British India or any part thereof desires that the provisions of this Act should be extended to such community, he may, by notification in the Gazette of India, declare that the provisions of this Act, with the substitution of the word "Khojas" or "Khoja", as the case may be, for the word "Hindus" or "Hindu" wherever those words occur, shall apply to that community in such area as may be specified in the notification and this Act shall thereupon have effect accordingly

Application of this Act to the Khoja community

THE HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) ACT VIII OF 1921.

(Received the assent of the Governor-General on the 27th. March 1921.)

An Act to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras.

WHEREAS it is expedient to declare the rights of Hindus to make transfers and bequests in favour of unborn persons in the City of Madras, It is hereby enacted as follows —

Short title

1. This Act may be called the Hindu Transfers and Bequests (City of Madras) Act, 1921.

Application and extent

2. (*1*) This Act shall apply to all transfers *inter vivos* and wills made by persons governed by the Hindu Law who are domiciled within the limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras

(*2*) In the case of transfers *inter vivos* or wills executed before the date of this Act, the provisions of this Act shall apply to such of the dispositions thereby made as are intended to come into operation at a time which is subsequent to the 14th February 1914.

Provided that nothing contained in this section shall affect *bona fide* transferees for valuable consideration in whom the right to any property has vested prior to the date of this Act.

Explanation—Hindus governed by the Marumakattayam or the Aliyasantana law shall be deemed to be persons governed by the Hindu law for the purposes of this Act.

3. Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfers *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition

4 The limitations and provisions referred to in section 3 shall be the following, namely —

(*a*) in respect of disposition by transfer *inter vivos*, those contained in Chapter II of the Transfer of Property Act, 1882, and

(*b*) in respect of dispositions by will, those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925

[§ 3 and 4 have been substituted for § 3, 4 and 5 by § 13 of The Transfer of Property (Amendment) Supplementary Act XXI of 1929, which came into

force on the 1st April, 1930 The original § 3, 4 and 5 were as follows .—

"3. A transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer or the death of the testator, as the case may be

Transfers and bequests in favour of unborn persons

"4 No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the transfer and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong"

Rule against perpetuity in regard to transfers.

(This is § 14 of the Transfer of Property Act, 1882)

"5 No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease and the minority of some person, who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong"

Rule against perpetuity in regard to bequests

(This is § 101 of the Indian Succession Act, 1865, now S 114 of Act XXXIX of 1925)

THE INDIAN LIMITATION (AMENDMENT) ACT I OF 1927.

(Received the assent of the Governor-General on the 18th. February 1927).

An Act further to amend the Indian Limitation Act, 1908, for certain purposes.

Section 3 —To section 21 of the said Act the following sub-section shall be added, namely —

"(3) for the purposes of the said sections (that is sections 19 and 20)"

(*a*) an acknowledgment signed, or a payment (of interest, or part payment) made in respect of any liability, by, or by the duly authorised agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be as against a reversioner, succeeding to such liability, and

(*b*) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment (of interest, or part payment) made by, or by the duly authorised agent of,

the manager of the family for the time being shall be deemed to have been made on behalf of the whole family."

HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT XII OF 1928.

(Received the assent of the Governor- General on the 20th. September 1928)

An Act to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts

WHEREAS it is expedient to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts, It is hereby enacted as follows —

Short title, extent and application.

1. (1) This Act may be called the Hindu Inheritance (Removal of Disabilities) Act, 1928

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall not apply to any person governed by the Dàyabhàga School of Hindu Law.

Persons not to be excluded from inheritance or rights in joint-family property

2. Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint-family property by reason only of any disease, deformity or physical or mental defect

Saving and exception

3. Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of the management of any religious or charitable trust which he would not have had if this Act had not been passed.

Section not retrospective —If any person suffering from any physical defect has before passing of the Act (20th. September 1928) been already excluded from inheritance or from a share on partition, the Act does not entitle him to claim the inheritance or the share on partition.

THE INDIAN LIMITATION (AMENDMENT) ACT NO. I OF 1929

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purposes hereinafter appearing, It is hereby enacted as follows —

Short title and commencement.

1. (1) This Act may be called the Indian Limitation (Amendment) Act, 1929.

Amendment of section 10, Act IX of 1908.

2 In section 10 of the Indian Limitation Act, 1908 (hereinafter referred to as the said Act), the following paragraph shall be inserted, namely —

For amendment *see ante p.* 908

HINDU LAW OF INHERITANCE (AMENDMENT) ACT II 1929.

(Received the assent of the Governor General on the 21st ebruary 1929)

An Act to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate

WHEREAS it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate · It is hereby enacted as follows .—

Short title, extent and application.

1 (1) This Act may be called the Hindu Law of Inheritance (Amendment) Act, 1929.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Perganas, but it applies only to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

Order of succession of certain heirs

2. A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother.

Provided that a sister's son shall not include a son adopted after the sister's death.

Savings.

3. Nothing in this Act shall—

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

INDIAN SUCCESSION (AMENDMENT) ACT. XVIII OF 1929.

(Received the assent of the Governor-General on the 1st October 1929)

An Act further to amend the Indian Succession Act, 1925, for certain purposes.

WHEREAS it is expedient further to amend the Indian Succession Act, 1925, for the purposes hereinafter appearing; It is hereby enacted as follows :—

Short title.

1. This Act may be called the Indian Succession (Amendment) Act, 1929

Amendment of section 2, Act XXXIX of 1925

2. After clause (b) of section 2 of the Indian Succession Act, 1925 (hereinafter referred to as the said Act), the following clause shall be inserted, namely :—

"(*bb*) 'District Judge' means the Judge of a principal Civil Court of original jurisdiction".

of section 57 Act XXXIX of 1925

3. (1) Sub-section (1) of section 57 (*a*) of the said Act shall be renumbered as section 57 and after clause (b) and before the proviso the word "and" and the following clause shall be added, namely ·—

"(c) to all wills and codicils made by any Hindu, Buddhist, Sikh, or Jaina on or after the first day of January, 1927 to which those provisions are not applied by clauses (a) and (b)".

(2) Sub-section (2) of section 57 of the said Act shall be omitted.

Amendment

4. In sub-section (2) of section 213 of the said Act, for the word "class" the word "classes" and for the words and

figures "sub-section (1) of section 57" the words, letters and figures " clauses (a) and (b) of section 57" shall be substituted.

of section 213, Act XXXIX of 1925.

5. The enactments specified in the Schedule are hereby repealed.

Repeals.

THE SCHEDULE ENACTMENTS REPEALED.

(See section 5).

Year.	No.	Short title.
1926	XXXVII	The Indian Succession (Amendment) Act, 1926.
1928	XXI	The Indian Succession (Second Amendment) Act, 1928.

(a) *See* Act XXI of 1928. For "Section 57," "Sub-Section (1) of Section 57" have been substituted.

CHILD MARRIAGE RESTRAINT ACT XIX OF 1929.

(Received the assent of the Governor-General on the 1st October 1929)

An Act to Restrain the Solemnisation of Child Marriages.

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows:—

1. (1) This Act may be called the Child-Marriage Restraint Act, 1928.

Short title, extent and commencement.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of April, 1930.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definition.

(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party" to a marriage means either of the parties whose marriage is thereby solemnised, and

(*d*) "minor" means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty-one years of age marrying a child

3. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees

Punishment for male adult above twenty one years of age marrying a child

4. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Punishment for solemnisig a child marriage

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he has reason to believe that the marriage was not a child marriage.

Punishment for parent or guardian concerned in a child marriage

6. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

Imprisonment not to be awarded for offences under section 3

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

Sections 8, 9, 10 and 11 are omitted.

THE TRANSFER OF PROPERTY (AMENDMENT) ACT XX OF 1929

(Received the assent of the Governor-General on the 1st October 1929.)

3. In Section 2 of the said Act, the word "Hindu" and the words "or Buddhist" shall be omitted.

Amendment of section 2, Act IV of 1882

The portion Section 2 of Act IV of 1883 which has been amended by the above Section ran as follows —

* * * * *

"And nothing in the second Chapter of this Act shall be deemed to affect any rule of *Hindu, Muhammadan or Buddhist* law."

61. In section 129 of the said Act the words "or, save as provided by section 123, any rule of Hindu or Buddhist law" shall be omitted.

The original Section 129 of Act IV of 1882 ran as follows:

"Nothing in this Chapter relates to gift of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan Law, *or, save as provided by Section 123, any rule of Hindu or Buddhist Law*"

HINDU GAINS OF LEARNING ACT XXX OF 1930.

(Received the assent of the Governer-General on the 25th July 1930)

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning, It is hereby enacted as follows:—

1. (1) This Act may be called the Hindu Gains of Learning Act, 1930.

Short title and extent

(2) It extends to the whole of British India.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions

(*a*) "acquirer" means a member of a Hindu undivided family, who acquires gains of learning,

(*b*) "gains of learning" means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of

this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning, and

(c) "learning" means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

Gains of learning not to be held not to be separate property of acquirer merely for certain

3 Notwithstanding any custom, rule or interpretation of the Hindu Law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family, or with the aid of the funds of any member thereof, or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

Savings

4. This Act shall not be deemed in any way to affect—

(a) the terms or incidents of any transfer of property made or effected before the commencement of this Act,

(b) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act,

(c) any right or liability created under a partition, or an agreement for a partition, of joint family property made before the commencement of this Act, or

(d) any remedy or proceeding in respect of such right or liability,

or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding pending in a Court at such commencement, and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

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